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<b>SEARCH AND SEIZURE LAW IN CANADA</b> Scott C. Hutchison and Michael P. Bury Release No. 6, June 2022
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### Publisher's Special Release Note 2021

The pages in this work were reissued in July 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the July 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This publication provides comprehensive coverage of search and seizure law, an essential element of both the criminal process and regulatory regimes. The effect of the Charter protection against unreasonable search and seizure is examined. Individual chapters examine various types of searches including electronic surveillance, administrative and regulatory searches, motor vehicle searches, firearms and weapon searches and mail searches. Detailed coverage is provided of the execution of search warrants, solicitor-client privilege, the disposition of seized property and Charter remedies including the exclusion of evidence.

This release features updates to the case law and commentary in the following chapters: 1 (Defining “Search”), 2 (Defining “Seizure”), 3 (Search Incident to Arrest), 4 (Electronic Surveillance), 5 (Administrative and Regulatory Searches), 6 (Motor Vehicle Searches), 8 (Firearms and Weapons), 11 (Search, Seizure and Other Constitutional Rights), 16 (Criminal Search Warrants), and 19 (Constitutional Remedies), as well as the Words and Phrases section.

## CASE HIGHLIGHTS

- **Electronic Surveillance** —Upon re-entering Canada, the accused were referred to secondary inspection by the border services agency, where their cell phone and laptop computer were searched pursuant to para. 99(1)(a) of the *Customs Act*. Photos and videos of child pornography was found on these personal electronic devices and the accused were arrested and later convicted for possession of same. The accused’s appeals of conviction were dismissed, though a declaration of invalidity was issued. The appellate court found para. 99(1)(a) to be unconstitutional to the extent that it imposed no limits on searches of electronic devices. In the absence of any threshold requirement, this provision violated s. 8 of the Charter and the significant intrusion on one’s personal privacy could not be justified under s. 1. Further, the Court of Appeal found the accused to have been detained from the moment the line between routine screening and the more intrusive searches and interrogation, and held the accused’s rights under ss. 7 and 10 to have been violated with denial of their right to remain silent and of their right to counsel, as well as their freedom from self-incrimination. The Court however held this instance not to be one appropriate for exclusion of the evidence pursuant to s. 24(2) of the Charter, after having found the border services officers to have acted reasonably and with the good faith belief that their actions were authorized by law; and after having found society’s confidence in the justice system to be better served by admission of the evidence: *R. v. Canfield*, 2020 ABCA 383, 2020 CarswellAlta 2004, 15 Alta. L.R. (7th) 1, 395 C.C.C. (3d) 483, [2021] 3 W.W.R. 410, 477 C.R.R. (2d) 119 (Alta. C.A.), leave to appeal refused *Sheldon Wells Canfield, et al. v. Her Majesty the Queen, et al.*, 2021 CarswellAlta 530, 2021 CarswellAlta 531 (S.C.C.)
- **Firearms and Weapons** —The accused was convicted of possession of heroin for the purpose of trafficking and possession of a loaded restricted firearm, after execution of a search warrant revealed the drugs and a handgun under couch cushions in the accused’s residence, as well as ammunition elsewhere in the residence. At trial, the accused applied to

have the evidence excluded, claiming that the search warrant should not have been issued. The court found the Information to Obtain (ITO) to have been based primarily on a KGB statement made by a witness who had stumbled upon the firearm while she was in the residence. In her statement, she described her personal observations and her conversations with the accused about the weapon. At trial, the judge found any information not disclosed to have been immaterial and found the ITO not to have been misleading. The accused's appeal was dismissed. The Court of Appeal found that additional information about other possible witnesses, the exclusion of hearsay, or excision of other information from the ITO would not have affected whether the search warrant could have been issued. Further, the appellate court reasoned that, even if the affiant had entertained more skepticism about the witness's reliability, the KGB statement, together with other information, would have crossed the threshold to justify issuance of the search warrant: *R. v. Mero*, 2020 BCCA 331, 2020 CarswellBC 3028 (B.C. C.A.)

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