The Supreme Court of Canada Considers How the "Plain View" Doctrine Applies to Searches of Electronic Devices

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The authority of the police to seize items of an evidentiary value that are in "plain view" has a long history in our shared common law. Though certain elements of the plain-view doctrine have developed differently in Canada and the United States of America, the authority of the police to seize evidence pursuant to its parameters remains a well-accepted police investigative power.[1]

The essence of the doctrine is quite simple: if in the course of their duties, the police see an item that will afford evidence, they generally can seize it. In Canada, it has been pointed out that "plain view seizure is a common law doctrine that permits the police to seize evidence of a crime or contraband without a warrant" (*R. v. Ahmed*, 2022 ONCA 640, para. 66). In the United States, the plain-view doctrine has been described as incorporating the "commonsense principle that the Fourth Amendment doesn't normally require an officer to ignore what he sees lying before him" (*Bovat v. Vermont*, 141 S.Ct. 22 (Mem) (2020), at 23). In Ireland, it has been pointed out that "on searching in good faith if gardaí come across evidence as to another crime (one other than the crime for which the warrant was issued), be that a drug-cultivation plant in a house or a bloodied knife or a computer thought related to that separate crime, that object or those objects may also be seized" (*Director of Public Prosecutions -v- Quirke* [2023] IESC 5, para. 88).

Historically, what was or was not in plain view was usually not difficult to differentiate. However, when this seizure power is applied to electronic devices, such as computers and cellular telephones, this differentiation is no longer without difficulty. For instance, is anything not on the screen when the device is opened in plain view? Accordingly, the question that arises is whether this historic and long-standing police power can be adapted to police searches of modern technology.[2]

It has been suggested that applying the plain-view doctrine "to digital evidence represents a misunderstanding of the nature of modern computer searches and gives the police wide latitude to search and retain any information found on a computer."[3]

Professor Jørgensen explains that the "plain-view doctrine requires that evidence of criminality be 'immediately apparent'—can the police perceive evidence of criminality in a medium where they need complex computer tools to 'see' the information contained?" (*Id*. at 803). As will be seen, the answer to this question may depend, in part, on how we define "immediately apparent."

In this column, I intend to review a recent decision of the Supreme Court of Canada (*R. v. McGregor*, 2023 SCC 4, [2023] 1 SCR 1) in which the application of the plain-view doctrine was considered in the context of a search of a computer. Interestingly, the investigation and the initial search took place in the United States.

I will commence with the historical context of how the plain-view doctrine began and then look at its development in Canada and the United States. I will then review the Supreme Court of Canada's decision in *MacGregor*.

THE HISTORICAL CONTEXT

Our "early common law restricted search warrants to stolen goods and authorized officers conducting a search to seize only those items listed in the search warrant (*Six Carpenters' Case*, Co. Rep. (1610) 8 146a.)."[4] In *Quirke*, the Supreme Court of Ireland noted that the "early common law powers of search, limited to warrants to seek out stolen goods, limited the trawl to those goods listed in the warrant; *Price v Messenger* (1800) 2 Bos & P 158, (1800) 126 ER 1213. That extended to such other items as were likely to furnish evidence of the identity of the goods stolen; *Crozier v Cundy* (1827) 6 B & C 232" (para. 60).

Footnotes

1. See generally R. v. Buhay, [2003] 1 S.C.R. 631 (Can.); Coolidge v. New Hampshire, 403 U.S. 443 (1971).
2. The immense amount of information contained within electronic devices, such as cellular telephones, was described by Chief Justice Roberts in *Riley v. California*, 573 US 373 (2014), in the following manner (at 388):

   > One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy…Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, *supra*, rather than a container the size of the cigarette package in *Robinson*.

3. See Lisa Jørgensen, *In Plain View?: R v Jones and the Challenge of Protecting Privacy Rights in an Era of Computer Search* (2013) 46 U.B.C. L. Rev. 791, at 793.
4. See Roger Salhany, Section 489 and the Plain View Doctrine in the United States and Canada, 13 C.R. (7th) 95, 101 (2014).

THE PLAIN-VIEW DOCTRINE IN THE UNITED STATES

In the United States, the plain-view doctrine is subject to compliance with the Fourth Amendment to the United States Constitution.[5] As a result, searches "conducted…without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[6]

One of these exceptions is the plain-view doctrine. In *Arizona v. Hicks*, 480 U.S. 321 (1987), it was noted that though a seizure by the police pursuant to this doctrine need not be related "to the justification for their entry" and probable cause for the seizure was required (at 325-326). The Supreme Court of the United States concluded that "[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises" (*Id.* at 327).

