NFA

# SEARCH & SEIZURE IN CANADA

## A comprehensive guide on gun owners' rights and obligations

including case law reviews

2018 edition

## INVESTIGATIVE TECHNIQUES OF POLICE OFFICERS

The police use their powers in the Criminal Code and the common law to detain persons, as well as search and seize firearms on persons, in residences, vehicles, buildings and storage facilities. The standard of proof most often is one of reasonable and probable grounds. However, there are some warrant provisions that only require a reasonable suspicion to execute certain type of investigative warrants. The police also utilize informants and undercover agents to develop a prosecution for firearms offences. The police also use tracking devices in vehicles, dial number recorders, production orders, conduct covert surveillance and wiretaps.

A firearms investigation may also develop from a routine Fish & Wildlife motor vehicle stop, and even escalate to a comprehensive undercover operation involving surveillance and wiretaps.

## THE BALANCE OF PROOF IN SEARCH CASES INVOLVING FIREARMS

Investigations involving firearms and the law of search and seizure involving firearms, follow the provisions of the common law, the Criminal Code and the Charter of Rights and Freedoms in the same way as other criminal or narcotics investigations. There are, however, some exceptions.

First, a search authorized by a judicial official who authorizes a warrant to search (also known as a search warrant) is deemed to be valid and lawful. To challenge the validity of a lawful search, the onus of proof is upon the Applicant or accused person to satisfy the Court that the warrant to search ought not to have been granted. The court reviewing the issuance of a warrant is not to simply substitute its opinion with the issuing judicial official, but must determine and find that the warrant ought not to be granted in the first instance. This is an onus that is not easily displaced. If the warrant is found to have been unlawful, the Court must then determine whether the evidence is admissible pursuant to s.24(2) of the Charter.

Most warrants authorized in the Criminal Code require that the police have reasonable and probable grounds to believe that an offence has been committed. However, there are investigative warrants that may not involve the search of a residence which have a lower standard of proof.

Typically, most firearms cases involve the search of a residence, storage facility or motor vehicle. The search of a residence will most often involve the issuance of a search warrant. If there are emergency or exigent circumstances, the police may conduct a warrantless search pursuant to s. 117.02 of the Criminal Code.

Most firearms search cases involving the search of motor vehicles start with an investigative detention ("reasonable suspicion") which may lead to grounds to search a vehicle. Most motor vehicle searches are warrantless. In a warrantless search, the Crown has the onus to satisfy the Courts that the police had reasonable and probable grounds to lawfully conduct the search. The onus then is with the Crown to prove the lawfulness of the search.

***Section 8 of the Canadian Charter of Rights and Freedoms*** reads as follows:

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

In ***Hunter v. Southam, 1984 CarswellAlta 121,*** the Supreme Court of Canada confirmed that s.8 of the Charter protects the privacy interests of citizens from unlawful searches, absent reasonable and probable grounds:

> *[19] I begin with the obvious. The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.*

A judicial officer is required to review the grounds to justify the warrant before it will be authorized:

> *[32] The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence may be uncovered by the search, would be to define the proper standard as the possibility of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.*

*[43] Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 of the Criminal Code authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American Bill of Rights provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation..." The phrasing is slightly different but the standard in each of these formulations is identical. The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshhold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.*

Therefore, a judicial officer must be satisfied that the information presented constitutes reasonable and probable grounds to believe that an offence has been committed and there is evidence at the target location that forms the basis of the grounds to search.

# MOTOR VEHICLES AND FIREARMS

## Reasonnable Suspicion

In ***R. v. Mann, 2004 SCC 52***, the Supreme Court recognized that, although there is no general power of detention for investigative purposes, police officers are entitled to detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a crime and that the detention is reasonably necessary on an objective view of the circumstances. The Court said that in such instance the police are entitled to conduct a pat-down search of the individual detained, but only to ensure their safety and the safety of others. However, the Court stressed that the investigative detention and protective search power had to be distinguished from an arrest and the incidental power to search on arrest. The police had no authority to go beyond a search for weapons that might be used by the individual detained.

However, an investigative detention may lead to an officer forming reasonable and probable grounds to search. This is very common in motor vehicle stops. An officer forms grounds to detain a person and a vehicle, then continues with an investigation, which could lead to the officer forming reasonable and probable grounds to search.

Every motor vehicle search case relies upon its own facts. The Courts apply established case law to determine whether a citizen has been subject to an unlawful search and seizure.

