SCC File No. 39416

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Ontario)

B E T W E E N:

MATTHEW STAIRS

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO
CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PARTS I & II: OVERVIEW AND STATEMENT OF POSITION

1. The Attorney General of Ontario intervenes on the issue of whether the police have common law authority to conduct a limited search for a valid purpose connected to a lawful residential arrest, such as the preservation of police or public safety. The court below split on the proper rubric under which to analyze the question. The majority (Fairburn A.C.J.O., Harvison Young J.A. concurring) applied the doctrine of search incident to arrest and held that the search was lawful. The dissenting judge (Nordheimer J.A.) instead applied the standalone power to conduct safety searches ("*MacDonald* safety search") and held that the search was unlawful. This divide introduces uncertainty into the legal landscape that governs police decision-making in the often volatile, dangerous and rapidly changing dynamics of a lawful residential arrest.[1]

2. Uncertainty is anathema to the promotion of safe, effective and *Charter*-compliant investigations. The Attorney General of Ontario submits that this Court should affirm the central and apposite role played by the doctrine of search incident to arrest in residential arrests, and provide guidance on how the authority to search incident to a residential arrest interacts with *MacDonald* safety searches and the doctrine of exigent circumstances. The Attorney General of Ontario addresses the following two points:

a) **The doctrine of search incident to arrest authorizes a limited search for a valid purpose connected to a lawful residential arrest.** The doctrine advances crucial objectives for the administration of criminal justice. These objectives apply with equal force in connection to residential arrests. The requirement that a search be "truly incidental" to the arrest necessarily imposes spatial and temporal limits on police conduct and constitutes a robust protection against unconstitutional overreach.

b) **The doctrine of search incident to arrest applies to lawful residential arrests without amendment.** The doctrine applies without the need to conduct a *de novo* ancillary powers doctrine analysis. Its application can be triggered by any of the valid purposes for a search incident to arrest, on a reasonable basis standard, by any investigation that engages those purposes. It is neither necessary nor desirable to amend

[1] *R. v. Golub* (1997), 117 C.C.C. (3d) 193, 1997 CanLII 6316 (Ont. C.A.), at para. 18; *R. v. Carelse-Brown*, 2016 ONCA 943, at para. 28.

the doctrine of search incident to arrest as it applies to residential arrests. Searches incident to arrest for the purpose of police and public safety are analytically distinct from *MacDonald* safety searches and from the doctrine of exigent circumstances.

3. The Attorney General of Ontario agrees with the legal principles set out by the Attorney General of Canada but takes no position on the facts of this case.

4. The doctrine of search incident to arrest has roots deep in the common law.[2] It is well-established that the doctrine authorizes a limited search of the area surrounding the location of the arrest for a valid purpose connected to the arrest, and the seizure of anything found. Neither the common law nor the *Charter* require independent justification for this search.[3] This doctrine is well-suited, without modification, to analysing and balancing the law enforcement objectives and privacy interests impacted by searches connected to a lawful residential arrest.

PART III: ARGUMENT

a) The doctrine of search incident to arrest applies to lawful residential arrests

5. The doctrine of search incident to arrest authorizes a limited search for a valid purpose connected to a lawful residential arrest. This result is compelled by policy, principle, and precedent. Search incident to arrest advances crucial objectives for the administration of criminal justice. These objectives have equal force in the context of a lawful residential arrest and are appropriately balanced against the countervailing privacy interests through the requirement that the search be "truly incidental" to the arrest.

i. Search incident to a residential arrest is anchored in policy

6. The doctrine of search incident to arrest arises from the need "to arm the police with adequate and reasonable powers for the investigation of crime", and because "[p]romptitude and facility in the identification and the discovery of guilt or innocence are of great importance in

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[2] *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at para. 52.
[3] *Cloutier v. Langlois*, *supra* note 2, at para. 52; *R. v. Golub*, *supra* note 1, at paras. 28-31; *R. v. Fearon*, 2014 SCC 77, at para. 121.

