
COMMENT

CHRONIQUE DE JURISPRUDENCE

The Inadequacy of Privacy: *Hunter v. Southam* and the Meaning of “unreasonable” in Section 8 of the *Charter*. R.T.H. Stone*

The author discusses the right of privacy under section 8 of the *Charter*, and argues that this right does not provide a sound basis for determining the scope of “reasonable” search and seizure. Indeed, emphasis on this right has led to conflicting caselaw with respect to administrative and personal searches, and has prevented courts from developing general principles of reasonableness. After criticizing the caselaw, the author tentatively suggests eight such principles.

L'auteur étudie le droit à la protection de la vie privée sous l'empire de l'article 8 de la *Charte canadienne* et soutient que ce droit n'est pas la bonne mesure pour déterminer quelles perquisitions et saisies ne sont pas « abusives ». De fait, l'insistance sur un tel droit a mené à une jurisprudence inconstante dans les domaines des saisies administratives et personnelles et a empêché les tribunaux d'établir des principes généraux sur le caractère non-abusif des saisies. Après une critique de la jurisprudence, l'auteur soumet huit principes généraux sur les saisies et les perquisitions abusives.

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I. Introduction

A few years ago I attempted to catalogue all the powers of entry available to the police and other officials under English law.¹ It was with some surprise that I discovered that the University Library had shelved my book in the "Tort" section. On reflection, however, the library's approach to what I considered as essentially a "public law" text did have some merit. Indeed, an alternate title might well have been "Trespass to Land: All Known Defences". Since an entry is either lawful or it is a trespass, the main though rarely effective remedy against abuse of entry powers by officials has been the action for "trespass". Moreover, if the British Parliament creates a statutory entry power, then there is automatically a defence to an action for trespass, and the scope of the power is simply a matter for statutory interpretation.

Such was the position in Canada prior to 1982. Now, however, section 8 of the *Canadian Charter of Rights and Freedoms*² gives protection against "unreasonable search or seizure". Further, the Supreme Court of Canada has suggested that the concept of "privacy", as opposed to that of trespass, should have the main role in determining what is, or is not, reasonable.

The purpose of this comment is to point out some ways in which this approach, at least as it is currently being interpreted by the courts, is inappropriate when giving content to section 8.³ In particular, problems arise from distinctions drawn between powers of inspection as opposed to powers of search or seizure; "administrative" or "regulatory" powers, as opposed to "criminal" procedures; and search of the person as opposed to search of premises. Before addressing these issues, however, the state of the existing law will be considered, and some general points made on the meaning of "unreasonableness" in this context.

¹R. Stone, *Entry, Search and Seizure* (London: Sweet & Maxwell, 1985).

²Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

³See K. Murray, "The "Reasonable Expectation of Privacy Test" and the Scope of Protection against Unreasonable Search and Seizure Under Section 8 of the Charter of Rights and Freedoms" (1986) 18 *Ottawa L. Rev.* 25. Murray also casts doubts on the value of the "privacy" test as the basis for developing section 8.

II. The Current Law: *Hunter v. Southam*

The starting point for any consideration of section 8 has to be the case of *Hunter v. Southam*.⁴ Although several earlier cases had considered this section, the Supreme Court, in *Hunter*, had its first opportunity to deal comprehensively with section 8 issues. The case, perhaps significantly, did not arise from an ordinary criminal investigation conducted by the police, but from the exercise of powers given to officials of the Combines Investigation Branch.⁵ According to section 10 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, the Director of Investigation and Research could authorise his officials to enter premises in which the Director believed that there might be evidence relating to an inquiry under the Act. In addition, the Director could authorise officials to "examine anything on the premises", and to "copy or take away for further examination or cop[y] any book, paper, record or other document" that, in the view of the official, might constitute evidence relating to the inquiry.⁶ The Director was required to obtain a certificate authorising such an entry from a member of the Restrictive Trade Practices Commission.⁷

In April 1982, such a certificate was obtained in respect to the premises of the *Edmonton Journal*, a newspaper in the Southam chain. The authorisation was challenged as a breach of section 8. The Supreme Court agreed, affirming the Alberta Court of Appeal, which unanimously held that section 10 of the *Combines Investigation Act* was unconstitutional.

In reaching this decision, the Court looked beyond the authorisation contained in section 10 of the Act. First, Dickson J. (as he then was) commented on the "breath-taking sweep" of the authorisation, which appeared "tantamount to a licence to roam at large on the premises of Southam Inc.", not just on those of the *Edmonton Journal*. Given its scope, it is likely that the authorisation in this case would have been struck down even if section 10 had been found constitutional. But the decision of the Alberta Court of Appeal had been more broadly based. Following its lead, the Supreme Court embarked on a general consideration of the proper method of interpreting *Charter* rights, and specifically, section 8.

⁴*Hunter, Director of Investigation and Research of the Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [hereinafter *Hunter* cited to S.C.R.].

⁵In England, a similar factual situation arose in *I.R.C. v. Rossminster Ltd.*, [1980] A.C. 952, [1980] 1 All E.R. 80 (H.L.), where the search powers of the Inland Revenue Commissioners, rather than those of the police, were called into question. Given the origin of both these cases, it is perhaps expected that the police will exercise draconian powers, but surprising when government officials possess similar powers.

⁶s.10(1).

⁷s.10(3).

Dickson J., having referred to the views of Viscount Sankey (in *Reference Re Section 24 of the B.N.A. Act; Edwards v. A.G. Canada*⁸) and Lord Wilberforce (in *Minister of Home Affairs v. Fisher*⁹), regarding the need to give constitutional documents a "large and liberal" or "generous" interpretation, started his analysis of section 8 with the observation that the *Charter* is a purposive document. It is, therefore, necessary to investigate the purpose underlying section 8 to determine what interests it protects, and thus what searches are "unreasonable". At this point a short digression on how the Court could have interpreted the concept of "unreasonableness" is in order.

