

Search and Seizure – Fair Investigative Practices in Canada

**International Centre for Criminal Law Reform
and Criminal Justice Policy**

1822 East Mall, Vancouver
British Columbia, Canada V6T 1Z1
Tel: 1 (604) 822-9875
Fax: 1 (604) 822-9317
Email: icclr@law.ubc.ca
www.icclr.law.ubc.ca



Search and Seizure – Fair Investigative Practices in Canada

By

Robert Gillen QC
Assistant Deputy Attorney General,
Criminal Justice Branch
British Columbia Ministry of the Attorney General
Vancouver, Canada

Paper prepared for
China Seminar

Beijing

China

June 2006

As part of the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) and GeoSpatial SALASAN Programme: The Canada China Procuratorate Reform Cooperation Project, supported by the Canadian International Development Agency

Search and Seizure – Fair Investigative Practises in Canada

How crimes are investigated and prosecuted is an important part of defining the relation between a government and its people. Different countries investigate and prosecute crimes in different ways. In Canada we place great importance on the interest of the individual, even when that creates hardship for the general public. This affects the way we investigate and prosecute crimes. Our concept of fair investigative practices is an area where the tension between individual and group interest is evident. I want to examine one aspect of our concept of fair investigative practices to illustrate how Canada responds to these tensions.

The law of search and seizure provides an excellent example of the Canadian approach to fair investigative practices. Our search and seizure laws and practices reflect our beliefs and values about the relationship between the government and its citizens. Our approach starts with a general requirement that searches must be authorized by an independent judicial official before they occur. We recognize exceptions to preauthorized searches in several situations, but it is important to emphasize that these situations are exceptions. The lawfulness of a search and seizure is not based on the success of the search. The fact that police found what they were looking for does not make a search legal. We do, as part of balancing public and private interests, on occasion admit the evidence from illegal searches. But, in these cases we always recognize that the search is improper and that admission of the illegally obtained evidence is exceptional. These exceptions are based on principled recognition that in limited circumstances the public interest must prevail over private interests.

Our laws have not always been like this. Before we adopted a Charter of Rights and Freedoms our law of search and seizure was simple. Police searched for things, police seized things, but no one paid much attention to how police conducted themselves. We had procedural safeguards in our law to prevent abuse, but there was no consequence for violating our safeguards. In short, if search evidence was relevant to a case, it was admissible regardless of how police obtained the evidence. We even had writs of

assistance which were given to special police officers that authorized them to enter and search any house at anytime for narcotics. No grounds were required. No accountability existed beyond internal police practices.

In 1982 Canada adopted a written Charter of Rights and Freedoms. The relationship between the government and the people changed. Police could no longer use a writ of assistance to walk into your house anytime they wanted because they believed narcotics were in your home.

Like other common law jurisdictions, what was a fair investigative practice became a matter for the courts. But the rules had changed. Determination was now based on a written Charter of Rights and Freedom that was the supreme law of the land, a power greater than Parliament, a power greater than government.

The early days of the Charter were filled with search and seizure cases. Writs of assistance were quickly declared illegal. And principles of fair investigative practice began to emerge.

One of our first major cases involved a search of a media outlet, *Hunter v. Southam Inc.*, [1983] 2 S.C.R. 145. The director of investigations authorized his investigators to search the media in relation to illegal trade practices. The Supreme Court of Canada ruled that a primary purpose of our Charter of Rights and Freedoms is to prevent the government from improperly intruding on a individual's privacy. Unjustifiable intrusions must be stopped before they happen. Consequently searches should be authorized before they occur, and the person who does the authorizing must be neutral and independent. The director who authorized the search of the media outlet was not an impartial arbitrator. The director could not fairly decide between the interest of the government and the individual because he also had investigative functions.

The Court ruled that fair investigative practices require preauthorization of searches by a neutral, independent person based on evidence under oath that an offence has been

committed and that evidence of that offence is likely to be found at the place to be searched.

Not all searches are protected by the Charter. It only protects individuals against unreasonable search and seizure. One of the concepts our courts have developed to decide when searches are permitted and when they are prohibited is the concept of reasonable expectation of privacy.

Canadians have a high expectation of privacy in their home, in their personal information such as medical records, and in their DNA to list a few areas. Searches touching on areas such as these require high standards of proof and heavy burdens on investigators before they will be proper. Other searches, such as looking at items left in plain view by a suspect, have low standards. Canadians do not expect privacy in relation to things left in plain view.