criminal investigations."[4] A lawfully arrested person has a lower expectation of privacy.[5] Upon arrest, the need for police to promptly gain control of things or information outweighs the individual's privacy interest.[6] Accordingly, the police "have considerable leeway in the circumstances of an arrest which they do not have in other situations".[7]

7. These policy rationales have equal importance whether the arrest occurs inside or outside of the residence. Courts cannot "ignore the realities of the situations in which police officers must make these decisions". Arrests are often a "volatile" atmosphere in which "the police must expect the unexpected".[8] Residential arrests can pose a "particularly heightened" danger or risk to the police.[9] Prompt, limited searches of the area surrounding the location of an arrest – residential or otherwise – allow the police to identify and mitigate safety risks, to discover evidence, and to preserve evidence that might otherwise be lost or destroyed.[10]

ii. Search incident to a residential arrest is supported by principle

8. The doctrine of search incident to arrest is designed to balance these policy objectives against the privacy interests in a residence, as required by s. 8 of the *Charter*. A search incident to a residential arrest is a search *in a residence*; it is not necessarily a search *of a residence*, *in its entirety*. The search must be "truly incidental" to the arrest:[11] the time, place and manner of the search must derive from a "valid purpose connected to the arrest" (*e.g.* preserving police or public safety, preserving evidence, or discovering evidence). A purpose is not valid if pursuing it was unreasonable in the circumstances.[12] The nexus between a valid purpose and the residential arrest imposes "meaningful limits"[13] on the spatial and temporal ambit of any incidental search.[14]

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[4] *R. v. Beare*, [1988] 2 S.C.R. 387, at para. 34; *R. v. Fearon*, *supra* note 3, at paras. 17, 22.
[5] *R. v. Fearon*, *supra* note 3, at para. 56.
[6] *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 17; *R. v. Fearon*, *supra* note 3, at para. 45.
[7] *R. v. Caslake*, *supra* note 6, at para. 20.
[8] *R. v. Golub*, *supra* note 1, at para. 44.
[9] *R. v. N.N.M.* (2007), 223 C.C.C. (3d) 417, 2007 CanLII 31570 (Ont. S.C.) *per* Hill J., at para. 280, citing *U.S. v. Davis*, 471 F. 3d 938 (8th Cir. 2006), at p. 944.
[10] *R. v. Fearon*, *supra* note 3, at para. 49.
[11] *R. v. Caslake*, *supra* note 6, at paras. 13-14; *R. v. Saeed*, 2016 SCC 24, at para. 37.
[12] *R. v. Caslake*, *supra* note 6, at paras. 19-20, 25-23; *R. v. Nolet*, 2010 SCC 24, at para. 49.
[13] *R. v. Fearon*, *supra* note 3, at para. 57.
[14] *R. v. Caslake*, *supra* note 6, at paras. 16-18, adopting *R. v. Lim (No. 2)* (1990), 1 C.R.R. (2d) 136, [1990] O.J. No. 3261 (Gen. Div.), at para. 50, *per* Doherty J. (as he then was), aff'd 1993

9. It is "beyond question" that the spatial ambit encompasses the "immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him".[15] What constitutes "immediate surroundings" in a given case will be informed by the valid purpose of the search, and there is no fixed temporal deadline.[16] However, absent a proper explanation, significant distance and delay may undermine the "reasonable basis" for the police to have searched for the articulated valid purpose, and call into question whether the search was truly incidental to the arrest.[17]

iii. Search incident to a residential arrest is recognized by precedent

10. There is domestic and international precedent for applying the doctrine of search incident to arrest to residential arrests.[18] Canada has largely charted its own course in this area. In the seminal case of *Cloutier v. Langlois*, this Court described the United States' approach to vehicle searches incident to arrest as "instructive" but "of limited assistance".[19] It remains noteworthy that the Fourth Amendment permits a post-arrest search of the area in a residence "within [the arrestee's] immediate control", "within which he might gain possession of a weapon or destructible evidence".[20] The arresting officer can search "spaces immediately adjoining the place of arrest from which an attack could be immediately launched", "as a precautionary matter and without probable cause or reasonable suspicion". A broader search is permissible only if the police have "a reasonable belief based on specific and articulable facts", but short of probable cause,[21] that the

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CanLII 8558 (Ont. C.A.) (without reference to this point); *R. v. Miller* (1987), 62 O.R. (2d) 97, 1987 CanLII 4416 (Ont. C.A.).