The Supreme Court of the United States has also indicated that "under the plain-view doctrine, 'any valid warrantless seizure of incriminating evidence' requires that the officer 'have a lawful right of access to the object itself'"[7] or that the "officer finds himself in a place he is lawfully permitted to occupy."[8]

Finally, the scope of the plain-view doctrine in the United States was recently explained by the United States Court of Appeals for the Sixth Circuit in *United States v. Loines*[9] as involving "four factors":

> Warrantless seizures presumptively violate the Fourth Amendment, but under certain circumstances an officer may seize evidence in plain view without a warrant." *United States v. Mathis*, 738 F.3d 719, 732 (6th Cir. 2013) (citing *Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987)). "[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. United States*, 390 U.S. 234, 236 (1968) (citations omitted).
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> Under the plain-view doctrine, four factors must be satisfied: "(1) the item seized must be in plain view, (2) the item's incriminating character must be immediately apparent, (3) the officer must lawfully be in the place from where the item can be plainly seen, and (4) the officer must have a lawful right of access to the item." *Mathis*, 738 F.3d at 732 (citing *Horton v. California*, 496 U.S. 128, 136–37 (1990)).

Similarly, in *Buhay*, the Supreme Court of Canada held that it is "not sufficient to argue that the evidence was in plain view at the time of the seizure. Indeed, it will nearly always be the case that police see the object when they seize it.…The 'plain view' doctrine requires, perhaps as a central feature, that the police officers have a prior justification for the intrusion into the place where the 'plain view' seizure occurred." [10]

"In Canada, the plain-view doctrine was subject solely to the common law until … 1982."

CANADA

In Canada, the plain-view doctrine was subject solely to the common law until the *Canadian Charter of Rights and Freedoms* was added to the Canadian Constitution (the *British North America Act*, 1867) in 1982. As a result, before 1982, Canadian courts could not generally exclude evidence on the basis that it was improperly obtained by the police. Salhany notes that before 1982, Canadian courts consistently held "that it did not matter how evidence was discovered. There were no brakes on the police searching premises pursuant to a search warrant. Any incriminating evidence discovered during a search pursuant to a warrant was admissible no matter how discovered."[11]

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The *Canadian Charter of Rights and Freedoms* added a provision to the Canadian constitution designed to protect individuals from "unreasonable" searches and seizures. Section 8 of the *Charter* states as follows:

Everyone has the right to be secure against unreasonable search or seizure.

SECTION 8 OF THE CHARTER

The Supreme Court of Canada has indicated that the purpose of section 8 of the *Charter* is to protect "the citizen's right to a reasonable expectation of privacy" (*R. v. Colarusso*, [1994] 1 S.C.R. 20, para. 70). The Supreme Court of Canada has held that a search will be reasonable pursuant to section 8 if it is "(1) authorized by law; (2) if the law itself is reasonable; and (3) if the manner in which the search was carried out is reasonable" (*R. v. Mann*, [2004] 3 S.C.R. 59, para. 36).

However, the Court has also held that section 8 "is only engaged if the claimant has a reasonable expectation of privacy in the place or item that is inspected or taken by the state" (*R. v. Reeves*, [2018] 3 S.C.R. 531, para. 12). In *R. v. Gill*, 2019 BCCA

5. The Fourth Amendment to the United States Constitution states:

   > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (U.S. Const. amend. IV.).

6. Katz v. United States, 389 U.S. 347, 357 (1967) (internal citations omitted).
7. Collins v. Virginia, 138 S.Ct. 1663, 1672 (2018).
8. *Bovat v. Vermont,* No. 19-1301, 141 S. Ct. 310 (Oct. 19, 2020) (Gorsuch, J., concurring in denial of certiorari, joined by Sotomayor and Kagan, JJ.).
9. United States v. Loines, No. 22-3073, ___ F.4th ___, 2023 WL 1234567, *7 (6th Cir. Apr. 18, 2023).
10. *Supra* note 1, para. 37.
11. Roger Salhany, Section 489 and the Plain View Doctrine in the United States and Canada, 13 C.R. (7th) 95, 98 (2014).

"[A] warrantless search can be authorized by statute or the common law."

