Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

police powers— search and seizure in criminal law enforcement

Working Paper 30

Canada

POLICE POWERS — SEARCH AND SEIZURE IN CRIMINAL LAW ENFORCEMENT

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1983

Notice

This Working Paper represents an attempt to consolidate, rationalize and reform police powers of search and seizure in criminal law enforcement. The Commission seeks responses from all members of the judiciary, legal profession, legislative bodies and the public at large who would care to comment upon it. The Commission will be formulating its Report to Parliament at a later date, after having taken into account the public response to this Working Paper.

The Commission would be grateful, therefore, to receive comments addressed in writing to:

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For their assistance in evaluating the legalities of search warrant issuance, the Commission is indebted to the members of the panel assembled by Mr. Justice Ducros: Mr. Justice Edward Bayda of the Court of Appeal of Saskatchewan; Associate Chief Justice James Hugessen of the Superior Court of Québec; Mr. Justice Benjamin Greenberg and Mr. Justice Jean-Guy Boilard of the Superior Court of Québec; Mr. Justice John O'Driscoll of the Supreme Court of Ontario; Mr. Justice Peter Richard of the Supreme Court of Nova Scotia; Mr. Justice Kenneth Fawcus, formerly of the Supreme Court of British Columbia; and Mr. Justice Benjamin Hewak of the Manitoba Court of Queen's Bench.

Preface

When the Commission first began its examination of police powers of search and seizure in 1978, the view was not infrequently encountered that the law of search and seizure could safely be left as it was.

To be sure, it was acknowledged that police practices might not always conform strictly to legal requirements, and that, occasionally at least, judicial officers responsible for the issuance of search warrants might exercise their discretion rather less judicially than their office required. For the most part, however, it was urged upon us that the law of search and seizure stood in no need of close scrutiny, much less fundamental reform.

As evidence for that proposition, we were invited to observe the relative dearth of case-law, both civil and criminal, generated by allegations of illegal search and seizure. On this evidence, of course, the problems of search and seizure were episodic rather than systematic: they were problems attributable to the powers' exercise in particular circumstances, rather than to the constitution of the powers themselves. And, of course, if this evidence were accepted as proof, then clearly there were more promising subjects for law reform than search and seizure.

For our part, we were inclined to suspect that the problems of search and seizure went beyond occasional non-compliance with an otherwise satisfactory legal regime. Our preliminary research had disclosed a confusing array of criminal search and seizure powers. When one added to that array the various search and seizure powers available for the investigation of other federal offences, to say nothing of the powers authorized by provincial legislation, the cumulative effect was truly bewildering. Surely, it seemed, there must be substantial uncertainty in the sheer force of numbers alone. Although the rule of law's imperative of certainty might be respected in each particular instance, an indiscriminate proliferation of search

and seizure powers would render the aggregate of such powers, for law enforcement personnel and public alike, virtually unascertainable and hence uncertain.

And, of course, to the uncertainty of numbers must be added the uncertainties of varying justifications and procedures. Even within the *Criminal Code* itself, search powers varied materially, with the legality of their exercise in particular cases contingent upon differing justifications and differing formal, substantive and probative criteria. In the face of this proliferation of highly variegated powers, there seemed every reason to attempt, at a minimum, a thorough consolidation and rationalization of the criminal law's powers of search and seizure.

Instead of proceeding directly to this task, however, we were anxious to ascertain whether the powers and discretions associated with the law of search and seizure represented any kind of problem in practice. Conceivably, the muddle that we perceived was, if not perfectly intelligible, at least manageable for experienced police and judicial officers.

The methods we used for examining search and seizure practices need not be described here. Suffice it to say that we closely examined the use of search warrants, writs of assistance and powers of search without warrant. Suffice it to say also that we found ample confirmation of our initial apprehension that legal constraints upon police powers of search and seizure were not being closely observed; and that a significant part of this disparity between law and practice was attributable to the complexity and incoherence of the legal regime by which the powers were governed.