1. *The Concept of "Unreasonableness": Case Law pre-Hunter v. Southam*

Section 8 uses the the concept of "unreasonableness" when prohibiting "unreasonable" search and seizure. Reasonableness is, of course, often used in the common law — most notably, perhaps, in the tort of negligence, where the standard of "foreseeability" is based on what a "reasonable person" would foresee. But the concept appears in many other areas. The frequency with which it appears, and the comfortable familiarity of its phraseology, should not lull us into thinking that it is easy to define.

One possible approach would be to treat "unreasonableness" as meaning simply "without reason". In other words a search would only be "unreasonable" if it was totally arbitrary, and without any rational basis. This approach would have left the law in its pre-*Charter* state. Thus, the existence of a statutory power authorising a search would provide the "reason" for it. Further, as long as the requirements of the statute itself were fulfilled, the search would be "reasonable". McDonald J. came close to this approach in *Re Reich and College of Physicians and Surgeons of Alberta (No.2)*.¹⁰ In *Re Reich*, which was decided prior to *Hunter v. Southam*, the Judge found that demands for the production of documents by the College under section 37 of the *Medical Profession Act*, R.S.A. 1980, c. M-12 had a rational basis in the protection of the public from incompetence in the practice of medicine.¹¹ Although McDonald J.'s approach drew on the *Wednesbury* approach,¹² later courts have given a wider interpretation to "reasonableness".

It is clear, however, that the standard is objective. We are not concerned with what a particular official exercising a search power, or a particular victim of a search, considers reasonable. It is a general standard of "rea-

⁸(1929), [1930] A.C. 124 at 136-7, [1930] 1 D.L.R. 98 at 106-7 (P.C.).

⁹[1980] A.C. 319 at 329, [1979] 3 All E.R. 21 at 26 (H.L.).

¹⁰(1984), 53 A.R. 325, 8 D.L.R. (4th) 696 (Q.B.) [hereinafter *Re Reich* cited to D.L.R.].

¹¹*Ibid.* at 709.

¹²*Ibid.* at 706-7.

sonableness" that is in question. It is also clear that the issue is more culturally "loaded" than the issue of reasonable foreseeability in tort, where the perceptive abilities of the average person are key. While even that question cannot be totally divorced from context, at some point the objective capacity of the human brain is relevant, and imposes some framework on the discussion. When looking at the "unreasonable search" there is no similar core of scientific objectivity. All depends on the context. Thus, what is reasonable within a particular society at a particular time is the standard.

Problems arise when one confuses the reasonableness of a search with "reasonable grounds for suspicion" or belief. There is an obvious temptation to use the "reasonableness" of belief approach as the starting point for a discussion of section 8.¹³ Once again, however, the approach is misleading. The issue in cases dealing with the exercise of police power upon reasonable grounds is, primarily, the state of knowledge of the person making the decision. Did he or she have sufficient information from which to infer that it was likely that particular items might be found on particular premises? This, again, refers to the intellectual capacity of the average individual. It is a decision with little or no "moral" content. Yet the issue in section 8 is, primarily, a moral one, and is based on the standards and expectations operating within a society at a particular time. Of course, the answer might still be given that the search is to be regarded as "reasonable" if the person authorising the entry had reasonable grounds for a particular belief or suspicion. But the two issues have no necessary connection.

2. *The "Privacy" Approach*

In *Hunter*, the S.C. could have interpreted section 8 as doing little more than giving added status to pre-Charter law. In other words, the Court might have held that if a power was part of formally unimpeachable legislation, it could not be regarded as unreasonable. Such a holding would be consistent with *Entick v. Carrington*,¹⁴ which confirmed the need for proper legal authorisation for any invasion of property rights. But Dickson J., without really arguing the point, simply asserted that "in my view, the interests protected by section 8 are of a wider ambit than those enunciated in *Entick v. Carrington*".¹⁵ Further, these interests are not limited to the protection of property.

¹³See, e.g., L. Paikin, "The Standard of 'Reasonableness' in the Law of Search and Seizure", in V. Del Buono (ed.), *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982) at 94.

¹⁴(1765), 95 E.R. 807, [1558-1774] All E.R. Rep. 41.

¹⁵*Hunter*, *supra*, note 4 at 158.

For further guidance, Dickson J. turned to the United States Constitution, specifically, to the Fourth Amendment, which contains a similarly worded "broad right". American courts have interpreted this right as protecting "people not places",¹⁶ with the dominant principle being the protection of privacy. Dickson J. adopted the same approach when dealing with section 8. In one of the key passages in his judgment, he set out this approach as follows:

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for the purposes of the present appeal I am satisfied that its protections go at least that far. The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.¹⁷

The required assessment should be made by an *impartial arbiter* on the basis of reasonable grounds for suspicion that relevant evidence *will* (as opposed to "may") be found. On both these points section 10 was too wide, and was, therefore, struck down.

III. The Effects of *Hunter v. Southam*

The decision in *Hunter v. Southam* has affected both legislation and litigation. The possibility of challenging evidence by means of section 24 of the *Charter* (as was the case in *Hunter*), has meant that in a large number of criminal cases, alleged invasions of privacy in the course of obtaining evidence have been used as the basis for excluding such evidence.¹⁸ Further, the government has revised the powers of entry given to various officials, to ensure that these powers meet the criteria laid down in *Hunter v. Southam*. What follows is a summary of the relevant legislation.

¹⁶*Katz v. United States*, 389 U.S. 347 at 351 (1967).

¹⁷*Hunter*, *supra*, note 4 at 159-60.

