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Digital and Internet Age Meet the Law of Search and Seizure

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The title of this article is taken directly from the first sentence of the Supreme Court of Canada decision of *R. v. Vu* released November 7, 2013 ("*Vu*"). This case is the latest example of the Supreme Court of Canada grappling with applying traditional legal concepts to the modern digital age.

Vu involved an investigation by police of a residence with respect to theft of electricity. The investigation resulted in charges of production of marijuana, possession of marijuana for the purposes of trafficking and theft of electricity. The evidence tying the particular accused to the residence was found by police on computers and a cellular phone found in the residence.

Although the police had obtained a warrant to search the residence, the warrant did not specifically authorize the search of computers found in the residence, nor did the police seek a further order specifically relating to the computers and cellular phone. The accused argued that his right to be free from unreasonable search and seizure guaranteed by section 8 of the *Canadian Charter of Rights and Freedoms* had been infringed by the warrantless search of the computers and cell phone.

The Court held that section 8 of the *Charter* required a balance to be struck between the right of an individual to be free from state interference and the legitimate needs of law enforcement. The balance has been achieved in two ways: first, the police must obtain prior judicial authorization for a search in all but the most limited situations; and, second, an authorized search must be conducted in a reasonable manner.

The Court reviewed the traditional approach to searches of receptacles found in a place where prior judicial authorization had been granted for a search. Traditionally, the police did not require any further authorization to search any receptacles as filing cabinets, drawers and desks that were found in the place for which the search authorization had been given. The authorization to search the place included the authorization to search receptacles found in that place. The question for the Supreme Court of Canada then became whether computers and cellular phones should be treated in the same fashion as receptacles found in place for which search authorization had been given.

The Court determined that it was not appropriate to treat a computer or cellular phone in the same fashion as other receptacles in a place, drawing on previous case law that had found that a search of a personal or home computer was an extremely intrusive invasion of privacy. The Court noted that there are characteristics of computers that make them unlike a traditional receptacle, as computers may provide an almost unlimited universe of information about the owner or user when a search of the contents is conducted. Furthermore, there is material on a computer that may not have been generated by the user and it is difficult for a user to delete information from a computer. The Court concluded that the privacy interests under consideration with respect to a computer

required that the computer be treated as a separate place. Therefore, police would require specific authorization to search a computer and would have to justify that there were reasonable grounds for believing that the information they required would be found on the computer. Police conducting a search pursuant to a warrant that does not specifically authorize the search of a computer may seize the computer and ensure the integrity of the data. However, prior to searching the contents of the computer, the police would be required to request authorization for such a search.

Although the Court found that the search of the computer in *Vu* was unlawful, the Court went on to conduct an analysis under section 24(2) of the *Charter* and determined that the information obtained from the search should not be excluded from evidence.

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