For example, in ***R. v. Grant and Campbell, 2015 ONSC 1646***, the Court held that the detention and search in relation to firearms was lawful, and therefore the application to exclude the evidence was dismissed:

*[1] The two accused, Javantai Grant and Raevon Campbell, are charged with a host of offences flowing from their alleged unlawful possession of two loaded handguns in the early morning hours of July 30, 2013. They contend that the roadside police search of Mr. Campbell's motor vehicle, in which they both were travelling, and during which the two prohibited firearms were discovered, was in violation of their right to be secure against unreasonable search and seizure, guaranteed by s. 8 of the Canadian Charter of Rights and Freedoms. They seek the exclusion of this evidence under s. 24(2) of the Charter. The Crown argues that the firearms were lawfully seized by the police during the reasonable police search of the vehicle which was incident to the arrest of the accused. The Crown contends that, in any event, the firearms are admissible under s. 24(2) of the Charter.*

*[2] At the conclusion of the hearing of this pre-trial motion, I advised the parties of my ruling, that the evidence of the police discovery of the firearms in the motor vehicle was admissible. My conclusion, more particularly, is that: (1) the pat-down searches of the accused and the motor vehicle search which revealed the firearms were reasonable warrantless searches conducted incident to the lawful arrest of the accused in accordance with s. 8 of the Charter; (2) the delay in advising the accused of the reasons for their arrest, and the informational component of their rights to counsel was in violation of ss. 10(a) and 10(b) of the Charter; and (3) the evidence as to the police finding of the two firearms in the motor vehicle was admissible pursuant to s. 24(2) of the Charter.*

In ***R. v. Thompson, 2013 ONSC 1527***, the Ontario Superior Court of Justice ruled that an individual who was the target of a police detention and search as a result of a gun tip was subject to an unlawful detention, and his right to be secure against unreasonable search and seizure was violated. The Court excluded the evidence of the firearms seized in the motor vehicle. This case provides an extensive review on the law of detention and search and seizure.

There was a "gun-call" to the police by a tipster:

*Adrian Thompson has a prior criminal record including for firearms-related offences. He admits that he is not inexperienced with the criminal justice system. On September 10, 2011, Adrian Thompson and his young daughter went shopping for furniture. The accused's vehicle was parked at the Brick, a retail store in Brampton. Concealed in Mr. Thompson's vehicle was a loaded handgun, marihuana, and cocaine.The Peel Regional Police Service (PRPS) Communications Centre, on receipt of a tip, dispatched officers to the Brick parking lot where there was an encounter with the accused leading to his detention and a warrantless search of his vehicle.*

The Court held that the police unlawfully detained and searched the accused:

*[121] Once Sergeant Ceballo effected detention of the accused at the location of the rear of the Mazda, he was legally obliged to inform him as to the reason for his detention.*

*[122] Only one suspect was targeted for detention. This was not a case of the police requiring a short time to sort out from among multiple persons who should be detained. Nor was the presence of Thompson's upset child a reason to dispense with compliance with the detainee's constitutional rights. While I accept that Mr. Thompson's daughter was upset, the testimony of the police witnesses consciously or unconsciously, in my view, retrospectively enhanced the significance of this feature of the case in an effort to minimize their own lack of obedience to Charter obligations.*

*[123] Further, the pat-down search of Mr. Thompson established that he was not armed. He was placed, with his child, some distance away from the location of the open driver's door of the Mazda. Two armed police officers had control of the scene. Within a couple of minutes, two more police officers were on scene.*

*[124] On the totality of the evidence, I am satisfied that Sergeant Ceballo had, from the outset, every intention of searching the Mazda for the presence of a firearm. As will be discussed in further depth below, unimpeded by any concern for lawful authority to search Thompson's vehicle, he intended to work backward from the results of his search of the vehicle. If a firearm was not located, then "no harm, no foul, go on your way". If a firearm was seized, then the sergeant would get to the detainee's constitutional rights. This, of course, highlights the very real concern of what actually goes on in the low visibility theatre of investigative detentions.*

*[125] Adrian Thompson had a constitutional right to be informed immediately on detention of the reason for the state's interference with his liberty. Leaving apart his own unique history as a black citizen in Peel Region, Mr. Thompson was entitled, as a detainee in the public location in which he found himself detained, to learn, in a timely way, the jeopardy in which he had been placed. Then, and only then, could he make a fully informed decision respecting speaking to the police. Indeed, he had a right not to surrender to unlawful detention — an assessment which could only be made in the context of knowing the asserted reason of the police for his detention.*

*[167] The Crown failed to overcome the presumption of unconstitutionality associated with a warrantless search and seizure.*