¹⁸See, e.g., *R. v. Cameron* (1987), 16 C.C.C. (3d) 240, 13 C.R.R. 13 (B.C.C.A.); *R. v. Dombrowski* (1985), 18 C.C.C. (3d) 164, 44 C.R. (3d) 1 (Sask. C.A.); *Re Mandel & The Queen* (1986), 25 C.C.C. (3d) 461; *R. v. James* (1986), 55 O.R. (2d) 609, 55 O.A.C. 319 (C.A.); *R. v. Manuel* (1986), 50 C.R. (3d) 47 (Que. C.S.P.).

1. *Legislation*

The main legislation is Bill C-27, most of which was proclaimed in force on October 15, 1985, under the title of the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*. It deals with powers of entry given to government officials under acts as various as the *Bankruptcy Act* and the *Pesticide Residue Compensation Act*. The powers are divided into those concerned with entry and *inspection*, and those concerned with entry and *search*. A slightly different approach is taken when interpreting these two powers of entry.

Looking first at inspection powers, there is a fairly standard approach. The inspector is given the power to enter premises without warrant if he has reasonable grounds for believing that he will find objects which he is entitled to inspect under the relevant act. If, however, he wishes to enter a "dwelling-house", he may not enter without the occupier's consent, unless he obtains a warrant from a justice of the peace. An information on oath must be supplied to the justice, who must himself decide whether sufficient grounds exist for the issue of a warrant.

This form is used, for example, in section 19 of the *Canadian Dairy Commission Act*. The distinction between dwellings and other premises is consistent with the use of "privacy" as the basis for "reasonableness". A person presumably has a greater interest in protecting the privacy of the place where he or she lives, as opposed to the place where he or she carries on business. Privacy does attach to business premises, of course. Indeed, the premises in *Hunter v. Southam* were of this kind.¹⁹

Turning to powers of entry and search under Part II of the *Statute Law Amendment Act*, the approach is narrower. Here, the general line is as follows: in order to enter premises *of any kind* to search for evidence of an offence, a warrant will be needed, at least in the absence of exigent circumstances making it impractical for one to be obtained.²⁰ Again, though to a more limited extent, the distinction is understandable in terms of "privacy". A "search" of premises is more likely to impinge on a person's privacy than a mere "inspection". Conversely, it might be argued that if the purpose of the search is to find evidence of criminal offences, the public interest in the detection of crime should weigh heavily in any balancing of public interest and personal privacy rights. Indeed, the detection of crime would tip the balance far more than administrative inspection. Taking this argument one step further, stricter controls should be expected over the "inspection" pow-

¹⁹See also Martin J.A. in *R. v. Rao* (1984), 4 O.A.C. 162 at 182, 40 C.R. (3d) 1 at 32 (C.A.): "In my view, however, the individual's legitimate expectation of privacy in contemporary society extends equally to his office."

²⁰See, e.g., *Canada Water Act*, R.S.C. 1985, c. C-11, s. 26(a).

ers than over the "search" powers, yet this is the opposite of what is in fact the case. This argument will be dealt with in greater detail in the analysis of case law subsequent to *Hunter v. Southam*.

Section 443 of the Criminal Code reflects the same policy, in that it requires the police to obtain a warrant before searching *any* premises for evidence of criminal offences. The definition of evidence is extremely wide, and includes the following: "anything on or in respect of which any offence against this Act or any other Act has been or is suspected to have been committed" (443(1)(a)), or anything that there is reasonable ground to believe will afford evidence with respect to the commission of such an offence (443(1)(b)), or "anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant" (443(1)(c)).

2. *Hunter v. Southam*: Its Progeny

As a watershed decision, *Hunter v. Southam* has generated much case law. Some of the decisions simply apply the case to criminal or quasi-criminal searches where either the enabling statute, or the exercise of the power in a particular case, fell foul of the need for "reasonable grounds".²¹ Such case law is not discussed here. Rather, the focus is on the ways in which the general principles found in *Hunter* have been developed, in particular, in relation to administrative searches and personal searches.

(a) Administrative "Searches" and "Seizures"²²

(i) *Production Orders (pre-Hunter case law)*

An issue which has generated a considerable body of case law is whether an order for the production of documents comes within the scope of section 8. An analysis must start with the pre-*Hunter* case of *Re Alberta Human*

²¹See, e.g., *M.N.R. v. Kruger Inc.*, [1984] 2 F.C. 535, 13 D.L.R. (4th) 706, 55 N.R. 255, 12 C.R.R. 45, 84 D.T.C. 6478 (C.A.) and *R. v. Print Three Inc.* (1985), 51 O.R. (2d) 321, 20 D.L.R. (4th) 586, 47 C.R. (3d) 91, [1985] 2 C.T.C. 48, 10 O.A.C. 220, 20 C.C.C. (3d) 392 (C.A.), both considering the *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 231(4); *Re Ontario Chrysler (1977) Ltd. and Rush* (1987), 59 O.R. (2d) 724, 39 D.L.R. (4th) 100 (H.C.), considering the *Business Practices Act*, R.S.O. 1980, c. 55, s. 11(1); *R. v. Belliveau* (1985), 18 C.C.C. (3d) 554, 61 N.B.R. (2d) 223, 158 A.P.R. 223 (Q.B.), considering the *Tobacco Tax Act*, R.S.N.B. 1973, c. T-7, s. 2.2(2); *R. v. MacAusland* (1985), 52 Nfld. & P.E.I.R. 349, 153 A.P.R. 349, 14 C.R.R. 179, 19 C.C.C. (3d) 365 (P.E.I. C.A.), considering the *Liquor Control Act*, R.S.P.E.I. 1974, c. L-17.

²²See also A. Reid & A. Young, "Administrative Search and Seizure Under the Charter" (1985) 10 Queen's L.J. 392.

