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Search and Seizure: Authorities Can't Keep What They Seize Indefinitely

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In a recent decision,¹ the Superior Court of Québec held that an authority cannot keep copies of electronic documents seized during a search and seizure after officially notifying the person that it will not bring penal or administrative proceedings against the person. In this decision, the Court reminds us that a seizing authority that retains a copy of seized documents indefinitely without any form of judicial review infringes the fundamental rights of the individuals whose property was seized.

Background

During searches and seizures conducted as part of an investigation involving 10 individuals and three companies, the Autorité des marchés financiers (AMF) obtained close to 16 million electronic documents, seizing computers, cellphones, external hard drives and USB keys. Orders were rendered during the course of the investigation to allow the AMF to keep what was seized for a specified amount of time before charges were laid. Three years after seizing the items, the AMF officially declared that no penal or administrative proceedings would be brought. The people who were targeted in the searches and seizures asked the Court to order the AMF to return their property to them, in whatever form or medium it was in, along with any copies the AMF may have made.

Decision

The Court ordered the AMF to return all the material in question, pointing out that, until charges are laid, the retention of what is seized during an investigation must be periodically reviewed by the court. It also noted that seized property must be returned to its owner as soon as possible and that investigative authorities cannot keep a copy once the court has ordered it to be returned.

Following consistent Supreme Court of Canada jurisprudence, the Court also held that "things seized" include both the content and the medium containing the data. Contrary to what the AMF argued, "citizens have a reasonable expectation of privacy in terms of both their computer and the information it contains" [translation].

The AMF has now brought this decision before the Court of Appeal of Québec.

Impact

In pointing out that the AMF was not "above the law" or beyond a court's reach, the Court confirmed the importance of protecting the rights of individuals targeted by a search and seizure as well as the rights of innocent third parties. It also noted that an authority with investigative powers is merely the custodian of the things seized and cannot keep documents in any form whatsoever without the court's permission.

¹ *Baazov v Autorité des marchés financiers*, 2019 QCCS 5564.

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