Book Review of Robert Diab and Chris D.L. Hunt, *Search and Seizure* (Toronto: Irwin Law, 2023)

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Irwin Law's "Essentials" series is deservedly among the most populous on bookshelves in Canadian law schools, libraries, and offices. While the series typically provides concise overviews of broad topics like criminal or constitutional law, it has more recently begun to include editions on particularly complex constitutional rights protected under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[1] Professors Robert Diab and Chris Hunt's recent addition on the protection against unreasonable search and seizure provided in section 8 of the *Charter* falls into the latter category. Their contribution is most welcome given the rapidly evolving nature of jurisprudence interpreting and applying this notoriously complex right. In light of these challenges, Justice Martin captures the contribution made by the book perfectly in her foreword: "[T]his excellent book… provides a precise and digestible presentation of the right to privacy and the jurisprudence interpreting section 8 of the… *Charter*."[2]

The authors open the book in a unique way by posing and answering at length two core questions at the heart of search and seizure law: what does it protect, and why does its protection matter? This is a prudent starting point for a book on section 8 of the *Charter*, given the persistent normative debate surrounding the value of privacy itself and how that debate can significantly impact the seemingly endless scenarios wherein privacy is implicated by state conduct. "While there are no definitive answers to these questions," the authors write, "conceptual clarity on them is important to making sense of how section 8 works and what it aims to do."[3] The

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1 Being schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*].

2 See Robert Diab and Chris Hunt, *Search and Seizure* (Toronto: Irwin Law, 2023) at xiii.

3 *Ibid* at 3.

"theoretical disarray"[4] within which the Supreme Court of Canada ("SCC") engages makes resolving many search and seizure questions difficult, and the admirably concise review provided by the authors of the main philosophical justifications for privacy relied upon by the Court in developing its jurisprudence (and some beyond) suitably primes the student and practitioner alike for the book's subsequent deep dive into the jurisprudence interpreting section 8 of the *Charter*.

Diab and Hunt's contribution to the Essentials series is also refreshing for its critical engagement with jurisprudence. While the extent of this engagement is perhaps beyond what most readers of an Essentials text would expect—parts of the book reading like the penultimate section of a law review article—the state of the section 8 jurisprudence justifies such treatment. For instance, the authors engage at length with the persisting question of whether the police must "refuse to look" (or "refuse to listen") when brought incriminating information by a third party.[5] They also criticize the role of abandonment as a threshold consideration as opposed to a factor to consider when assessing whether a reasonable expectation of privacy exists.[6] They also do not shy away from calling for the overturn of the SCC's permissive use of strip searches given their limited efficacy and discriminate application.[7] The authors further develop existing arguments for a restrictive role for the "biographical core" concept in the reasonable expectation of privacy analysis.[8] Practical commentary is also forthcoming on the appropriate response to the current state practice of using production orders to retrieve subscriber information from internet service provider,[9] how to reconcile the standards of proof required before searches

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4 See *R v Spencer*, 2014 SCC 43 at para 35 citing Chris D.L. Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011) 37 Queen's Law Journal 167 at 176-77.

5 See Diab and Hunt, *Search and Seizure*, *supra* note 2 at 65-76.

6 *Ibid* at 123-27. This critique is particularly interesting in light of the authors' argument that a more nuanced understanding of abandonment could provide greater protection against DNA seizures by the state. Such criticism could also have implications for an area of law yet to be developed: familial DNA searching.

7 *Ibid* at 267-68, building upon Kent Roach's recent work. See Kent Roach, *Canadian Policing: Why and How it Must Change* (Toronto: Irwin Law, 2022).

8 *Ibid* at 116-21.

9 *Ibid* at 193-95. The authors, however, might consider my competing proposal to allow for such information to be issued on administrative demand in the context of child sexual abuse material investigations. See Colton Fehr, "A Proposal for Police Acquisition of ISP Subscriber Information on Administrative Demand in Child Pornography Investigations" (2019) 24 Canadian Criminal Law Review 235.

pursuant to investigative detention and "safety searches" may be conducted,[10] and clarifying the standard for conducting "no knock" or "hard" entries when carrying out a warrant.[11]

As with any first edition of a textbook, there are a handful of revisions and additions that are worth considering. I raise these points only because I anticipate a desire in the legal community for *Search and Seizure* to be updated at regular intervals to cover the varied jurisprudential developments inevitable to the field. In that spirit, the authors may wish to expand the book by providing even more critical engagement with issues and/or literature percolating in the lower courts, such as familial DNA searches, searching short-term rental properties,[12] and the plethora of issues posed by artificial intelligence. It may also be useful to merge Chapter 7 – entitled "When is a Search Law Reasonable" – into other chapters as it struck me as somewhat redundant in its treatment of jurisprudence. By so doing, the authors would free up space to provide a more expanded review of lower court decisions detailing particularly popular and persisting issues (e.g., application of the novel requirements for searching cell phones incident to arrest, detailing the restrictions that some courts have placed on computer searches,[13] and so on).[14]

These suggestions are nevertheless not meant to take away from the fact that Diab and Hunt have crafted an indispensable resource for understanding the law of search and seizure. I accordingly highly recommend this book to law students, lawyers, legal scholars, and judges

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10 *Ibid* at 239-45.

11 *Ibid* at 315-22.

12 While the authors at 141-42 describe the leading decision in *R v Chow*, 2022 ONCA 555, the case is given minimal treatment. I just so happen to know that one of the authors has given this issue considerable thought as we co-authored an article on this very topic! See Colton Fehr and Robert Diab, "Searching Short-Term Rental Units: When Will Police Require a Warrant?" forthcoming in the Criminal Law Quarterly.

13 This jurisprudence follows the SCC's decision to leave open the possibility of search protocols for computer searches as the development and understanding of computers progresses. See *R v Vu*, 2013 SCC 60 at para 62 ("I would not foreclose the possibility that our developing understanding of computer searches and changes in technology may make it appropriate to impose search protocols in a broader range of cases in the future. Without expressing any firm opinion on these points, it is conceivable that proceeding in this way may be appropriate in some circumstances"). Notable commentary on the issue followed the *Vu* case. See, e.g., Gerald Chan, "Life After *Vu*: Manner of Computer Searches and Search Protocols" (2014) 67 Supreme Court Law Review (2d) 433; Nader Hassan, "A Step Forward or Just a Sidestep? Year Five of the Supreme Court of Canada in the Digital Age" (2015) 71 Supreme Court Law Review (2d) 439.

14 I note that the authors acknowledge in the preface that the focus of the book is on the SCC's jurisprudence.

who engage with the law of criminal procedure, as well as anyone more broadly interested in the concept of privacy and the way it limits state action.