Rights Commission and Alberta Blue Cross Plan.²³ There, the Alberta Court of Appeal considered powers under the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, which allow the Alberta Human Rights Commission to require production of documents. The court stated, without adducing authority or discussing the issue, that

We accept the view that a forced production of documents in a civil proceedings, or during an administrative inquiry, is a seizure.

The Court went on to hold that the procedures met the section 8 test of "reasonableness".²⁴

One implication of this argument is that "search" and "seizure" may be treated separately. An order for the compulsory production of specified documents might be a "seizure" but is certainly not a "search". The following November, however, the Federal Court of Appeal, in *Re Ziegler and Hunter*,²⁵ was of the view that such a power did not constitute a "seizure" within the meaning of section 8. In *Re Ziegler*, the Court considered section 17 of the *Combines Investigation Act*, which empowered the Director of The Restrictive Trade Practices Commission to order persons to give evidence *and to bring documents with them*. The majority of the Court (Marceau J. dissenting) followed case law on the U.S. 4th Amendment, and held that the power did not amount to a seizure.²⁶ Marceau J., on the other hand, thought that the Alberta approach was logically correct:

It is the taking hold by a public authority of a thing belonging to a person against that person's will that constitutes the essence of a seizure and the fact that the person is or is not forced to hand over the thing himself appears to me irrelevant.

Nevertheless, he held that the power was constitutional in this case because it was "reasonable".

²³(1983), 48 A.R. 192, 1 D.L.R. (4th) 301 (C.A.) [hereinafter *Alberta Human Rights Commission* cited to A.R.].

²⁴*Ibid.* at 195-96.

²⁵(1983), [1984] 2 F.C. 608, 8 D.L.R. (4th) 648 (C.A.).

²⁶See, e.g., *Oklahoma Press Publishing Co. v. Walling, Wage and Hour Administrator*, 327 U.S. 186 (1946); *In Re Horowitz*, 482 F. 2d 72 (1973), cert. den. 94 S. Ct. 64; *Dunham v. Ottinger*, 154 N.E. 298 (1926).

(ii) *Production Orders (post-Hunter case law)*

In subsequent cases, the majority view in *Ziegler and Hunter* is generally the one that has been followed.²⁷ Indeed, in *Gainers Inc. v. U.F.C.W., Local 280-P*,²⁸ the Alberta Court of Appeal did not follow its earlier decision, and was clearly of the view that the *Labour Relations Act*, which permitted the Labour Relations Board to order that an individual present him or herself before the Board, and bring any "document or other thing", was not a seizure. Even if it was, however, it was "reasonable" vis-à-vis the tests laid down in *Hunter v. Southam*. The Court also drew a distinction between "powers of testimonial compulsion" and powers to "administer, investigate, and then prosecute complaints."²⁹

In *Coast Tractor & Equipment Ltd v. Halliday*,³⁰ the same approach was taken in respect of a "garnishee" order. Gibbs J. felt able to extract some principles from earlier case law. He found that legislation which had been successfully challenged had as constituent elements³¹

the exercise of the coercive power of government, an invasion of privacy and penalty provisions for non-compliance. If those cases are fairly representative of the decisions of the appeal courts of the provinces, and of the Supreme Court of Canada, it may be that it can now be said that unless all those elements are present, the challenger cannot succeed under section 8.

The exceptions to this general trend begin with *Re Reich and College of Physicians and Surgeons*,³² which was decided after *Ziegler and Hunter*.³³ Although McDonald J. in the Alberta Queen's Bench, felt obliged to follow his own Court of Appeal, and hold that a forced production of documents under section 37(2) of the *Medical Profession Act* would be a seizure, he distinguished the case before him. He stated that it involved a demand under section 37(1), which could only be backed up by civil sanctions.³⁴

²⁷See, e.g., *K Mart Canada Ltd/K Mart Canada Ltée v. Millmink Investments Ltd* (1986), 10 C.P.C. (2d) 109 (Ont. Master); *Re Saskatchewan Human Rights Code: Cole v. F.W. Woolworth Co.*, [1985] 6 W.W.R. 759 (Sask. Q.B.); *R. v. McKinlay Transport Ltd* (1987), 58 O.R. (2d) 310, 37 D.L.R. (4th) 454, 32 C.C.C. (3d) 1, 27 C.R.R. 109 (H.C.).

²⁸[1986] 5 W.W.R. 667, 75 A.R. 130 (C.A.) [hereinafter *Gainers* cited to W.W.R.].

²⁹*Ibid.* at 670.

³⁰(1987), 37 D.L.R. (4th) 316, 13 B.C.L.R. (2d) 66 (S.C.) [hereinafter *Coast Tractor* cited to D.L.R.].

³¹*Ibid.* at 320.

³²*Re Reich, supra*, note 10 at 696.

³³But before the Supreme Court's decision in *Hunter, supra*, note 4.

³⁴If it were a "seizure", McDonald J. would have found it reasonable because it had "a rational basis" in the protection of the public from incompetence in the practice of medicine (*Re Reich, supra*, note 10 at 709).

In addition, the first instance decision in *Thomson Newspapers v. Director of Investigation and Research*³⁵ also followed the Alberta Court of Appeal. This case was, like *Hunter v. Southam*, concerned with a provision of the *Combines Investigation Act* — section 17 — which empowered the Director to order the production of documents. J. Holland J., in the Ontario High Court, took the view that since the power could be exercised without an impartial arbiter having authorised it on the basis of reasonable grounds for belief that an offence had been committed, it was inconsistent with section 8. On appeal, however, the Ontario Court of Appeal reversed this decision, and applied the *Ziegler and Hunter* approach. The Court held that section 8

does not encompass an order requiring the production of documents so long as the section authorizing the order (or the law apart from that section) gives the person required to produce a reasonable opportunity to dispute the order and prevent the surrender of the documents under section 17.³⁶

Even if section 17 did involve a “seizure”, the court thought that it was reasonable.

