

PRIVACY IN PERIL

Hunter v Southam
and the Drift from Reasonable
Search Protections

Richard Jochelson
and David Ireland



UBCPress · Vancouver · Toronto

Contents

<i>Acknowledgments</i>	vii
Introduction	3
1 Dickson's Decision: The Supreme Court as Guardian of the Constitution	8
2 The Threshold Test: A Reasonable Expectation of Privacy	24
3 Lowering the Bar: The Supreme Court's Failure to Maintain the <i>Hunter</i> Standard	65
4 Expanding Search Powers: Search Incident to Arrest and Exigent Circumstances	102
Conclusion	137
<i>Appendix: A Note on the Evidence</i>	150
<i>Notes</i>	155
<i>Bibliography</i>	195
<i>Index of Cases</i>	207
<i>Index</i>	214

Acknowledgments

We have many people to thank for their assistance in completing this book. First and foremost, we thank our spouses and children, who make everything possible for us. Second, we thank UBC Press, Randy Schmidt, and Michelle van der Merwe, for their dedication to, and assistance with, this volume. We are also grateful for the work of our student assistants, Hayley Allardyce and especially Alicia Dueck-Read, who provided invaluable support. The collective at Robsoncrim.com, Canada's Criminal Law Blog and Research Centre, was also of great assistance. This work would not be possible without the support of the Legal Research Institute at Robson Hall, Faculty of Law, University of Manitoba. We are also grateful to Jonathan Black-Branch, Dean of Robson Hall, for supporting our research as well as our colleagues and peers around the country who inspired us to complete this book. Finally, we thank the students at Robson Hall for providing us with the drive to continually learn and become better teachers of the law.

INTRODUCTION

On 17 September 1984, exactly twenty-nine months after the *Canadian Charter of Rights and Freedoms* became law, the Supreme Court of Canada released its decision in *Hunter v Southam*.¹ The *Charter*, in sections 7 through 14, had provided Canadians with a blueprint for how officers of the state should behave when enforcing the criminal law. *Hunter* was the first Supreme Court decision to substantially address the parameters of section 8, which states that “[e]veryone has the right to be secure against unreasonable search or seizure.” The court declared that, in the vast majority of cases, warrantless searches would be unreasonable under section 8. Police would henceforth require authorization, based on “reasonable and probable grounds,” before undertaking searches and seizures. The decision established the Supreme Court as the guardian of the Constitution and promised to protect individuals from encroaching state power. But, as we show, privacy law in the post-9/11 era took a turn that Chief Justice Brian Dickson, one of Canada’s most significant jurists, never imagined when he penned the landmark decision.

By entrenching individual rights in legislation, the *Charter* promised a path to equality and social justice for all Canadians. The *Charter*’s authors – politicians, experts, and other members of the political class – had debated each word and phrase to meet this goal.² But in the new constitutional order, and within the tradition of the common law, it would be the courts that decided the purpose, reach, and scope of the new document, and the decisions of the Supreme Court of Canada would take on extraordinary significance.³ Dickson, who assumed the position of chief justice on 18 April 1984, would go on to pen many

pivotal decisions that limited the state's ability to place Canadians, even those who had criminal proclivities, under surveillance. In *Hunter*, he made it clear that the *Charter* should only rarely be used by courts to condone or enable (i.e., effectively legislate) government interference in the lives of Canadians.⁴

Yet, when it came to police powers, particularly search and seizure, that is precisely what happened. Contrary to Dickson's vision, the Supreme Court has become one of the principal instruments for administering police powers in Canada, and this administrative function stands in stark contrast to the court's self-declared role as guardian of the Constitution.⁵ In mutating the intent of *Hunter*, the court has endorsed using the *Charter* as an instrument of state power. As we will show, the right of the individual to be free from unreasonable search and seizure has been eroded by four principal developments:

- the emergence of judicial threshold tests that preclude individuals from asserting their right to privacy in many circumstances
- a reduction in the standards of privacy protections
- new powers of search and seizure at common law
- the expansion of existing common law search powers.⁶

These techniques have complicated and recast the *Charter*, not as a bastion of individual liberty and freedom but rather as a tool of state surveillance and interference.⁷

Although *Hunter* was decided well before the high-security context of our times – an era in which fear of terror has led to the development of new, intrusive surveillance practices, policies, and legislation in the name of achieving security – it continues to be among the most cited cases in Canada's criminal procedure pantheon.⁸ Indeed, our analysis of reported cases (for a detailed discussion, see the Appendix at the end of this book) reveals that the jurisprudence of search and seizure has seen booming business in Canada's courts: 1,500 cases between 1982 and 2015, with 62 percent of them being heard after 9/11. Since 2001, *Hunter* has been cited between 99 and 151 times a year in Canada's courts, an astounding statistic for a case that was decided in 1984

and that only relates to the breach of one species of *Charter* right – unreasonable search and seizure.⁹ However, when we looked a little deeper, we noted a curious thing: whereas 22 percent of the courts agreed with the precedent in 1984, only 1 percent did so after 2005, and the majority of citations were neutral.