[15] *Cloutier v. Langlois*, *supra* note 2, at pp. 180-181; *R. v. Golden*, 2001 SCC 83, at para. 75; *R. v. Rao* (1984), 12 C.C.C. (3d) 97, 1984 CanLII 2184 (Ont. C.A.), at pp. 110-111 *per* Martin J.A., leave to appeal to SCC refused, [1984] S.C.C.A. No. 107.

[16] *R. v. Concepcion*, 1994 CanLII 1746 (B.C.C.A.), at para. 27 *per* Finch J.A. (as he then was).

[17] *R. v. Caslake*, *supra* note 6, at para. 25; *R. v. Lim (No. 2)*, *supra* note 14, at para. 50; also *R. v. Sinclair*, 2005 MBCA 41, at paras. 20-22, leave to appeal to SCC refused, [2005] S.C.C.A. No. 263; *R. v. Dunkley*, 2016 ONCA 597, at paras. 35-38; *R. v. Ellis*, 2016 ONCA 598, at paras. 25-43; *R. v. Frieburg*, 2013 MBCA 40, at para. 41.

[18] *R. v. Bishop*, 2013 BCSC 522, at paras. 64-70; *R. v. Sawatzky*, 2017 ONSC 4289, at para. 39.

[19] *Cloutier v. Langlois*, *supra* note 2, at pp. 167, 173-175; *R. v. Golden*, *supra* note 15, at paras. 60-65, 98-99; *R. v. Fearon*, *supra* note 3, at paras. 60-62.

[20] *Chimel v. California*, 395 U.S. 752 (1969), at p. 763; *Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160 (2016), at p. 2174.

[21] Compare *R. v. Plummer*, 2011 ONCA 350, at paras. 43-66 *per* MacPherson J.A. and paras. 75-79 *per* Sharpe J.A., Laskin J.A. concurring, holding that reasonable suspicion can ground a pat-

areas "harbo[r] an individual posing a danger to those on the arrest scene".[22]

11. The United Kingdom takes a more expansive approach. In domestic investigations, the common law has been superseded by *The Police and Criminal Evidence Act*. Section 32 ("Search upon arrest") authorizes the police to "enter and search any premises" where an individual was at the time or before they were arrested for an indictable offence, "for evidence relating to the offence", "to the extent that it is reasonably required for the purpose of discovering any such thing or any such evidence", and only if the police have "reasonable grounds for believing that there is evidence for which a search is permitted".[23]

12. Where the common law still applies (*e.g.* extradition), a police officer who "enters a house and arrests a suspect pursuant to a warrant of arrest" is "entitled to search the entire house and seize any articles which provide evidence against the suspect".[24] The House of Lords has held that it "would be contrary to common sense to hold that the power to search and seize after arrest did not extend to searching the remainder of the premises belonging to the suspect in which or on which he had been arrested".[25]

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down search of the detainee and, in appropriate cases, a limited search of the surrounding area incident to an investigative detention, for a valid protective purpose.

[22] *Maryland v. Buie*, 494 U.S. 325 (1990), cited in *R. v. Golub*, *supra* note 1, at pp. 211-212 and *R. v. N.N.M.*, *supra* note 9, at para. 279.

[23] *The Police and Criminal Evidence Act 1984*, c. 60, ss. 32(2)(b), (6) and (7). Further, section 18 ("Entry and search after arrest") permits the police to "enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence", if they have "reasonable grounds to suspect" that the premises contain evidence related to that offence, or to a similar or connected indictable offence. The search must be "reasonably required" for that purpose and authorized in writing by "an officer of the rank of inspector or above": ss. 18(1)-(4).

[24] *Rottman v. Commissioner of Police of the Metropolis*, [2002] UKHL 20, at para. 56 (*per* Lord Hutton, for the majority), citing *Ghani v. Jones*, [1970] 1 Q.B. 693, at p. 706.

