

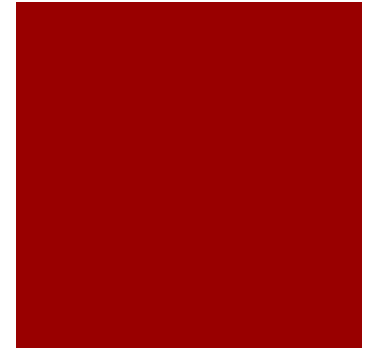


# Current Issues in the Law of Search and Seizure

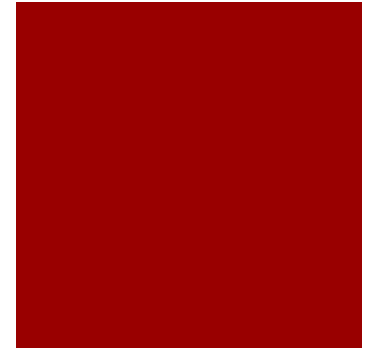
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# Objectives

- Expose you to the foundational law of search and seizure in Canada
- Explain key principles in assessing whether someone enjoys a “reasonable expectation of privacy”
- Note historical trends and key tensions in the law and policy in this area
- See why this is such a great topic for the classroom...
- Segue into Nader Hasan’s presentation about technology

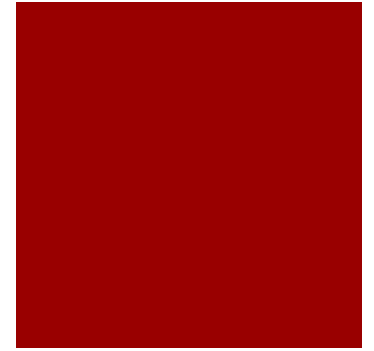


# Section 8 of the *Charter of Rights and Freedoms*



- Everyone has the right to be secure against unreasonable search or seizure.
  - So a protection against “unreasonable search or seizure”... what, then, is a “reasonable search?”

# A “reasonable search”



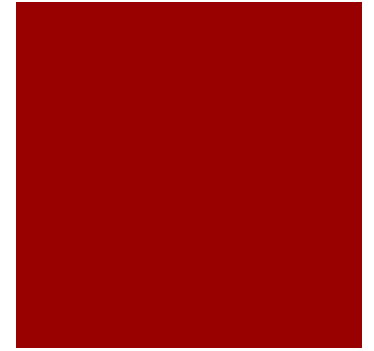
- *Collins* – in **general terms** a reasonable search must be:
  1. Authorized by law
  2. That law must itself be reasonable
  3. The search must be carried out reasonably
  
- In *Hunter v Southam* the Supreme Court explained what this would generally look like in a criminal law setting

# A “reasonable search” in a criminal law setting



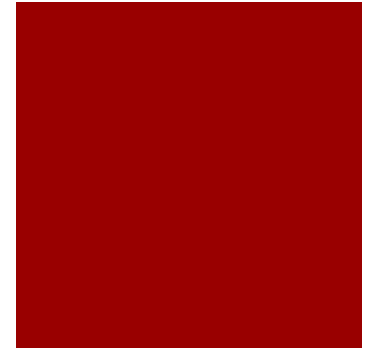
- *Hunter v Southam* – what a “reasonable search” will generally look like:
  1. **Prior authorization (a warrant)**
    - Because privacy, once lost, cannot be restored...
    - Exception of “exigent circumstances”
  2. **By an impartial tribunal**
  3. **Based on there being “reasonable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.”**
  4. **The search is carried out reasonably.**

# Some key principles from *Hunter v Southam*



- Warrantless searches are *presumptively unconstitutional*
- The purpose of section 8 is to **protect reasonable expectations of privacy**
- There is always a balancing between the interest in privacy and the state's need for law enforcement in interpreting the boundaries and demands of section 8

# Lessons learned from the early law...



- There was a split as to whether this was about **territorial** or **informational** privacy.
- The Court was very clear that the expectation of privacy at issue is **vis-à-vis the state** (*R v Wong*)
- Note the time when these cases are being worked out... late 1980s, 1990s.

# So the key... did the accused enjoy a “reasonable expectation of privacy?”



- Since section 8 is protecting a REP, the protections and rules are only “triggered” when there is a reasonable expectation of privacy
- To decide if there is a REP, you must consider “the totality of the circumstances.”



# So the key... did the accused enjoy a “reasonable expectation of privacy?”



- In *Spencer* (2014), the Court explained that this involves assessing:
  1. The **subject matter** of the alleged search
  2. The **nature** of the claimant's privacy interest in the subject matter
    - Territorial? Personal? Informational?
  3. The claimant's **subjective expectation** of privacy in the subject matter
  4. Whether this subjective expectation of privacy was **objectively reasonable** having regard to the totality of the circumstances.

# Deciding on the REP is a **normative** exercise



- “the reasonable expectation of privacy standard is normative rather than simply descriptive.”
  - *Spencer* at para. 18.
- “Privacy analysis is laden with **value judgments** which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy.” (para 14)

# What do we see?

- The protections offered by law turn on deciding the value judgment of whether someone **should** enjoy a privacy interest vis-à-vis the state...
  - This makes it great for the classroom...
- There is a general relaxation of the strict protections from *Hunter v Southam* based on the needs of law enforcement
  - Sniffer dog cases
- The nature of information and technology has radically changed since the cases that shaped this law...
  - Over to Nader....





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# Thank you

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