260, the British Columbia Court of Appeal suggested that the "key to the application of the plain-view doctrine is the principle that s. 8 of the *Charter* protects reasonable expectations of privacy against state intrusions. The premise is that a person can have no reasonable expectation of privacy in an item in plain view to officers where the officers have a right to be present and are carrying out their lawful duties" (para. 32).

The Supreme Court of Canada has also held that a "warrantless search is presumptively unreasonable and contrary to s. 8 of the *Charter*" (*R. v. Nolet*, [2010] 1 S.C.R. 851, para. 21). This is important, because post-1982, Canadian judges have the authority to exclude evidence obtained in contravention of the *Charter* (see section 24(2) of the *Charter*).[12]

Finally, in Canada, a warrantless search can be authorized by statute or the common law (see *R. v. Tim*, 2022 SCC 12). There are numerous exceptions to the warrant requirement in Canada, such as consent searches, search incidental to arrest, strip searches, certain types of border searches[13], and plain-view seizures. In *R. v. Jones*, 2011 ONCA 632, the Ontario Court of Appeal pointed out that "[b]oth the common law plain-view doctrine and the statutory s. 489 provisions are exceptions to the general rule that a warrantless search is unreasonable and, therefore, a violation of s. 8" (para. 58).

SECTION 489 OF THE CRIMINAL CODE OF CANADA

The plain-view doctrine has been given statutory recognition in Canada through amendments to the *Criminal Code of Canada* R.S.C. 1985. In 1955, Parliament began this statutory recognition by adding section 431 to the *Criminal Code* (see *Criminal Code*, 1953-54, c. 51). This provision has been renumbered and expanded. It is found in section 489 of the *Criminal Code*. It states as follows:

> (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds
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> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
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> (b) has been used in the commission of an offence against this or any other Act of Parliament; or
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> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.
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> (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
>
> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
>
> (b) has been used in the commission of an offence against this or any other Act of Parliament; or
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

The wording of this provision allows plain-view seizures by Canadian police officers executing search warrants or when they are otherwise "lawfully present in a place." The latter is a potentially broad seizure power.

THE SEARCH OF THE COMPUTER IN R. V. JONES

In *Jones*, the police obtained a search warrant to search the accused's computer for evidence of commission of the offence of fraud. In the course of their search, the police came across images of child pornography. They decided to expand their search for video files containing child pornography, finding a number of them. They did not have a search warrant that allowed them to search for child pornography images or videos. The evidence discovered by the search led to the accused being charged with the offence of possession of child-pornography, of which he was convicted.

On appeal, the Ontario Court of Appeal indicated that the issue was whether the seizure of the pornographic images and videos was constitutionally reasonable as required by section 8 of the *Charter* (para. 53):

> ...the issue is whether, having lawfully conducted a search of data and image files for evidence of fraud, and having discovered image files containing what they reasonably believed to be child pornography, the police were (a) entitled to seize and utilize the image files containing child pornography to form the basis for a child pornography investigation and prosecution (a different offence than the one for which they were lawfully seeking evidence); and (b) entitled to conduct a further examination of other computer files for further evidence of child pornography, including video files that they would not have examined in

12. Section 24(2) of the *Canadian Charter of Rights and Freedoms* states as follows:

> *Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*

See also Lauren-Jean Ogden, *Taken for Grant-ed: Assessing the Short-Comings of the Grant Test's Application to the Evidence Obtained from Personal Devices*, 45 MAN LJ 26 (2022) (discussing the application of section 24(2) of the Canadian Charter of Rights and Freedoms to unreasonable searches of electronic devices).

13. See *R. v. Barac*, 2023 ONCA 216.

the course of their search for evidence of fraud, for the same secondary purpose.

PLAIN VIEW

The Court of Appeal indicated in ***Jones*** that "[r]esort to this common law power is subject to the following restraints" (para. 55):

(i) The officer must be lawfully in the place where the search is being conducted ("lawfully positioned", in the language of the authorities);
(ii) the nature of the evidence must be immediately apparent as constituting a criminal offence;[14]
(iii) the evidence must have been discovered inadvertently;[15]
(iv) the plain-view doctrine confers a seizure power not a search power; it is limited to those items that are visible and does not permit an exploratory search to find other evidence of other crimes.