[25] *Rottman v. Commissioner of Police of the Metropolis*, *supra* note 24, at para. 58. See also *Criminal Investigation Act* 2006 (Western Australia), s. 133; *Police Powers and Responsibilities Act 2000* (Queensland), ss. 442-444; *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales), ss. 27-28A; *Crimes Act 1900*, ss. 223-225 (Australian Capital Territory); *Search and Surveillance Act 2012* (New Zealand), ss. 117, 119.

13. Applying the doctrine of search incident to arrest to a lawful residential arrest takes the middle path between prescriptive restrictions and expansive powers. A contextual, case-by-case application of the "truly incidental" requirement incorporates the flexibility required to meaningfully address the myriad factual scenarios that occur during a residential arrest, while providing robust protection against unconstitutional overreach.

b) The doctrine of search incident to arrest does not require modification

14. The respondent has confined its response to offences of domestic violence and to searches for the purpose of police or public safety.[26] The Attorney General of Ontario elaborates below on how search incident to a lawful residential arrest is situated more broadly in the landscape of common law authority, and submits that the doctrine of search incident to arrest is well-suited to apply to a lawful residential arrest without modification or additional constraints.

i. The doctrine applies without a *de novo* ancillary powers doctrine analysis

15. The common law power to search incident to arrest has its roots in *Waterfield*, but it has long since grown into a fundamental doctrine of our criminal law.[27] If an arrest is lawful, and an incidental search is for a valid purpose relating to the arrest and conducted reasonably, it is presumptively authorized by the doctrine of search incident to arrest, without the need to conduct a fresh analysis under the ancillary powers doctrine.[28]

ii. The doctrine applies on a reasonable basis standard

16. This Court should reject any invitation to impose a standard of reasonable grounds to suspect or believe for searches incident to a residential arrest. That modification is neither necessary nor desirable. In general, search incident to arrest "does not require additional grounds beyond the reasonable and probable grounds necessary to justify the lawfulness of the arrest itself".[29] The right to search and the legality of that search flows from the fact and the legality of the arrest.[30] This framework complies with s. 8 of the *Charter* because the arrest itself requires

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[26] Factum of the Respondent, at para. 23.
[27] *R. v. Reeves*, 2018 SCC 56, at para. 77; *Fleming v. Ontario*, 2019 SCC 45, at paras. 42-43.
[28] *R. v. Caslake*, *supra* note 6, at para. 14; *R. v. Clayton*, 2007 SCC 32, at para. 22.
[29] *Cloutier v. Langlois*, *supra* note 2, at pp. 185-186.
[30] *R. v. Caslake*, *supra* note 6, at para. 13.

reasonable and probable grounds.[31] As this Court held in *Caslake*, "the only requirement is that there be some reasonable basis for doing what the police officer did".[32] Elevating that requirement to a probability-based threshold would preclude prompt access to critical information for the assessment and mitigation of risk and for the ongoing criminal investigation, and upset the well-established balance between law enforcement objectives and privacy in the context of an arrest.[33]

iii. The doctrine applies without additional constraints on the manner of the search

17. This Court should similarly reject any invitation to impose additional constraints on how a search is conducted incidental to a residential arrest. That modification would add complication without content. A limited search that is truly incidental to a lawful residential arrest is not the "particularly invasive" type of search that requires this Court to modify the doctrine of search incident to arrest in order to comply with s. 8 of the *Charter*.[34] Unlike a strip search or the taking of bodily samples, a search of the area of an arrest does not "invariably and inherently" result in a severe invasion of privacy or an affront to human dignity.[35] Searches that infringe on bodily integrity are "much more serious" than an intrusion into a suspect's home and give rise to "completely different concerns".[36]

18. The fundamental concern about searches incident to a residential arrest relate to the spatial and temporal scope of the search, not to any qualitatively different character of that search or its subject matter.[37] The spatial and temporal scope of the search are necessarily limited and fully addressed through the "truly incidental" requirement that the search be connected to a valid purpose.

