

Kluwer Competition Law Blog

The Supreme Court of Canada: A Computer is Not a Cupboard

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Thursday, November 28th, 2013

Here is an item that I co-wrote with my colleague Stephane Eljarrat.

When investigating cartel violations in Canada, the Competition Bureau's tool of choice is the "search and seizure" (the Canadian equivalent of the "dawn raid" in Europe). The Bureau exercises its search and seizure powers pursuant to judicially authorized warrants which it must obtain prior to searching a location and seizing records contained therein.

In a recent decision on the use of search and seizure powers generally in Canada, the Supreme Court of Canada addressed the question of whether a search warrant must expressly permit authorities to search computers or other electronic devices found on the premises (such as cellphones), or whether computers, etc. can be treated as any other "container" (such as filing cabinets, boxes, briefcases and cupboards) and searched without specific authorization in the warrant.

The Supreme Court of Canada' held in its decision in *R. v. Vu*, 2013 SCC 60 that computer and cellphone searches must be specifically authorized. Although the decision dealt with search and seizures carried out in a police enforcement context the same principles would presumably apply to Competition Bureau searches as well.

Facts and Decision

At issue in *Vu* was the police examination of two computers and a cellular phone that were found by police officers inside a residence in the course of their search of the premises. A search of these devices allowed police to identify the occupant of the residence and to press criminal charges against him. At trial, the accused asked the judge to exclude the evidence found by the search of the devices as the warrant did not specifically authorize the police to search the computer and the cellular phone.

In a unanimous decision, the Supreme Court of Canada held that the search of computers and smartphones is different from that of cupboards or filing cabinets. To comply with the accused's fundamental rights, computers and smartphones must be specifically authorized in the search warrant. The Court nonetheless refused to exclude the evidence obtained in the illegal search, satisfied that the admission of the evidence would not bring the administration of justice into disrepute[1].

Computers are Distinct Locations

The decision in *Vu* excludes computers from the general principle, as computer searches give rise to particular privacy concerns. Indeed, computers:

- store immense amounts of information, including personal information;
- hold information on a user's interests, habits, and identity, without the knowledge of the user;
- retain files and data even after the users think that they have destroyed them; and
- give access to information and documents that are not in any meaningful sense at the location for which a search is authorized.

Given their numerous and striking differences, the Court held that computers must be treated as distinct locations. If police wish to search any computers found on the premises they are searching, "they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for". If they fail to obtain prior authorization, the police may nonetheless seize the computers and, then once authorized to do so, they may search the computers.

Comments

Vu is the first Supreme Court decision to clearly recognize the difference between traditional storage spaces and computers and other devices storing electronic information. The Competition Act contains a specific section authorizing computer searches and so Bureau search warrants will typically provide for express authorization to search for and extract relevant computer records. However, *Vu* is important for establishing the proposition that the Bureau cannot search personal electronic items, such as cellphones, pdas, etc, without similar express authorization.

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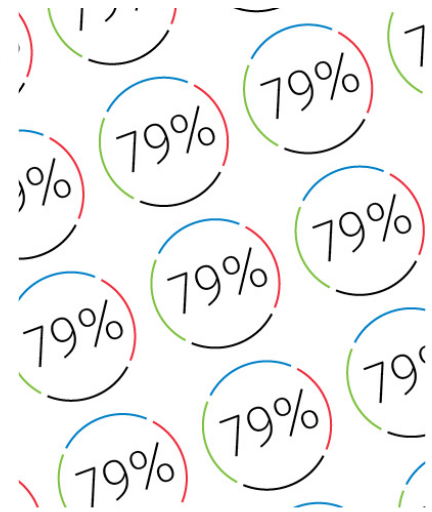
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