The Court of Appeal concluded that because the police were "lawfully examining the image files under the warrant" when they "unexpectedly saw images that were immediately recognizable as images of child pornography, the detection and seizure of the child pornography images in those files met all the requirements of both the plain-view doctrine and s. 489 of the *Criminal Code*." (para 65)

However, the Court of Appeal reached the opposite conclusion as regards the video files. It held that that the video files "were not sitting 'in plain view'… The doctrine therefore did not apply. Finally, to permit the plain-view doctrine to operate in such circumstances would be to run the risk of overseizure, a risk to which electronic media searches are particularly susceptible and something the court must guard against" (para. 67).

SECTION 489

In ***Jones***, the Court of Appeal also considered whether the seizure of the video files was authorized by section 489 of the *Criminal Code*. The Court of Appeal concluded that the seizure of the video files was not authorized by section 489 of the *Criminal Code* because "[i]mplicit in the s. 489 power is the premise that the law enforcement officer has come across or seen something in the course of a lawful search. The law enforcement officer must have reasonable and probable grounds to believe that that something 'will afford evidence' of a crime... Like the plain-view doctrine, s. 489 provides law enforcement agencies with a right to seize. It does not provide them with a right to search for further evidence" (para. 73).

"[P]olice… investigating… voyeurism… seized, without warrant, a clock camera belonging to the landlord."

Section 489 of the *Criminal Code* was subsequently considered by the Ontario Court of Appeal in *R. v. Chow*, 2022 ONCA 555. In *Chow*, the police were investigating the offence of voyeurism occurring through surreptitious videotaping. While lawfully in the tenant-complainants' apartment, they seized, without warrant, a clock camera belonging to the landlord.

The Ontario Court of Appeal concluded that the search did not violate section 8 of the *Charter* because it was authorized by section 489(2) of the *Criminal Code*. The Court of Appeal held that the police "were entitled to enter the apartment at the complainant's invitation." They were "therefore lawfully present within the meaning of s. 489(2)" (para. 46).

In addition, the Court of Appeal concluded in *Chow* that it was "of no moment" that the police "did not know exactly how the device worked or whether it was capable of transmitting information. Neither of these technological questions precluded [them] from having reasonable grounds to believe the offence of voyeurism had been committed." The officers "knew that the device had a hidden camera; that it was aimed at the complainant's bed; and that the complainant's bag had been removed so as not to block the camera. What more could be required before [they were] entitled to believe the offence of voyeurism had been committed?" (para. 50).

Relying on its earlier decision in *Jones*, the Court of Appeal concluded in *Chow* that "[g]iven the lawfulness of the seizure of the device, I accept the Crown's submission that the police were entitled to inspect its physical qualities, though not the informational contents of the memory card within it.…Once the police confirmed that there was an SD memory card in the device, they obtained a warrant before accessing the data on the memory card" (para. 53).

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14. The use of the phrase "immediately apparent" is interesting. In *Coolidge*, Justice Stewart used the same language (see page 467). Salhany points out that subsequently in *Texas v. Brown*, 460 U.S. 730 (1982), Mr. Justice Rehnquist, referred to *Coolidge* and suggested "that the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminating character of evidence is necessary for an application of the 'plain view' doctrine" (at 101). As we have seen, in *Hicks*, the Unites States Supreme Court settled on "probable cause" being the required standard. In *Gill*, the British Columbia Court of Appeal interpreted "the 'immediately apparent' element of the test" as requiring "that the officer has 'probable cause to associate the discovered property with criminal activity'" (para. 54). Since "probable cause" is not a standard normally applied in Canada, it would be preferable to say that the officer had "reasonable and probable grounds to believe."
15. In *Gill*, the "inadvertent" requirement was considered and the British Columbia Court of Appeal held that "for the plain view doctrine to apply, the discovery of the item by the officer must be 'inadvertent' in the sense that it is not discovered by unauthorized search, but rather, because it is in the open when the police are lawfully in the place where it is visible, and lawfully exercising police duties" (para. 52). Similarly, in *R. v Squires*, 2016 NLCA 54, it was held that "[s]o long as the police are lawfully in a place from where the viewing can take place without invading the suspect's zone of territorial privacy and the item is in plain view, it may be seized without a warrant. While the fact that discovery is inadvertent may reinforce the genuineness of police assertions supporting plain view, it need not be a stand-alone requirement" (para. 78).

"Another member of the Canadian Armed Forces ... discovered two audio-recording devices in her residence."