*[168] It is common ground, and as reviewed in paras. 112-115 above, the reasonable suspicion to investigatively detain Mr. Thompson, such as it was, did not found authority on Sergeant Ceballo's part to search the detainee's vehicle without a warrant. Quite correctly, Crown counsel agrees with this conclusion given the state of the evidence at trial. Despite the limited information at the sergeant's disposal from what he heard of the gun-call dispatch, at one point in his testimony he told the court that that information justified a gun-point take-down of the black male about to enter the Mazda, even though Ceballo was unaware of his identity, to be followed by a warrantless search of the vehicle.*

*[169] The sergeant did not maintain that he searched the Mazda out of concern for police and public safety. Accordingly, while, given the state of the evidence and the Crown's concession that the officer did not undertake a Plummer search, it is unnecessary to adjudicate the issue, I am satisfied that, in any event, grounds and circumstances did not exist justifying such a search.*

## Wildlife Act

Provincial Wildlife acts often allow fish and wildlife officers to inspect firearms and ammunition to ensure hunters comply with hunting and Criminal Code regulations. For example, the Alberta Wildlife Act reads as follows:

***Inspection of weapons, ammunition and projectiles***

*70(1) If a weapon, ammunition or projectile or any part of it*

*(a) is in or on a vehicle, aircraft or boat or is being transported on an animal or by a person who is on foot, and*

*(b) is in plain view of a wildlife officer or wildlife guardian,*

*the officer or guardian may require the person who is or who appears to be in possession of that weapon or other thing to produce it for the purpose of inspection to determine whether it is there in circumstances constituting a danger to public safety or whether or not it is possessed in accordance with this Act.*

*(2) When an officer or guardian requires a person to produce anything for inspection under subsection (1), that person shall forthwith produce it to the officer or guardian.*

***Search, etc., without warrant***

*71(1) If distance, urgency, the imminent danger of the loss, removal, destruction or disappearance of evidence or other relevant factors do not reasonably permit the obtaining of a warrant, a wildlife officer or wildlife guardian may, without obtaining a warrant,*

*(a) enter into and search any premises or a place, vehicle, aircraft, boat or a building, tent or other structure,*

*(a.1) search any land lawfully entered on under section 66, or*

*(b) search any container, including a pack, or any packanimal,*

*if the officer or guardian believes on reasonable and probable grounds that there is in or on it any evidence of an offence against this Act.*

*(1.1) A wildlife officer or wildlife guardian who has reasonable and probable grounds to believe that the lawful exercise of any powers or the lawful performance of any duties or functions referred to in section 66(1) necessitates the examination or inspection of anything or any location referred to in subsection (1)(a), (a.1) or (b) or of any subject animal or other property may, without a warrant, perform that examination or inspection, as the case may be.*

*(2) The officer or guardian shall not enter into or search the living quarters of a private dwelling under this section unless the officer or guardian is in immediate pursuit of a person who the officer or guardian has reasonable and probable grounds to believe has committed an offence against this Act.*

*(3) The power to conduct a search, examination or inspection under this section must*

*(a) be exercised at a reasonable hour having regard to the circumstances underlying the reasonably perceived need for the search, examination or inspection, and*

*(b) be exercised in accordance with the prescribed restrictions.*

It is clear from the legislation that firearms owners have a reduced expectation of privacy when they possess firearms and ammunition in a public place or on Crown land.

## Conclusion

Ultimately, a police officer must have reasonable and probable grounds to lawfully search a motor vehicle without a warrant. A police officer may also seize a vehicle, then apply for a search warrant. The officer may conduct a search after the warrant has been granted.

## WARRANTLESS SEARCH (pursuant to s. 117.02 of the Criminal Code)

***Section 117.02 of the Criminal Code*** reads as follows:

***Search and seizure without warrant where offence committed***

- ***117.02 (1) Where a peace officer believes on reasonable grounds***

*(a) that a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or*

*(b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance,*

*and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed.*

***Disposition of seized things***

*(2) Any thing seized pursuant to subsection (1) shall be dealt with in accordance with sections 490 and 491.*

***Seizure on failure to produce authorization***

- ***117.03 (1) Despite section 117.02, a peace officer who finds***

*(a) a person in possession of a prohibited firearm, a restricted firearm or a non-restricted firearm who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess the firearm and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it, or*

*(b) a person in possession of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess it, may seize the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition unless its possession by the person in the circumstances in which it is found is authorized by any provision of this Part, or the person is under the direct and immediate supervision of another person who may lawfully possess it.*

***Return of seized thing on production of authorization***

*(2) If a person from whom any thing is seized under subsection (1) claims the thing within 14 days after the seizure and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody of it,*

*(a) a licence under which the person is lawfully entitled to possess it, and*

*(b) in the case of a prohibited firearm or a restricted firearm, an authorization and registration certificate for it,*