Manifestly, not all the non-compliance we observed could be attributed to so excusable a factor. For the problem of a complex and incoherent legal regime, however, there was an obvious solution: consolidate and rationalize the various search and seizure powers found within the common law, the *Criminal Code*, and within such crime-related statutes as the *Narcotic Control Act* and the *Food and Drugs Act*. Ideally, then, all crime-related search and seizure would be governed by a single and comprehensive set of standards and procedures.

But what standards and what procedures? Briefly, we fixed upon a standard of reasonableness that put a premium upon judiciality and particularity. And, of course, from that standard can be derived the procedures. In selecting this standard of reasonableness as the benchmark for specifying the justifications and procedures for the

exercise of police powers of search and seizure, we have attended closely to the *Canadian Charter of Rights and Freedoms* and its enjoinder against unreasonable search or seizure. Indeed, it can fairly be asserted that our recommendations represent merely an elaboration of the standard of reasonableness that informs the right, prescribed in section 8 of the *Charter*, to be secure against unreasonable search or seizure.

In the result, our recommendations for reform were guided by three central precepts. First, the disparate array of search and seizure powers presently providing for criminal and crime-related investigations should be replaced by a single, comprehensive regime. Second, if search and seizure powers were meaningfully to comply with the *Canadian Charter of Rights and Freedoms*, the grounds for their exercise should, as a rule, be determined to be reasonable by a judicial officer, adjudicating before the event and upon particularly sworn information. Third, the exceptions to the rule that search shall be by warrant should be so circumscribed as to permit resort to powers of search without warrant only in circumstances of recognized exigency or informed consent.

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Part One: The Present Situation and the Need for Reform

CHAPTER ONE

Introduction

1. The text of this Working Paper is divided into two parts. Part One is devoted to an analysis of present crime-related search and seizure laws, their history, and how they are put into practice. In Part Two, specific proposals are developed for reorganizing and changing certain aspects of these laws.

2. These matters are related, of course, particularly when one focuses on specific components of search and seizure procedure. For example, in order to make intelligent proposals respecting personal search, it is necessary to consider the present law, its historical background and the way it actually works. To immediately focus upon such specific components, however, is to risk missing the forest for the trees. One must first look at the larger picture: the problems and characteristics of the existing body of search and seizure law as a whole.

3. This is a complicated task; search and seizure laws are not easily organized into a manageable body. Indeed, it is difficult to think of another area in criminal procedure so characterized by bewildering distinctions and idiosyncrasies. Consider, for example, the array of search warrant provisions. In addition to section 443, which authorizes searches for items connected to offences generally, the *Criminal Code* contains specially focused provisions covering firearms, obscene publications, crime comics, things and persons in various disreputable houses, hate propaganda and precious metals.[1] Outside the *Criminal Code* itself, yet within areas associated with criminal law enforcement, one finds virtually identical regimes under the *Narcotic Control Act* and the *Food and Drugs Act*.[2] Aside from these crime-related warrants, there are nine other search warrants established under federal legislation.[3]

4. The complexity of the law does not stop at warrant provisions; the warrant is not even the major device for authorizing searches and seizures in contemporary legislation. It does predominate in the *Criminal Code* itself, although warrantless powers do exist with respect to weapons, illegally held timber, cocks in a cockpit, and counterfeit money. The diminished role of the warrant becomes evident, however, in other federal statutes. Altogether, it has been ascertained that eighty-two federal enactments, including again the *Narcotic Control Act* and the *Food and Drugs Act*,[4] confer upon designated officers powers to search without warrant. The search and seizure regimes under narcotics and drugs legislation are further complicated by the maintenance of special powers associated with the writ of assistance. In addition to these statutory powers, criminal law enforcement relies heavily on common law provisions for warrantless search incidental to arrest, and for searches permitted by "consent".

5. This assortment of powers is the product of a growth that has occurred in piecemeal fashion over the past 300 years. The tendency of legislators has been to enact a search power and append it to a particularized enactment when and where the need for one has been evident. Consequently, search and seizure powers have been regarded individually, as incidents of larger enactments, rather than collectively, as instances of a category of power. In this sense, the procedural rules governing search have followed the tradition of English criminal law; they have not developed so much as accumulated.

