Warrantless Searches

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WARRANTLESS SEARCHES

It's easy to tell when you have a search under warrant. But what is a warrantless search, and when is it lawful? The first part of this paper will set out the essential steps in analysing warrantless searches. The second part will list the most common varieties of warrantless search, along with the criteria that must be met if they are to be constitutionally compliant.

PART I: HOW TO ANALYZE A WARRANTLESS SEARCH

There are three key questions to ask in determining whether any search is reasonable within the meaning of s 8 of the *Charter*:

1) Is the state action a search?
   - ➔ NO: s 8 does not apply. No breach.
   - ➔ YES: go to Step 2.
2) Is the search authorized by law?
   - ➔ NO: search is not reasonable. Go to s 24(2).
   - ➔ YES, by statute, warrant or common law: go to Step 3.
3) Was the search executed in a reasonable manner?
   - ➔ NO: search is unreasonable and s 8 has been breached. Go to s 24(2).
   - ➔ YES: search is reasonable. No breach.

For a visual depiction of this process, please see Figure 1.

Step 1: Is the state action a search?

A state action is a search if it intrudes on an individual's reasonable expectation of privacy. In *R v Tessling,* 2004 SCC 67, the Supreme Court divided this inquiry into two steps.

First, did the individual have a reasonable expectation of privacy? The answer to this question will depend on the totality of the circumstances. *Tessling's* list of relevant factors is typically used as the analytical framework, though factors can be added or subtracted to suit the circumstances.

1. What was the subject matter of the police technique?
2. Did the individual have a direct interest in the subject matter of the police technique?

3. Did the individual have a *subjective* expectation of privacy in the subject matter of the police technique?

4. If so, was the expectation *objectively* reasonable? In this respect, regard must be had to:

    a. the place where the alleged "search" occurred;

    b. whether the subject matter was in public view;

    c. whether the subject matter had been abandoned;

    d. whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?

    e. whether the police technique was intrusive in relation to the privacy interest;

    f. whether the use of the police technique was itself objectively unreasonable;

    g. whether the police technique exposed any intimate details of the individual's lifestyle, or information of a biographical nature.

The non-nonexistent catalogue of permissible search techniques

According to *Tessling*, there is no catalogue of accepted or prohibited search techniques; each alleged search must be assessed on its own circumstances. This does not seem to be true in practice. For instance, the effect of *Tessling* was to decide that the use of infra-red heat detectors is not a search. For other catalogue entries, please see Figures 2 and 3.

Types of privacy

Tessling identified three types of privacy: personal, territorial and informational. When *Tessling* was decided, it was probably fair to say that personal privacy would merit the strongest privacy protection.

Today, informational privacy has arguably taken the lead. As the Supreme Court famously held in *R v Morelli*, 2010 SCC 8, "[i]t is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer." Since 2010, virtually all of the Supreme Court's major search cases have dealt with privacy questions raised by new information technologies.