The prevailing trend in the case law is thus against using section 8 in the area of production of documents. The cases do not, however, go so far as to say that *no* production order could amount to a “seizure”. How would section 8 apply in such a case? In line with the usual approach, where the issue is discussed in cases post-*Hunter*, a production order is treated as a potential or actual breach of privacy. To what extent does the compulsory handing over of documents infringe a person’s privacy? Clearly there is less infringement in surrendering, even under compulsion, a document or other item, than in having someone search your premises, and perhaps remove your files. But is privacy involved at all? This might depend on the nature of the document. If it is a personal letter, privacy may well be a factor. But, in the absence of section 8, and its related “privacy” slant, it is likely that the discussion of this situation would centre on two different issues.

The first issue is confidentiality.³⁷ Most obviously, lawyers or other professionals might argue that items should not be handed over because they are held “in confidence”. This has a close relation to privacy, but it is the “privacy” of the person to whom the confidence is owed that is important, not the privacy of the person in possession of the item. Issues of this nature were raised in *Bishop v. College of Physicians of British Colum-*

³⁵(1986), 54 O.R. (2d) 143, 26 D.L.R. (4th) 507 (H.C.).

³⁶(1986), 57 O.R. (2d) 257, 34 D.L.R. (4th) 413 (C.A.) [leave to appeal granted 25 June 1987, 23 O.A.C. 318n (S.C.C.)].

³⁷This issue was discussed in *Alberta Human Rights Commission, supra*, note 23 at 197, but independently of the issue of “reasonableness” under section 8.

bia,³⁸ which involved a demand for the production of medical records. At first instance the judge stressed the damage to the confidential relationship between doctor and patient which would be caused by allowing the documents to be handed over. He also thought that the seizure was “unreasonable”, and thus contrary to section 8. It is unclear, however, whether the judge thought that it was the breach of confidentiality, or simply the disruption to the doctor’s ability to practise, which made it unreasonable. The British Columbia Court of Appeal, while agreeing with the judge that the Rule of the Medical Services Commission authorising the “seizure” was *ultra vires* the section of the Act, refused to consider section 8.

The second issue which might be raised in relation to the compulsory handing-over of material is the rule against “self-incrimination”. Courts may have some hesitancy about compelling persons to hand over material which might lead to their conviction for a criminal offence. This hesitancy may lie behind the distinction between criminal and civil procedures, a distinction to which the Alberta Court of Appeal referred in *Re Alberta Human Rights Commission*. Indeed, this distinction seems to form some basis for distinguishing between the various decisions in this area. It is true that in *Ziegler and Hunter*, a “self-incrimination” argument based on section 2(d) of the *Canadian Bill of Rights* was specifically rejected by the court. But the fact that there is no positive right against self-incrimination in Canadian law does not necessarily prevent its use as a relevant principle in determining reasonableness under section 8. Similarly, the fact that there is no specific “right of privacy” under the *Charter* has not prevented its development as a basis for interpreting section 8.

(iii) Inspection Powers

The distinction between criminal and civil procedures was also considered a relevant factor in *Bertram S. Miller Ltd v. R.*³⁹ There, the Federal Court of Appeal was considering the exercise of inspection and seizure powers under the *Plant Quarantine Act*, R.S.C. 1970, c.P-13. Ryan J. pointed out that the actions of the officials in this case were a step in an administrative process, not part of a criminal law “search and seizure”.⁴⁰ In addition, he argued that protection against unreasonable “seizure” was concerned

³⁸[1985] 6 W.W.R. 234, 65 B.C.L.R. 315 (S.C.), aff’d [1986] 3 W.W.R. 377, 1 B.C.L.R. (2d) 36 (C.A.).

³⁹[1986] 3 F.C. 291, 31 D.L.R. (4th) 211 (C.A.) [hereinafter *Bertram* cited to F.C.].

⁴⁰*Ibid.* at 324.

with the protection of property rights rather than privacy.⁴¹ But where there was an emergency situation involving a threat to public health, the interest in protection from unreasonable seizure of one's property had to give way to the public interest. "In such situations a warrant is not necessary for a seizure if such a seizure is authorized by statute and the terms of that statute are themselves reasonable."⁴² On the facts, there was no breach of section 8. Hugessen J. reached the same conclusion, but in more colourful language:

As to the context, it is my opinion that the test of what is "unreasonable" for the purposes of applying section 8 of the Charter will vary from case to case. Without attempting to be exhaustive, it seems to me that one will always have to look to the purpose of the statutory scheme authorizing the search and seizure, to the nature of the property or things seized, to the character of the premises where the search and seizure may normally be expected to be carried out and to the legitimate interests and expectations not only of the public at large but also of the person who is subject to the search and seizure. What is reasonable in terms of entry and inspection of a restaurant kitchen or commercial dairy, or a factory, or a mine will differ radically from what is reasonable for the search and seizure of private papers in a dwelling-house. By the same token, there is a distinction between a statutory scheme which obviously envisages routine inspections and testing at reasonable times in the normal course of business and one which is designed to permit, where necessary, armed and forceable intrusion at three o'clock in the morning. In short, there is a difference in kind between the tramp of jackboots and the sniff of the inspector of drains.⁴³

In *Bertram*, officials would most likely exercise their powers out of doors or in public commercial premises. "Indeed, the nature of the things to be searched is by definition, plant material or parasites, in which there can be no legitimate expectation of privacy."⁴⁴ The search must be conducted at a reasonable time and be based upon reasonable belief; if it is not, the citizen has his recourse at law.⁴⁵

It should be remembered that in the legislative changes referred to above, different controls were thought appropriate for "administrative inspections" as opposed to investigation of offences. This distinction has also appeared in the case law. Perhaps the clearest statement is found in the Ontario Court of Appeal's decision in *Re Belgoma Transportation Ltd. and*

⁴¹*Ibid.* at 241. Cf. Mackinnon A.C.J.O. in *Re Allen and Hamilton (City of)* (1987), 59 O.R. (2d) 498 at 507, 38 D.L.R. (4th) 303 at 311 (C.A.): "It is agreed that the Charter is not directed to the protection of property rights"; and Hugessen J. in *Lagiorgia v. The Queen*, [1987] 3 F.C. 28 at 31, 42 D.L.R. (4th) 764 at 767 (C.A.): "Section 8 protects rights of privacy and property against 'unreasonable' State intrusion".