6. This pattern of growth has not been interrupted in Canada by any major attempt to analyse the laws of search and seizure as a whole. Perhaps the closest undertaking to such an endeavour occurred prior to the introduction of the 1892 *Criminal Code*. Yet it is arguable that this effort marked more of a consolidation of existing provisions than a critical rethinking of them. At any rate, it is fair to say that however unkempt the arrangement of rules may have been ninety years ago, it is far more so now. It is thus time to examine comprehensively the present array of crime-related search and seizure powers, and it is primarily to this task that Part One of this Working Paper is directed.

7. Part One relies upon three modes of analysis to depict the present situation: legal, historical and empirical. The legal perspective ("What is the law?") and the historical perspective ("How has it evolved to its present state?") are presented in Chapter Two. Simply on the basis of this presentation, it might be

possible to make certain assessments of the coherence and viability of the rules, and the trends that have characterized their evolution. The picture is not complete, however, until the empirical perspective ("How is the law put into practice?") is considered; indeed, without this perspective, conclusions as to coherence and viability are of limited use.

8. Before depicting the present situation, however, it is useful to understand the parameters of the study. What are "searches", "seizures", and "warrants"? The answers to these questions may appear obvious, but the fact is that the words are often used improperly. Writs of assistance, for example, have been frequently described as "warrants", whereas they are really nothing of the kind. Aside from serving the interests of precision, a definition of essential concepts affords basic criteria according to which existing and proposed laws may be measured. To know what these concepts signify is to take the first step toward evaluating the laws that deal with them.

I. Searches and Seizures

9. Neither "search" nor "seizure" is defined in our present *Criminal Code*. This may seem a curious omission, but an explanation is not hard to find. Quite simply, the *Criminal Code* and similar statutes regard these exercises not as *acts* but as *powers* — powers to engage in a variety of courses of conduct. These courses of conduct are set out not in legal definitions but rather in two complementary types of provisions: general rules regarding police conduct in the performance of duties, and specific rules which both authorize and regulate particular search and seizure activities. In performing a search for, and seizure of, a firearm, for example, a peace officer is limited both by section 25 of the *Criminal Code*, which allows for the reasonable use of force in the enforcement of the law, and by the special provisions of sections 99, 100 and 101, which describe when and how such searches may be made, what may be seized, and how seized items should be disposed of after seizure.

10. This approach may suffice to set out what may be done in pursuit of a search and seizure power; however, it does not serve to

distinguish or identify that power. One must, rather, attempt to locate search and seizure powers in a larger context, asking, "What is their significance? What do they do and why are they necessary?" In this Working Paper, we accept the following definition. **Search and seizure powers are powers to perform intrusions for the purpose of obtaining things, funds or pre-existing information.**

A. Searches and Seizures as Intrusions

11. Searches and seizures, if one takes wide and commonplace definitions of the terms, are actions that virtually everyone performs in everyday life: looking for things, acquiring control over them, and transporting them from one place to another. It is only when these actions involve an intrusion on the recognized rights of another individual, however, that the law ordinarily takes notice. As a general rule, it responds by condemning the intrusion as a crime or tort, and levying the appropriate sanctions.

12. At this primary stage of legal response to intrusion, there is no distinction between actions performed by police officers and those performed by other individuals. The distinction arises, rather, by way of specially created exceptions to the general prohibitory standards. As one commentator has pointed out:

> Now neither a police officer nor anybody else may, other things being equal, lawfully assault or imprison another person, enter his premises or seize his goods, because such conduct constitutes trespass to the person, to land and to goods. Indeed in the first case a criminal offence also is committed. For this reason the law has developed rules justifying arrest, entry and seizure in certain cases and these powers form exceptions to the more general laws of crime and tort.[5]

It is in this sense, then, that search and seizure laws confer powers. More particularly, they confer *exceptional* powers, powers to do what an individual is, in ordinary circumstances, forbidden to do.