*the thing shall without delay be returned to that person.*

***Forfeiture of seized thing***

*(3) Where any thing seized pursuant to subsection (1) is not claimed and returned as and when provided by subsection (2), a peace officer shall forthwith take the thing before a provincial court judge, who may, after affording the person from whom it was seized or its owner, if known, an opportunity to establish that the person is lawfully entitled to possess it, declare it to be forfeited to Her Majesty, to be disposed of or otherwise dealt with as the Attorney General directs.*

***Application for warrant to search and seize***

*117.04 (1) Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance in a building, receptacle or place and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search the building, receptacle or place and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.*

***Search and seizure without warrant***

*(2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.*

This provision does not require reasonable grounds to make an arrest but merely requires a reasonable belief that an offence has been committed and that the evidence is likely to be found in the search:

- ***R. v. T.A.V., 2001 ABCA 316 (CanLII)***
- ***R. v. Narayan 2007 BCCA 429***
- ***R. v. Cocks 2014 BCSC 60***

***Section 117.02(1)(b)*** also authorizes a peace officer, who has reasonable grounds to believe that a firearm offence is being committed or has been committed and evidence is likely to be found on a person or in a place other than a dwelling house, to search and seize it without warrant. However, the conditions for obtaining the warrant must exist, and because of exigent circumstances it would not be practicable to obtain the warrant.

Therefore, if a peace officer has reasonable and probable grounds to believe that an offence has been committed, but is unable to apply for a warrant to search because of emergency or exigent circumstances exist, they may conduct a warrantless search pursuant to s. 117.02 of the Criminal Code.

## CONSENT TO SEARCH

A homeowner or the operator of a motor vehicle may be asked by a police officer if they consent to the search of their premises or motor vehicle. A police officer may not have reasonable and probable grounds to conduct a search, but if the officer obtains the valid consent of the person subject to the search, it may then be lawful.

A police officer will often have a form ready to be signed that allows a police officer to search with the consent of the party. **You should not consent to this search without speaking to legal counsel.**

Therefore, the advice of the NFA is to not consent to a search of your premises or motor vehicle. If the police are going to conduct a search, you should not consent.

In ***R. v. Wills 1992 CarswellOnt 77 (Ont. CA)***, the Ontario Court of Appeal outlined a very specific set of guidelines in determining whether the consent to search is valid:

*[69] In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:*

*(i) there was a consent, express or implied;*

*(ii) the giver of the consent had the authority to give the consent in question;*

*(iii) the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;*

*(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;*

*(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,*

*(vi) the giver of the consent was aware of the potential consequences of giving the consent.*

*[70] The awareness of the consequences requirement needs further elaboration. In Smith, supra, at pp. 726-728 [S.C.R.], pp. 322-323 [C.C.C.], pp. 136-137 [C.R.], McLachlin J. considered the meaning of the awareness of the consequences requirement in the context of an alleged waiver of an accused's s. 10(b) rights. She held that the phrase required that the accused have a general understanding of the jeopardy in which he found himself, and an appreciation of the consequence of deciding for or against exercising his s. 10(b) rights.*

*[71] A similar approach should be applied where s. 8 rights are at stake. The person asked for his or her consent must appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an "innocent bystander" whose help is requested by the police? If the person whose consent is requested is an accused, suspect or target, does that person understand in a general way the nature of the charge or potential charge which he or she may face?"*

## WHAT TO DO IF THE POLICE SEARCH YOUR RESIDENCE OR VEHICLE FOR FIREARMS

- If the police advise that they are going to conduct a search, **advise them that you are not consenting to a search;**
- If the police ask you to consent to a search of your person, vehicle or residence, or ask you to sign a consent to search, **do not consent;**
- **Do not assist in the search** or provide information to the police;
- If the police detain you, indicate that you wish to **exercise your right to counsel;**
- **Do not make any statements** whatsoever. You can simply identify yourself and provide identification. Do not explain circumstances or provide any information;
- The police or peace officers (eg. Wildlife Officers) may indicate they are conducting an inspection or search. **Do not interfere** with the investigation. If you do, you could be charged with obstruction of justice;
- If a police officer has determined that they have grounds to conduct a search, **do not argue or discuss** the circumstances or provide explanations. Do not interfere with the search.
- After the incident, **make detailed notes of the events.** Try to attach the names of the officers to their comments;
- Remember that peace officers may conduct a warrantless search of a premises, residence or vehicle in exigent circumstances pursuant to s.117.02 of the Criminal Code. It is important to **exercise your right to silence, then recall and record the details of the incident as soon as you can.**

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***Canada's National Firearms Association*** *P.O. Box 49090, Edmonton, Alberta T6E 6H4* *Toll Free: 1-877-818-0393* *NFA.ca*