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SEARCH AND SEIZURE LAW IN CANADA

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This publication provides comprehensive coverage of search and seizure law, an essential element of both the criminal process and regulatory regimes. The effect of the Charter protection against unreasonable search and seizure is examined. Individual chapters examine various types of searches including electronic surveillance, administrative and regulatory searches, motor vehicle searches, firearms and weapon searches and mail searches. Detailed coverage is provided of the execution of search warrants, solicitor-client privilege, the disposition of seized property and Charter remedies including the exclusion of evidence.

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This release features updates to the case law and commentary in the following Current Caselaw Digests: 1 (Defining “Search”: The Scope of Section 8), 3 (Searches Incident to Arrest), 4 (Electronic Surveillance), 5 (Administrative and Regulatory Searches), 6 (Motor Vehicle Searches), 8 (Firearms and Weapons), 9 (Military Searches), 11 (Search, Seizure, and Other Constitutional Rights), 12 (Extra-Territorial and Transnational Searches), and 16 (Criminal Search Warrants).

CASE HIGHLIGHTS

- **Electronic Surveillance**—Both the complainant and the accused were members of the Canadian Armed Forces posted in Washington, D.C. The complainant discovered two audio recording devices in her residence. After an investigation, the Canadian Forces National Investigation Services (CFNIS) concluded there were reasonable grounds to believe the accused had committed the offences of voyeurism and possession of a device for surreptitious interception of private communications. The local police department in Virginia assisted CFNIS by obtaining a warrant to search the accused’s residence and to seize items, including electronic devices, under state law. While executing the warrant, the police discovered evidence relating to the unanticipated offence of sexual assault. The CFNIS brought the seized devices to Canada and obtained Canadian warrants from the Court Martial for further analysis of their contents. The accused was arrested and convicted by the military judge, whose decisions were affirmed by the Court Martial Appeal Court. The accused appealed unsuccessfully to the Supreme Court of Canada. Recognizing the limitations of the *Charter*’s extraterritorial application, the court found the conduct of the CFNIS investigators to have been consistent with the requirements of the *Charter* and the Virginia warrant to have met the requirements of “specific, prior authorization” with independent grounds established to authorize digital searches, in addition to the residence of the accused. With respect to the evidence of sexual assault that had not been contemplated in the warrant, the court held the plain view doctrine to apply – the unlawfulness of the conduct disclosed on those files was immediately apparent to the officers who had inadvertently discovered them during the course of their properly authorized and executed search of the accused’s devices: *R. v. McGregor*, 2023 SCC 4, 2023 CarswellNat 335, 2023 CarswellNat 336 (S.C.C.).
- **Search, Seizure, and Other Constitutional Rights**—Two masked men robbed a bank, and the teller, at gunpoint, was instructed to put money into a duffel bag. While complying with the robbers’ instruction, the teller put a GPS tracking device in the bag. The robbers’ getaway vehicle crashed after a high-speed police chase, and the driver was arrested, while the other fled the scene. Hours later, an officer followed the GPS tracking device’s signal to a road where he spotted the accused, who was the only pedestrian on that part of the road. The officer noted that the accused’s clothing matched some of the varying witness accounts of what the robbers had been wearing, as well as that his location and direction of movement matched those indicated by the GPS device’s signals. The officer stopped the accused and advised of his

investigative detention. Upon learning that the GPS signal also indicated that its target was also stationary, the officer arrested the accused and read him his rights. Given that the robbery involved a handgun, the officer cuffed the accused and searched him. The officer found no gun but discovered money and the GPS device in the front pockets of his jeans. Charged with armed robbery and being masked with the intention of committing a criminal offence, the accused claimed his rights under ss. 8, 9 and 10 of the *Charter* had been violated, and sought exclusion of the evidence found on his person. The court found that, rather than having based his decisions on hunches, speculation or intuition, the officer had objectively reasonable grounds to suspect that the accused had been involved in the bank robbery. Further, the court considered the totality of the circumstances and found the officer's actions of investigation and detention of the accused to have been reasonably necessary. The court also found the arrest to have been based on reasonable and probable grounds, while the search incidental thereto was necessary to ensure the accused was not armed and to secure any evidence that might implicate him in the robbery. Finally, the court found no violation of the accused's right to counsel stemming from delays while transporting or booking him, or from their inability to locate his counsel of choice: *R. v. Marsh*, 2023 ONSC 969, 2023 CarswellOnt 1404 (Ont. S.C.J.).