13. The exact parameters of these powers are therefore of critical importance to the police. If a police officer acts outside them, even in the pursuit of legitimate objectives, he may be breaking the law,[6] and since an officer acting outside these powers has exceeded

his duties, the law will not afford him any special protection against those who obstruct his actions. In fact, the occupant of private premises who physically restrains an officer from searching them without valid authority is on the same legal footing as one obstructing any trespasser.[7]

14. The ambit of these exceptional powers is of equally grave concern to society as a whole. For the interests with which these powers conflict are among the most critical accorded to individuals in a liberal democracy: interests involving the inviolability and dignity of the person, the concept of privacy, the security of possessions and self-expression. Article 12 of the *Universal Declaration of Human Rights*, for example, prohibits "arbitrary interference" with an individual's "privacy, family, home or correspondence".[8] A specific application of this concern to those interferences entailed by searches and seizures may be perceived in section 8 of the *Canadian Charter of Rights and Freedoms*:

> Everyone has the right to be secure against unreasonable search and seizure.[9]

Because of the importance accorded to the individual interests at stake, it is critical that search and seizure laws be limited to the service of competing interests that truly justify the infringements entailed.

15. The threshold question in the elaboration of any scheme of intrusive powers of search and seizure is therefore: What competing interests should be allowed to justify intrusions upon such significant rights? Once this question is answered, secondary questions arise. What procedures can be instituted to authorize and monitor the intrusions? What constraints should be imposed on the persons who perform them?

16. Such questions, of course, may be posed in a context as wide as the spectrum of government intervention in human activity. In Canada today, intrusive searches and seizures are performed daily in the enforcement of schemes of economic regulation, health and safety legislation, and administrative procedures such as income tax rules, which all individuals are required to follow to one degree or another. A thorough analysis of the range of these intrusions is an important and considerable task.[10] The context of this paper, however, is limited. The intrusions it will discuss will be those pertaining to one particular role and function of the State, perhaps one of its most critical, and certainly one of its most historical: the enforcement of criminal law.

B. Search, Seizure and Arrest

17. Exercises of powers of search and seizure, along with those associated with arrest, constitute perhaps the most visible intrusions carried out in the enforcement of criminal law. Unlike other infringements on individual freedom, such as committal for trial or sentencing, these powers are likely to be exercised in the ordinary, everyday world: on streets, in homes, in workplaces and in vehicles. Occurring as they frequently do at the outset of the sequence of intrusions that run through the course of criminal procedure, a search, seizure, or arrest may mark the first significant contact between a suspect and a law enforcement officer. Moreover, the exercise of one power may well be a prelude to the exercise of another: a personal search may occur as an incident to arrest; an arrest may follow a seizure of incriminating evidence.

18. Because of the common characteristics and the frequent proximity of these exercises of police powers, the need arises to distinguish between them. The distinction accepted in this Working Paper is founded on the purpose of the two exercises. While arrest is a power directed towards asserting control over a person, search and seizure are directed primarily towards obtaining things, funds or information.

19. It may be thought that such a distinction is beside the point. After all, don't arrests and searches *look* different? Surprisingly enough, not necessarily; indeed, at the initial stage of intrusion, a search of premises for persons whom the police wish to arrest may be virtually indistinguishable in appearance from a search of premises for items that the police wish to seize. The premises are entered, perhaps by force, and the peace officers involved move through them trying to locate the person or thing that is the object of the investigation.[11]

20. Problems of distinction also arise where the intrusion takes place not on premises, but on the body of the person. In the *Scott* case, for example, the Federal Court of Appeal was presented with the following set of facts:

> The respondent was seated at a table with several others and had raised his glass and taken a gulp of beer when the appellant, Siddle, a sergeant of the R.C.M.P., who, with the appellant, Blaney, a constable of the same force, had arrived on the scene a moment or two earlier, seized the respondent by the throat, using his left hand for the purpose, and with his right hand seized the respondent's hair and pulled his head back so that his face was pointing generally towards the ceiling.[12]

What happened here? According to the trial judge, an arrest commenced with the application of the throat hold; he proceeded to find that this arrest was made without justification. The judges in the Court of Appeal, on the other hand, looked solely to the search and seizure powers under the *Narcotic Control Act* to justify the intrusion, Thurlow J. commenting that he was "unable to see on the evidence how what was done is to be regarded as an arrest".[13]