R. V. MCGREGOR

The Supreme Court of Canada commenced its judgment in *McGregor* by noting that "[t]his appeal arises from a criminal investigation conducted by the Canadian Forces National Investigation Service ("CFNIS") in the Commonwealth of Virginia in the United States" (para. 1).

The accused in *McGregor* was a member of the Canadian Armed Forces, posted to the Canadian Embassy in Washington. He held diplomatic immunity in relation to his "person, property, and residence pursuant to the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29" (para. 6).

Another member of the Canadian Armed Forces stationed in Washington, discovered two audio-recording devices in her residence. She reported the discovery and an investigation was commenced. The lead investigator contacted the Alexandria Police Department for assistance. The Alexandria police obtained a search warrant under the law of Virginia. The Supreme Court of Canada noted that the search warrant "authorized the search of Cpl. McGregor's residence in Alexandria as well as objects found therein—including electronic devices. The warrant further authorized the analysis of seized items" (para. 10).

The search warrant was executed by the Alexandria police, who allowed three Canadian Forces National Investigation Service investigators to accompany them. After entering the apartment, the officers with the Canadian Forces National Investigation Service took over the search. This included "triaging" most "of the electronic devices found in the residence, scanning their contents to determine which items to seize" (para. 11).

During this triaging process, the Canadian investigators discovered what they believed to be evidence relating to the offence of sexual assault (one of the Canadian investigators "saw a video file depicting Cpl. McGregor filming himself while sexually touching a woman who appeared to be lying unconscious on a floor" (para. 12)).

The Alexandria police seized the devices containing the incriminating evidence, as well as those that were not triaged at the scene. The items seized at Cpl. McGregor's residence included "three fake smoke alarm cameras, two remote controls for these cameras, two personal audio recorders, an oval camera alarm clock, a small square camera alarm clock with a remote, laptops, storage devices, and compact discs" (para. 13).

The Alexandria police allowed the Canadian Forces National Investigation Service to maintain custody of the items that had been seized. The Service subsequently brought the items to Canada and obtained Canadian warrants for further analysis of their contents.

THE COURT MARTIAL

At his Court Martial, Corporal McGregor argued that the search and seizure of his electronic devices contravened section 8 of the *Charter*. The military judge held that the *Charter* did not apply extraterritorially. Corporal McGregor was convicted of a number of offences, including sexual assault and disgraceful conduct. An appeal to the Court Martial Appeal Court was dismissed. The accused appealed to the Supreme Court of Canada.

THE APPEAL

The Supreme Court of Canada indicated that "[i]n this appeal, the Court is invited to examine the extraterritorial application of the *Charter* pursuant to s. 32(1) of the *Charter*. Both parties rely on this Court's decision in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, which is the governing authority on the territorial reach and limits of the *Charter*. Cpl. McGregor takes the position that the *Charter* applied to the actions of the CFNIS, whereas the Crown argues that *Hape* dictates the opposite outcome. For their part, the interveners have focused their submissions on whether the *Hape* framework should be reaffirmed, modified, or overruled" (para. 3).[16]

THE SUPREME COURT OF CANADA'S DECISION

Despite framing the appeal as involving the "extraterritorial application of the *Charter*," the Supreme Court concluded that it was "unnecessary to deal with the issue of extraterritoriality to dispose of this appeal." The Supreme Court held that it was unnecessary to do so because the actions of the Canadian Forces National Investigation Service in conducting their investigation did not result in any breach of the *Charter*.[17]

16. Section 32(1) of the *Canadian Charter of Rights and Freedoms* sets outs its territorial application in the following manner:

    This Charter applies

    (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

    (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

17. In a concurring judgment, two of the eight justices that participated in the final disposition concluded that there are "significant concerns" with *Hape*, that "go to the core of our jurisprudence on the extraterritorial application of the *Charter*, to the practical implications of its application, and to the ensuing lack of consistency and predictability of this area of the law. These concerns leave this portion of *Hape* ripe for reconsideration. However, given the majority's decision not to address it, we would leave the determination of whether *Hape* was wrongly decided to another day" (para. 79).

    In another concurring opinion, Justice Rowe was very critical of this criticism of *Hape*. He wrote that he was "concerned by my colleagues' insistence that this Court is free to depart from precedent at will, a fortiori, to do so without submissions or an evidentiary record.…Adherence to precedent 'furthers basic rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration.'…Departing from precedent in the absence of proper methodology necessarily jeopardizes those qualities of our legal system. Indeed, applying my colleagues' implicit criteria, it would be hard to imagine a judgment of the Court that could be considered secure" (para. 102).