⁴²*Bertram*, *supra*, note 39 at 331.

⁴³*Ibid.* at 341.

⁴⁴Cf. the "open fields" doctrine under the Fourth Amendment, discussed, *infra*, note 66 and accompanying text.

⁴⁵*Bertram*, *supra*, note 39 at 343.

Director of Employment Standards.⁴⁶ The court was considering section 45 of the *Employment Standards Act*, R.S.O. 1980, c.137. Under this section, an employment standards officer may enter upon lands or premises at any reasonable time to carry out an inspection, audit or examination. The court took the view that even if this was a search and seizure, it was reasonable:

The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those applied to search or seizure within an administrative context.⁴⁷

The same line was taken by a differently constituted Court in *R. v. Quesnel*,⁴⁸ in respect of a power to inspect farms.

The problem with this reasoning is that if "privacy" is the guiding principle, it should probably lead to the opposite conclusion. Note that the distinction the Court draws, as the above quote illustrates, is not between "search" and "inspection", but between "administrative" and "criminal" searches. Surely if two searches, identical in physical terms, are carried out, one for "criminal" and the other for "administrative" investigation purposes, the infringement of privacy is the same in both cases. If there is a difference it might well be that the public interest in the detection of crime is greater than the public interest in ensuring compliance with administrative regulations. If that is so, then it is the *administrative* searches which should be subject to stricter controls.

It may well be that the various decisions are simply *ad hoc* reactions to particular situations, rather than logical applications of principle. For instance, in *Re Ozubko and Manitoba Horse Racing Commission*,⁴⁹ "spot-check" searches of property belonging to people holding licences (in this case, as owners of racehorses) were approved. As Huband J.A. explains,

[All] licensees recognise that there must be procedures to ensure that the rules are being obeyed and, consequently, spot checks to confirm compliance with the rules are so manifestly reasonable that to argue otherwise on the basis of section 8 of the Charter becomes unthinkable.⁵⁰

This is a particularly clear example of assertion rather than argument forming the basis for the application of section 8.

⁴⁶(1985), 17 C.R.R. 78, 20 D.L.R. (4th) 156 (Ont. C.A.) [hereinafter *Belgoma* cited to D.L.R.].

⁴⁷*Ibid.* at 159.

⁴⁸(1985), 53 O.R. (2d) 338, 12 O.A.C. 165 (C.A.) [leave to appeal denied 22 May 1986, 55 O.R. (2d) 543 (S.C.C.)].

⁴⁹(1986), 33 D.L.R. (4th) 714, 43 Man. R. (2d) 253 (C.A.) [hereinafter *Ozubko* cited to D.L.R.].

⁵⁰*Ibid.* at 720.

(b) Personal Searches

The courts have had no hesitation in applying section 8 to searches of the person as well as to searches of premises. Though Canadian Courts are less willing than English Courts to treat the two separately, surely there should be differences of principle when the question of reasonableness is considered. The kinds of issues which must be considered were raised by *R. v. Pohoretsky*.⁵¹ In this case, following a road accident, blood samples were taken without consent. Urine which had been previously passed was also seized. The Manitoba Court of Appeal took the view that a search or seizure involving non-consensual intrusion into a person's body (not authorised by legislation) was illegal and unreasonable. Referring to the principles involved, Philp J.A. argued as follows:

the dignity of the person is a criterion for assessing the unreasonableness of an intrusion into the body. I would go further and say that it is the dominant criterion. The right to privacy, although not the subject of a special protection in the Charter, is well known to Canadian law, and is certainly an expectation of the community. That should be our concern and, in my view, any search and seizure involving an intrusion into the body would offend the community's sense of what is decent and fair.⁵²

Once again, privacy is referred to as a relevant principle, but in conjunction with the "dignity of the person". Why this qualification? The answer, presumably, is the feeling that to categorise what happened in this case simply as an invasion of privacy would be inadequate. Indeed, the very concept of privacy seems odd in this context. We do not condemn assaults or stabbings because they offend our concepts of privacy. The violation of an individual's bodily integrity calls out for stronger language. Philp J.A. seemed to sense this in his emphasis on the dignity of the person in the first part of the quotation. Furthermore, it is arguable that the passage would be just as effective, if not more so, were the reference to privacy removed. But again, it seems that the shadow of *Hunter v. Southam* touches the decision. Since the Supreme Court in *Hunter* used "privacy" as the guiding principle in interpreting section 8, and since *Hunter* is the leading case, lower courts have tended to feel that they must refer to the privacy argument,

⁵¹(1985), 17 D.L.R. (4th) 268, 45 C.R. (3d) 209 (Man. C.A.) [hereinafter *Pohoretsky* cited to D.L.R.]; rev'd [1987] 1 S.C.R. 945, 39 D.L.R. (4th) 699.