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[31] *R. v. Nolet*, *supra* note 12, at para. 51; *R. v. Caslake*, *supra* note 6, at paras. 20-22; *Cloutier v. Langlois*, *supra* note 2, at p. 186; *R. v. Fearon*, *supra* note 3, at paras 21-22.
[32] *R. v. Caslake*, *supra* note 6, at para. 13.
[33] *R. v. Caslake*, *supra* note 6, at para. 17; *R. v. Fearon*, *supra* note 3, at paras. 45, 66, 68, 70-71.
[34] *R. v. Saeed*, *supra* note 11, at para. 53; *R. v. Golden*, *supra* note 15, at para. 87; *R. v. Fearon*, *supra* note 3, at para. 44.
[35] *R. v. Fearon*, *supra* note 3, at para. 22; *R. v. Caslake*, *supra* note 6, at paras. 19-24; *R. v. Golden*, *supra* note 15, at para. 99; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 42; *R. v. Saeed*, *supra* note 11, at para. 44.
[36] *R. v. Stillman*, *supra* note 35, at paras. 39, 42; *R. v. Fearon*, *supra* note 3, at para. 20.
[37] *R. v. Fearon*, *supra* note 3, at para. 22; *R. v. Caslake*, *supra* note 6, at paras. 19-24; *R. v. Golden*, *supra* note 15, at para. 99; *R. v. Stillman*, *supra* note 35, at para. 42; *R. v. Monney*, [1999] 1 S.C.R. 652, at paras. 44-45; *R. v. Saeed*, *supra* note 11, at paras. 43-47.

iv. The doctrine applies to any of the valid purposes for a search incident to arrest

19. This Court should not foreclose the possibility that a search incident to a lawful residential arrest can be undertaken for *any* of the valid purposes of a search incident to arrest. Other jurisdictions have calibrated the balance between privacy interests and the need to discover evidence arising from a residential arrest. Canada may choose, in an appropriate case, to do the same.

v. The doctrine does not exclusively apply to offences of "domestic violence"

20. Search incident to a lawful residential arrest can apply to investigations outside the context of "domestic violence". "Domestic violence", "intimate partner violence" and "family violence" are useful but incomplete heuristics for police and judicial decision-making.[38] The nature of the offence under investigation may support reasonable inferences about the valid purposes engaged by a proposed search, but no label can fully describe the panoply of victim and perpetrator relationships or the range of criminality that may engage the underlying need to preserve police or public safety and effectively investigate crime. An arrest can be dangerous and volatile regardless of how the investigation is compendiously described.[39]

vi. The doctrine is analytically distinct from a *MacDonald* safety search

21. A search incident to a residential arrest for the purpose of police or public safety is analytically distinct from a *MacDonald* safety search. The majority in the court below correctly held that *MacDonald* was decided in "a completely separate context that is far afield" from the case at bar. *MacDonald* safety searches apply in circumstances *other* than incidental to a lawful arrest. For that reason, they must be independently justified on a different, higher standard. The police did not have reasonable and probable grounds to arrest Mr. MacDonald and could not rely on the compelling policy rationales underlying the doctrine of search incident to arrest. Mr. MacDonald was not under arrest and had an undiminished reasonable expectation of privacy.

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[38] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 2 and 718.2(a)(ii)); also *Victims of Interpersonal Violence Act*, S.S. 1994, v. V-6.02, at s. 2(e.1) (Saskatchewan); *The Domestic Violence and Stalking Act*, S.M. 1998, c. 41, s. 2, at s. 2(1.1) (Manitoba); *Domestic Violence Protection Act*, 2000, S.O. 2000, c. 33, at s. 1(2) (Ontario).

[39] *R. v. Nasogaluak*, 2010 SCC 6, at para. 35; *R. v. MacDonald*, 2014 SCC 3, at para. 32; *R. v. Golub*, *supra* note 1, at paras. 18, 44; *R. v. Strachan*, [1988] 2 S.C.R. 980, at para. 42.