How is it that a case so widely cited gets so little positive judicial treatment? How is it that the courts are drifting away from the *Hunter* standard even as citations of it are rising? To answer these questions, we also undertook an empirical analysis of the judicial language deployed in cases citing *Hunter* to determine why the case continues to be in vogue. For instance, a search for the phrase “expectation of privacy” revealed that references to *diminished* expectations of privacy have increased steadily since the 1990s. Although Dickson spoke of section 8 applying only when the accused possessed a reasonable expectation of privacy, we hypothesize that judicial decisions have gradually transformed this threshold question into a threshold spectrum. Similarly, our analysis revealed that references to reasonable and probable grounds have also increased along with the number of search-and-seizure cases. Even more surprising, references to “reasonable suspicion” and “warrantless searches” also rose steadily after 2000, indicating a fundamental change in search-and-seizure law – warrantless searches on reasonable suspicion have become somewhat regularized. Finally, we observed that a large number of the cases promoting the expansion of common law police powers (powers rooted in traditional police duties that the courts can confirm in the absence of legislation) cite *Hunter*, even though Justice Dickson was not in favour of the development of these powers.¹⁰ These cases have also risen steadily since 9/11.¹¹

In the chapters that follow, we trace how the language of the law has been used to manoeuvre around the *Hunter* precedent, even as the courts deploy the *Hunter* case for precedential consistency. Chapter 1 examines Chief Justice Dickson’s background, the origins of the case, the facts that gave rise to the decision, and subsequent interpretations of it, including our own. Chapter 2 traces the evolution of the threshold test of reasonable expectation of privacy from *Hunter* to the present day. In particular, we examine how the test has been altered or transformed

to preclude the application of section 8 protections in many cases. We reveal that as the threshold test has become increasingly objective, it has become increasingly more difficult to obtain section 8 protection, and when it is obtained, the protections it offers are not as extensive as *Hunter* promised.

In Chapter 3, we examine the Supreme Court's failure to maintain the standard of reasonable and probable grounds for many different types of search and seizure, despite the clear direction in *Hunter* to do so. The cases discussed span decades characterized by the jurisprudential promotion of state interest over the rights of the individual. In this context, reasonable suspicion has become a middle-ground standard used to mandate search powers in the absence of a warrant, and the standard is most often deployed when border protection, national security, or common law police powers are at issue. We show that in cases where the constitutional warrant requirement has proven to be inconvenient, the court has created new common law police powers to circumvent the protections explicitly laid out in *Hunter*. Finally, in Chapter 4, we discuss two particular contexts where search powers were influenced by *Hunter* but ultimately fell short of its framework – searches incident to arrest and warrantless searches.

Hunter has been cited an impressive number of times, but our exploration of the case law shows that the courts cite it either to explain away the guarantees it provided or to make diminished standards look exceptional. The courts hold *Hunter* out as the gold standard for police work even as they pivot away from that standard to meet what is perceived as a more pressing need for security. In this way, *Hunter* is both precedent and spectre. To have legitimacy in the common law system, it must be in the room so it can be diluted. In this sense, *Hunter* is a landmark case, but the courts use it to mark land that they are willing to develop and alter. References to *Hunter* can be viewed cynically in this light, as justifications for rights derogation. But these citations also provide hope that courts in the future might return to the case to utilize it not as a high watermark foil but as a model of best practices in policing and state surveillance in Canada. In remembering and unpacking the *Hunter* case, we ultimately call for a return to the foundational principles

that underpinned it. Justice Dickson's interpretation of section 8 rights offered a vision of privacy and freedom from state interference for all Canadians. Although his vision remains unrealized in an era of heightened security and expanding police powers, we argue that constant citation of *Hunter* in the halls of justice suggests that the protection of our civil liberties will endure, and perhaps even find dominion, in the twenty-first century.

© UBC Press 2019

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher.

Library and Archives Canada Cataloguing in Publication

Title: Privacy in peril : Hunter v Southam and the drift from reasonable search protections / Richard Jochelson and David Ireland.

Names: Jochelson, Richard, 1973- author. | Ireland, David, 1974- author.

Description: Series statement: Landmark cases in Canadian law, 2562-5241 | Includes bibliographical references and index.

Identifiers:

Canadiana (print) 20190143711 | Canadiana (ebook) 20190143789 | ISBN 9780774862578 (hardcover) | ISBN 9780774862592 (PDF) | ISBN 9780774862608 (EPUB) | ISBN 9780774862615 (Kindle)

Subjects: LCSH: Searches and seizures—Canada.

Classification: LCC KE9270 .J63 2019 | LCC KF9630 .J63 2019 kfmod | DDC 345.71/0522—dc23

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
www.ubcpres.ca