⁵²*Ibid.* at 284-85.

despite the fact that Dickson J. emphasized that there might well be other relevant principles.⁵³

Somewhat surprisingly, privacy was not considered at all in *R. v. G.(J.M.)*.⁵⁴ The case concerned the search by a school principal of a 14 year old pupil. Another teacher had alleged that the pupil had been seen placing drugs in his socks. In his office, the principal informed the pupil of his suspicion and asked him to remove his socks. The pupil refused. In circumstances which are not clear from the report, the principal then took some tin foil from the student's "right sock or pant leg".⁵⁵ Marijuana was found. At first sight, this looks like a case where there was an intrusion on the pupil's privacy, but the Ontario Court of Appeal did not deal with it in those terms. The Court found that the search was reasonable because it was "related to the desirable object of maintaining proper order and discipline" and "was not excessively intrusive".⁵⁶ Furthermore, it was often "neither feasible nor desirable that the principal should require prior authorization before searching his or her student and seizing contraband."⁵⁷ It would seem that the Court took a very relaxed view of the principal's action here, since it is hard to believe that in any other context a non-consensual search inside a person's clothing would be so easily justified.⁵⁸ The age of the suspect and the school situation may have carried more weight with the court than was perhaps appropriate.

⁵³A situation similar to that in *Pohoretsky* arose in *R. v. Katsigiorgis* (1987), 62 O.R. (2d) 441, 23 O.A.C. 27 (C.A.). The accused was in hospital following a road accident, in which a passenger in the car he had been driving was killed. The police suspected that the accused had been drinking prior to the accident. They seized a blood sample which had already been taken by the hospital staff, and a sample of urine which had been passed. The Crown argued that the accused had given permission for both seizures. On this occasion, presumably because there was no question of the samples having been taken without consent, the Court of Appeal held that there was no unreasonable search or seizure. See, also, *Re N and D* (1985), 49 O.R. (2d) 490, 13 C.R.R. 26 (*sub nom. R.N. v. M.D.*) (Fam. Ct.), holding that submission to a blood test in a paternity suit involved no breach of section 8; and *R. v. Alderton* (1985), 49 O.R. (2d) 257, 44 C.R. (3d) 254, 17 C.C.C. (3d) 204, 12 C.R.R. 361, 7 O.A.C. 121 (C.A.), holding that there was no breach of section 8 when a sexual assault suspect allowed police to take hair samples.

⁵⁴(1986), 33 D.L.R. (4th) 277, 56 O.R. (2d) 705, 17 O.A.C. 107, 29 C.C.C. (3d) 455 (C.A.) [hereinafter cited to D.L.R.].

⁵⁵*Cf. R. v. Lerke* (1986), 25 D.L.R. (4th) 403, 43 Alta L.R. (2d) 1 (C.A.); *R. v. Mutch* (1986), 47 Sask. R. 122, 26 C.C.C. (3d) 477 (Q.B.); *Re Gaudreault and The Queen* (1985), 17 C.R.R. 320 (Ont. Dist. Ct.).

⁵⁶*Supra*, note 54 at 282.

⁵⁷*Ibid.* at 283.

⁵⁸In the U.K., the *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, s.1(9), and paragraph 3.5 of the associated *Code of Practice*, lay down special procedures for searches other than the "superficial examination of outer clothing."

In *Re C.U.P.W., Calgary Loc. 710 and Canada Post Corp.*,⁵⁹ Dixon J. in the Alberta Queen's Bench had to deal with the issue of privacy in the context of a personal search. The Post Office was formulating rules under which employees could be asked to submit for inspection any object carried into or out of any postal facility. Lockers and vehicles would also be subject to inspection. The judge recognised that the proposed procedures were

intrusions of privacy, but the real issue here is, is it a reasonable expectation of postal employees that their carried items and lockers may only be searched under a judicial warrant? I have concluded that it is not and that the inspection procedures...will constitute a reasonable intrusion on [an employee's] right to be secure from unreasonable search or seizure.⁶⁰

Although Dixon J. does refer to the right of privacy, the reference really adds nothing to his argument. If he had simply asked himself the question "are the rules reasonable", he would undoubtedly have come to exactly the same conclusion. For Dixon J., it would seem that the concept of privacy has no substantive force in determining whether there has been a breach of section 8.

Finally, the Supreme Court had the opportunity to consider the effect of section 8 in the context of personal searches in *R. v. Collins*.⁶¹ The accused was suspected of dealing in drugs, and was under observation in a pub. A police officer seized her by the throat and brought her to the floor. Heroin was found in her hand. In reaching the conclusion that the search was in breach of section 8 the Court did not refer to principles of privacy. Instead, Lamer J. argued that

[a] search will be reasonable if it is authorised by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.⁶²

The Supreme Court did not articulate any general principles as to how a court should assess reasonableness, apart from the fact that where there is a "warrantless" search, the burden is on the Crown to show that it is reasonable. In *Hunter*, the Crown did not establish that the officer had reasonable grounds for suspicion, as required by section 10(1) of the *Narcotic Control Act*, before carrying out the search. The case, therefore, supports the view that a search which is "illegal" under a statute is also "unreasonable" under section 8, but the case does not otherwise help with the determination of general principles.

⁵⁹(1987), 40 D.L.R. (4th) 67, 53 Alta L.R. (2d) 121 (Q.B.) [hereinafter *C.U.P.W.* cited to D.L.R.].

⁶⁰*Ibid.* at 73.

⁶¹[1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 [hereinafter *Collins* cited to S.C.R.].

⁶²*Ibid.* at 278.

IV. Conclusion

In *Hunter v. Southam* the Supreme Court of Canada took a bold step, and decided that section 8 of the *Charter* should receive a broad interpretation. Later case law has suffered from two defects.