The Supreme Court concluded that a valid search warrant had been obtained and that the "evidence of sexual assault was discovered inadvertently by the investigators in the process of triaging the devices at the scene of the search; its incriminating nature was immediately apparent. Although the warrant did not contemplate such evidence, the digital files in issue fell squarely within the purview of the plain-view doctrine" (para. 4).

On this basis, the appeal was dismissed. In doing so, the Supreme Court considered the law in relation to searches of electronic devices and the application of the plain-view doctrine to such searches. They did so by commencing with a review of how section 8 of the *Charter* is engaged when an electronic device is searched.[18]

SECTION 8 OF THE CHARTER AND THE SEARCH OF ELECTRONIC DEVICES

In *R. v. Vu*, [2013] 3 S.C.R. 657, the Supreme Court held that "if police intend to search any computers found within a place they want to search, 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" (para. 48).

In *McGregor*, the Supreme Court noted that the "fact that a search of an electronic device is expressly authorized by warrant does not mean that any file contained therein may be analyzed — even where no search protocol has been imposed." Police officers "are 'bound, in their search, to adhere to the rule that the manner of the search must be reasonable.'…Consequently, they cannot 'scour the devices indiscriminately'… but must limit their search to the types of files that are 'reasonably necessary to achieve [the warrant's] objectives.'…Should 'the officers realiz[e] that there was in fact no reason to search a particular program or file on the device, the law of search and seizure would require them not to do so'" (para. 29).

Though the search warrant issued in Virginia did not encompass the investigation of sexual assault offences, the Supreme Court held that the "discovery of unforeseen evidence does not invalidate the authorization to conduct a search for the purposes outlined in the original warrant.… Here, the investigators discovered the impugned evidence when they were in the process of triaging Cpl. McGregor's electronic devices at the scene of the search, as was expressly authorized by warrant. The investigators set aside the incriminating devices for seizure and further analysis. Indeed, the CFNIS obtained Canadian warrants before further analyzing their contents. In my view, this investigative process was consistent with s. 8 of the *Charter*" (***McGregor***, at 36).

"[T]he Supreme Court considered the law in relation to searches of electronic devices…"

THE PLAIN-VIEW DOCTRINE

The Supreme Court of Canada indicated that a plain-view seizure of evidence "defeats the presumption that seizures must be judicially authorized." The Court held that "two requirements must be satisfied for the plain-view doctrine to apply" (at paragraph 37):

> (1) the police officers must have a legitimate 'prior justification for the intrusion into the place where the 'plain view' seizure occurred'…; and (2) the incriminating evidence must be in plain view in that it is 'immediately obvious' and 'discovered inadvertently' by the police.

It is interesting that in formulating the test for the application of plain-view seizures, the Supreme Court of Canada reverted to the questionable wording that the seizure must involve evidence that is "immediately obvious" and that was "discovered inadvertently." The appeal in *McGregor* provided the Court with an opportunity to clarify and update this wording.

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18. In a concurring judgment, two of the eight justices that participated in the final disposition disagreed "that applying the plain view doctrine is necessary in this case. The plain view doctrine permits seizure without a warrant in defined circumstances. Cpl. McGregor does not dispute seizure before this Court" (para. 86). The concurring justices noted that "[o]ur Court has never decided the issue of when a particular file on a device is seized, as opposed to when the device (e.g., a laptop) itself is seized. This Court should not decide it in this case. Unintended consequences may flow from deciding the issue without the benefit of any submissions. And it is unnecessary to a resolution of the case" (para. 90). Finally, they suggested that "the assumption that the files were seized when they were initially seen by police is highly questionable under existing precedent… In our view, simply seeing the file at Cpl. McGregor's home did not likely constitute a seizure because he did not 'ceas[e] to have a privacy interest in' it in the required sense…as evidenced by the need for the subsequent Canadian warrant. Additionally, finding that a file is seized when it is 'viewed' conflates merely seeing a file with seizing it. To analogize to physical files, this would suggest that the police seize every piece of paper that they view during the search of a file cabinet" (para. 91). The concurring justices concluded their judgment by suggesting that the issue of the application of the plain view doctrine to "electronic data" should be left "for another day" (para. 94):