22. The interaction between searches incident to arrest for the purpose of police or public safety and *MacDonald* safety searches is confused in part by the latter's uncertain parameters – specifically, whether *MacDonald* overruled the reasonable suspicion standard for safety searches established in *Mann* and *Clayton* in favour of reasonable grounds to believe.[40] Some courts have answered the question in the affirmative.[41] Other courts have answered it in the negative.[42] This Court should avail itself of the opportunity to clarify that *MacDonald* does not apply to limited searches conducted for a valid purpose, including police or public safety, connected to a residential arrest, and affirm that *MacDonald* does apply, on a reasonable suspicion standard, where the safety search is conducted independent of any arrest.

vii. The doctrine is analytically distinct from exigent circumstances

23. This Court should reject any invitation to impose an exigent circumstances requirement for searches incident to a residential arrest. Imposing a probability-based threshold would upend the balance between law enforcement objectives and individual privacy. Imposing an exigency requirement would destroy it.

24. The appellant relies on *Golub*.[43] *Golub* dealt with an exigent entry for the purpose of searching a residence in its entirety. The entry and the search were inextricable. The "exceptional circumstances" therefore had to crystallize *before the entry*. It is in this context that *Golub* properly holds that "searches of a home as an incident of arrest, like entries to a home to effect an arrest, are now generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home"

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[40] *R. v. Peterkin*, 2015 ONCA 8, at para. 59; *R. v. McGuffie*, 2016 ONCA 365, at para. 52; also *R. v. Boekwa*, 2017 ONSC 705, at para. 114; *R. v. Lee*, 2017 ONCA 654, at paras. 40-43; *R. v. Moulton*, 2015 ONSC 1047, at paras. 98-99; *R. v. Garland*, 2019 ABCA 479, at para. 40; *R. v. Del Corro*, 2019 ABCA 156, at paras. 48-49; *R. v. Scheck*, 2015 BCCA 471, at paras. 56-61; *R. v. Ahmed-Kadir*, 2015 BCCA 346, at paras. 63-73; *R. v. Patrick*, 2017 BCCA 57, at para. 59; *R. v. Carpenter*, 2014 NSPC 122, at paras. 142-146.

[41] *R. v. Naimi*, 2020 ABQB 396, at para. 154; *R. v. Thomas*, 2014 ABPC 172, at paras. 57-58; *R. v. Tetrault*, 2016 ABQB 373, at paras. 117-119; *R. v. Zouhri*, 2018 ABQB 291, at paras. 53-55.

[42] *R. v. Webber*, 2019 BCCA 208 at paras. 53-65; *R. v. Bassi*, 2019 BCSC 1224, at para. 73; *Akintoye v. White*, 2017 BCSC 1094, at paras. 160-167; *R. v. Le*, 2014 ONSC 2033, at paras. 99-100, aff'd 2018 ONCA 56, rev'd 2019 SCC 34; *R. v. Bhandal*, 2019 ONCJ 370, at paras. 46-53; *R. v. Kim*, 2016 ABPC 9, at paras. 52-59.

[43] Factum of the Appellant, at paras. 61-63.

(emphasis added).[44] A search incident to a residential arrest is qualitatively different. In that framework, the entry and the search are distinct investigative steps; the relevant nexus is between the search and the arrest. The reasonable basis for the search crystallizes *after the entry*. In short, *Golub* governs an entry justified by a search, preceded by an independently justified arrest; search incident to a residential arrest governs a search justified by an arrest, preceded by an independently justified entry.

25. Residential arrests require the police to lawfully enter a space that may be unfamiliar to them in its layout, its contents and its occupants. In these circumstances, the police should be permitted to conduct a limited search for a valid purpose connected to the arrest. As *Golub* recognizes, 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 protect themselves from the dangers to which they are exposed".[45]

PART IV AND V: COSTS AND ORDER SOUGHT

26. Not applicable.

ALL OF WHICH is respectfully submitted this 30th day of June, 2021 by

Mabel Lai
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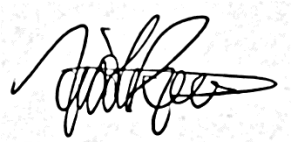

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[44] *R. v. Golub*, *supra* note 1, at para. 41.
[45] *R. v. Golub*, *supra* note 1, at para. 45.

PART VI: TABLE OF AUTHORITIES

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