First, the reluctance to get away from "privacy" has led to decisions which at best are unconvincing in their reasoning, and at worst incoherent. Attempting to fit all situations into a "privacy" strait-jacket has resulted in messy case law. Second, the failure to develop general principles from the holding in *Hunter v. Southam* has effectively left the scope of "reasonableness" undefined. Courts do not even agree on the effect of an illegal search. There are cases which say that an unlawful search is *ipso facto* unreasonable,⁶³ while others hold that no such automatic link exists.⁶⁴

A step forward would be simply to adopt American jurisprudence on the Fourth Amendment. However, the wording of section 8 is not identical, and Canadian courts have tended to be selective in their reliance on American jurisprudence. As we have seen, Dickson J. (as he then was) made reference to *Katz* in *Hunter v. Southam*. Moreover, cases on specific situations, such as interception of communications, have also relied on this case. Yet there has been no wholesale importation of general principles. For example, in *Re Milton and The Queen*,⁶⁵ a case concerned with the seizure of fishing nets, counsel invited the court to adopt the U.S. Supreme Court's "open fields" doctrine in relation to privacy. According to that doctrine, "an individual may not legitimately demand privacy for activities conducted out of doors and fields, except in the area immediately surrounding the home."⁶⁶ Craig J.A., however, rejected this approach, preferring to base his decision that there was no infringement of section 8 on the following argument: "[s]urely it is not unreasonable that a peace officer, or other person charged with the enforcement of an Act, should be empowered to seize something which, he believes on reasonable grounds, is being used in the commission of an offence."⁶⁷

⁶³*R. v. Noble* (1984), 48 O.R. (2d) 643, 14 D.L.R. (4th) 216, 6 O.A.C. 11, 16 C.C.C. (3d) 146 (C.A.); *R. v. Dombrowski* (1985), 37 Sask. R. 259, 18 C.C.C. (3d) 164, 44 C.R. (3d) 1 (C.A.).

⁶⁴*R. v. Gibson* (1983), 37 C.R. (3d) 175 (Ont. H.C.); *R. v. Cameron* (1984), 16 C.C.C. (3d) 240, 15 C.R.R. 282 (B.C.C.A.).

⁶⁵(1986), 37 D.L.R. (4th) 694, [1987] 2 W.W.R. 622 (*sub nom. Milton v. R. in Right of Canada*), 10 B.C.L.R. (2d) 1 (C.A.) [hereinafter cited to D.L.R.].

⁶⁶*Ibid.* at 700, quoting Powell J.'s interpretation in *Oliver v. United States*, 466 U.S. 170 at 178 (1984), of the rule in *Hester v. United States*, 265 U.S. 57 (1924). See, also, *Air Pollution Variance Bd of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861 (1974); *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Dunn*, 481 U.S. 1024 (1987).

⁶⁷*Supra*, note 65 at 704.

For the reasons outlined above, Canadian courts are probably correct in refusing to follow Fourth Amendment principles. But Canadian courts must, then, develop principles of their own. For the future, a pluralist approach to section 8 would seem desirable. The courts must recognise, as Dickson J. did, that there is no one principle which can be used to determine all questions of "reasonableness". There is, rather, a collection of principles, which differ in the way in which they are used. Further, the weight given to each should vary from case to case. Recognition of this larger, but finite group of principles, will make the law more certain and predictable than the present reliance on "privacy". Such reliance has had the effect of leaving "reasonableness" effectively undefined, except in situations closely analogous to *Hunter v. Southam*.

What then are these additional principles? Some of them have already been hinted at. "Dignity of the person", "confidentiality", and the rule against self-incrimination, should all have a part to play. Is it possible to add to this list? Perhaps property rights should be included. Despite some authorities to the contrary, it is submitted that any trespassory entry should be regarded as unreasonable.

A problem remains, however, in that general principles themselves tend to be based on "reasonableness". The *Hunter v. Southam* privacy principle, for example, is based on a "reasonable expectation" of privacy. The use of "reasonableness" in this way makes predicting the outcome of any case particularly difficult. What constitutes a "reasonable" expectation of privacy? The role for judicial discretion is enormous, as the subsequent case law has shown. A way must be found to prevent all discussion of section 8 from collapsing into what a particular judge or court thinks is "reasonable". It should be possible to develop more specific "guidelines" from general principles, guidelines which are not themselves framed in terms of "reasonableness". Although the case law is not very clear, the following guidelines are tentatively suggested. The first is based on property rights; the next three relate at least in part to privacy; the fifth and sixth stem from the idea of dignity of the person; the seventh incorporates confidentiality and self-incrimination; and the eighth relies on a principle that the law should permit only the minimum necessary scope to non-consensual searches and seizures:

1. Any trespassory entry (*i.e.*, any entry not authorised by statute or common law) is unreasonable.

2. Any forcible entry (*i.e.*, without permission) to inspect or search domestic premises or to search business premises is unreasonable, unless an independent judicial authority has given permission (*e.g.*, by issuing a warrant).

3. Any entry to inspect business premises is unreasonable unless it takes place within normal business hours, and is limited to a visual inspection. Anything further should be justified by warrant.

4. Entry to any premises will be reasonable in an emergency, *i.e.*, where the entrant has reasonable grounds to believe that entry is necessary in order to prevent personal injuries or serious damage to property.⁶⁸

5. Any infringement of a person's bodily integrity is unreasonable.

6. Personal searches are unreasonable, unless the person is suspected on reasonable grounds of having committed a criminal offence.

7. A demand to deliver up or hand over any documents, if justified by statute or common law, is reasonable, unless it would involve a breach of confidence or self-incrimination. Even here, if a serious criminal offence is the subject of investigation, confidential material may be demanded.

8. Any search will only be reasonable to the extent that it is necessary for the purposes for which it is conducted.⁶⁹

Any general approach based solely on broad concepts is bound to be unwieldy and unpredictable. It is suggested that a range of narrower guidelines, such as those outlined, will enable courts to interpret section 8 in a more coherent and intelligible fashion.

⁶⁸The reference to "reasonableness" here, and in 6, below, is to its objective meaning. See, *supra*, at 473-74.

⁶⁹Students of English Law will note here, and in 4 above, the influence of the *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, sections 17 and 19.