DNA search practices are a good example of how our law of search and seizure developed. When DNA first became an investigative tool Canada did not have any special search provisions for DNA. Police would simply take a blood sample when they wanted one as part of the booking process and analyze it for DNA. No preauthorization was required or available. No restrictions were placed on how samples were obtained. Our courts declared these investigative DNA practices illegal. They were unfair investigative procedures. Parliament responded with a series of amendments to legislation that created a scheme that required judicial preauthorization for DNA searches, limited sampling techniques, restricted the type of information the sample could be analyzed for to exclude private medical information, and placed restrictions on the use of DNA profiles. Initially DNA warrants were only available for a small list of offences. Over time that list has expanded as our ability to obtain crime scene DNA has advanced and as people have come to accept that the safeguards built into our DNA warrant provision adequately protect individual interests. Parliament struck a balance between the privacy interests of individuals and the public interest in the investigation and prosecution of crime by establishing a fair investigative procedure.

In some areas of search and seizure the interest of the public outweigh the interest of the individual. Regulatory and security searches are good examples of this. If you come to visit Canada you may be searched at an airport. People accept that some searches are necessary.

We also recognize that sometimes police do not know what are fair investigative procedures. This happens when new procedures are developed before our legislators have a chance to catch up or when police rely on an established practice that has recently been found illegal, *R. v. Hamill*, [1987] 1 S.C.R. 301. In Canada the fruits of an illegal search can still be used in court if the court decides that the admission of the search evidence would not bring the administration of justice into disrepute.

The concept of the administration of justice is fundamental to the Canadian determination of fair investigative practices. One of the things it means in relation to search and seizure is that the admissibility of evidence obtained through a search is determined by balancing the interests of the individual and the interests of the public. A factor in favour of admissibility is the good faith of the officer. A judicial official may have issued a search warrant in error. If that error is because the police officer did not disclose relevant evidence to the judicial official that the officer knew should be disclosed, the product of that search will not be admitted into evidence. But if the officer did disclose the evidence to the judicial official and the official made a mistake in issuing the search warrant, the officer is entitled to rely on that search warrant as long as the officer continues to act in good faith. The officer who does not disclose evidence because he is not aware of the evidence, or is not aware the evidence is important, may or may not act in good faith. Incompetence and laziness do not make good faith, diligence and good judgment do make good faith.

A search may be legal for some purposes and illegal for other purposes. For example, authorities can search a house to determine whether it complies with electrical safety requirements. The prerequisites for a regulatory safety search are low. Preauthorization

by a judicial official is not required. Authorities do not need reasonable grounds to believe there is any violation of electrical standards as a precondition to the search. About the only thing that is required is advanced notice of the search to the owner and occupant of the house. If an electrical safety search turns up evidence of a crime, that evidence may or may not be admissible depending on whether admission of the evidence would bring the administration of justice into disrepute. If the electrical safety search was an attempt by authorities to avoid the requirements of the Criminal Code for a regular search warrant, the evidence discovered in the electrical safety search will not be admitted. Thus if police suspect a marijuana grow operation in a house, but lack the grounds to obtain a Criminal Code search warrant to look in the house for evidence of marijuana cultivation, police cannot have electrical safety inspectors search the house, ostensibly to determine whether it has illegal or unsafe wiring, and then use evidence that the electrical inspector found a marijuana grow operation in a prosecution for cultivating marijuana. If the electrical search was genuinely for safety purposes and illegal firearms were observed, the administration of justice would not be brought into disrepute by the admission of the firearm evidence in a criminal prosecution because it was truly an accidental discovery.

Another example of an illegal search that may not result in exclusion of the search evidence is a search that locates evidence police would have found anyway. This is known as the discoverability principle. A company may give police information about a suspect that is private, possibly that a suspect is HIV positive. The information would be important to the police if they were looking for a person who committed a rape that infected a victim with the HIV virus. If police are trying to narrow down a list of suspects, the information the company has about this individual would be very helpful. But the company should not have provided the information to the police because of the private nature of the information. The information may still be admissible if the police would have discovered the information anyway. The police had enough material to get a search warrant for the company records and were likely to search the company records anyway, the police would probably have found the evidence even if the company did not give it to them. In these circumstances the administration of justice is not brought into disrepute because the evidence would have been found anyway. Although the

investigative procedure that was used was not fair, another fair procedure was available that was both likely to be used and likely to discover the evidence.

Fair investigative practices also arise in relation to how police conduct searches. Police cannot destroy a home looking for evidence. They must conduct any search in a reasonable manner.

There are many other examples in Canadian criminal law where fair investigative procedures are important. The few examples I have given in relation to search and seizure are only a taste of how our concepts of fair investigative practices affect our view of the relationship between our government and our people. Our search and seizure laws and practices help balance the privacy interests of the individual and public interest in the detection of crime. Fair investigative practices are an important part of that balance. Some practices can be judged quickly in advance. We do not let police search anyone's home whenever they want to. Suspects cannot complain when police seize something that is in plain view. These decisions are easy. Other decisions are difficult. Fair investigative procedures ultimately depend on the context of the procedure and the facts surrounding its use. A procedure may be fair in one context such as an electrical inspection that is truly aimed at determining the safety of a building and unfair in another such as the electrical search that is really a ruse to gain entry to a building to look for illegal drugs. Our laws try to strike a balance. They strive for flexibility. We think they work well.