> Not only is reliance on the plain view doctrine superfluous and dependent on questionable assumptions regarding when a file is seized, whether or not to extend the plain view doctrine to the search of the content of a computer is a fraught issue that has not been addressed by this Court. We have never endorsed the application of the doctrine to electronic files as set out by the Ontario Court of Appeal in *Jones*. The search and seizure of personal computers marks an incredibly intrusive, extensive and invasive search of one's privacy (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, paras. 2-3). To that end, we have required specific authorization for the search and seizure of computers (*Vu*) and modified the common law approach to searches incident to arrest in the case of cell phones (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621). There are special considerations associated with electronic data which suggest we should not assume that the plain view doctrine applies, or that it applies without modification. Additionally, we did not receive any submissions on the issue. We would leave that issue for another day.

APPLICATION TO ELECTRONIC DEVICES

The Supreme Court acknowledged that "[c]oncerns have been expressed about the plain-view doctrine in relation to electronic seizures," but found it "unnecessary to express a settled opinion on the limits of the doctrine" because it was "satisfied that it does apply in some form to electronic devices" and that in "the case at bar, there can be no doubt that the doctrine applies" (para. 37).

The Supreme Court did hold that in "the context of digital searches," the prior justification "extends only to the types of files that are 'reasonably necessary' for the proper execution of such a search.…In other words, there must be a reasonable nexus between the files examined and the purposes of the warrant for a search to satisfy the first requirement of the plain-view doctrine" (para. 38).

THIS CASE

The Supreme Court concluded that "both requirements of the plain-view doctrine are satisfied in the present case" (paras. 41-42):

> First, the investigators had a legitimate justification for their inspection of the files containing evidence of sexual assault at the scene of the search. As mentioned above, the Virginia warrant meets the *Vu* requirement of specific, prior authorization applicable to digital searches. Moreover, the military judge found that "[t]he discovery of files relating to a potential sexual assault . . . occurred while looking for the types of files specifically sought and authorized" (*voir dire* decision, para. 25). The investigators "demonstrat[ed] care to limit the impact of the search through screening and conduct of a targeted search that involved a minimum of personal information" (para. 27). In these circumstances, the initial search leading to the discovery of the files in issue satisfies the requirement of prior justification.
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> Second, the digital files disclosing evidence of sexual assault were in plain view, given their inadvertent discovery and immediately apparent unlawfulness. The investigators came upon these files in the triage process, which was designed to quickly identify evidence of interception and voyeurism. The military judge rejected "the submissions to the effect that the investigators continued to look into files they had no authority to look at under the terms of the warrant" (para. 25). He further noted that "any device that was assessed to contain potential child pornography and sexual assault files [was] set aside for seizure and further analysis back in Canada" (para. 25). Moreover, there was no need to closely examine the files to ascertain their incriminating nature — in contrast to the documents in *Law*, which were not facially unlawful. I thus conclude that the impugned evidence was in plain view and that its seizure during the triage process did not violate s. 8, either as part of a search carried out unreasonably or as an unreasonable seizure.

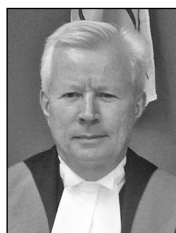
THE MAJORITY'S OPINION

The Court concluded that "CFNIS demonstrably observed the requirements of the *Charter*. The investigators discovered the incriminating evidence in the execution of a digital search expressly authorized by a valid warrant. The evidence of sexual assault, although not contemplated in the original warrant, fell squarely within the purview of the plain-view doctrine. The CFNIS seized the evidence in accordance with that doctrine and subsequently obtained Canadian warrants before conducting an in-depth analysis of the files in issue. Even on Cpl. McGregor's view of the law, it is difficult to see how the CFNIS could have more fully complied with the *Charter*. In light of my conclusion that the investigative process was consistent with s. 8 of the *Charter*, it is unnecessary to address Cpl. McGregor's argument that the evidence should be excluded under s. 24(2)" (para. 44).

CONCLUSION

It is clear now from *McGregor* that in Canada the plain-view doctrine applies to searches of electronic devices and that the traditional scope of the doctrine is applicable. The meaning of such elements as "inadvertent" and "immediately apparent" are open to interpretation.

It is also clear that the plain-view doctrine does not allow for searches of electronic devices beyond what the officer comes across while lawfully examining a device. Subject to emergencies, Canadian police officers who see incriminating evidence in such a situation are well advised to obtain a search warrant before proceeding further.



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