21. The point that emerges from such cases is that it is fruitless and misleading to attempt to characterize police actions as "arrests", "searches" or "seizures" on the basis of phenomenological characteristics. What is distinguishable on this basis is simply the nature of the intrusion: an assault upon the person, a trespass upon premises. The distinction between the various classifications of police powers may be properly appreciated only when it is recalled that the function of these powers is to except the police from the general rules relating to intrusions. The existence of these exceptions, in turn, depends on the presentation of a justification for them. The essential distinctions between exercises of powers of search, seizure and arrest lie not in the form of intrusion made, but rather in the justification for intrusion offered. In other words, in response to the question, "What interest or purpose is served by this particular intrusion?", the powers of search, seizure, and arrest present distinct answers.

22. The American Law Institute's definition of search in its *Model Code of Pre-Arraignment Procedure* runs in part:

> Any intrusion, other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance....[14]

This suggests that search is really a preliminary exercise, undertaken for the purpose of achieving the ultimate objective, a seizure; or, to be exact, the purpose of the search is to find something. Assuming that it is found, the purpose of the seizure then becomes relevant.

23. Seizure is defined in the *ALI Code* as follows:

> The taking of any person or thing or the obtaining of information by an officer pursuant to a search or under other color of authority....[15]

To refer back to the sequence that begins with search, seizure represents the acquisition of control over what has been found. In this respect, seizure is analogous to an arrest. As one commentator has noted,

> Police "seize" human beings, as well as animate and inanimate objects.... The arrest of a person and the seizure of a thing are parallel activities which may or may not be incident to a search.[16]

The distinction between the purposes of seizure and arrest thus lies in the object of control: an inanimate object (which in our view encompasses things, funds and information)[17] in the former case, a person in the latter.

24. The exception to this general breakdown occurs when control over individual *A* is asserted in order to rescue him from confinement by individual *B*. While perhaps superficially resembling an arrest, such an exercise is distinct from an arrest in that its purpose is not the detention of individual *A*. Rather, the coercive element of the exercise is directed towards individual *B*, just as it would be if he were the custodian not of a person but of a thing sought. Accordingly, such rescues may be seen to have more in common with seizures than arrests. While this view prompts us to consider powers of rescue in the course of this Working Paper, we maintain that the interests of clarity demand that they be kept separate from powers of search and seizure.

25. Two further matters deserve clarification. First, in speaking of the object of control, it is important to be aware of the distinction between the purpose for which the power is exercised and the steps that may be necessary to achieve that purpose. For example, in order to conduct a search of a person it is necessary to assert control over that person for the duration of the search. This assertion of control might well satisfy the traditional test for arrest set out in the *Whitfield* case:[18] touching with a view to detention. Because of the instrumental character of such intrusions, however, they are not uncommonly perceived as a deprivation upon liberty that somehow falls short of qualifying as an arrest.

26. This problem has often been resolved in American jurisdictions by classifying the detention necessary to effect the search as a "stop". This term is also used by police forces in Canada to cover such activities as checks of automobile drivers for licences and insurance documents. A further semantic refinement — "freezing" the occupants of premises being searched for narcotics — was introduced into the vocabulary of search and seizure by *Levitz* v. *Ryan*.[19] It remains to be seen, however, whether in the light of the *Charter* these "stops" and "freezes" will qualify as arrests or detentions or be given a distinct juridical status. More generally, it remains to be seen whether, and to what degree, Canadian courts will modify the notion that the duties conferred upon peace officers imply

the powers necessary and incidental to their performance. For present purposes, however, we have not found it necessary to resolve these issues. Instead, we have attempted, wherever possible, to make explicit which instrumental intrusions are to be attached to particular powers of search and seizure.

27. Second, in distinguishing the purpose of a search from that of a seizure, it is not intended to suggest that separate justifications must always be offered at different stages of intrusion. Rather, the two stages often form a continuum; as was mentioned, the purpose of the search resides in the seizure that is expected will follow it. However, the *Colet* case,[20] recently decided by the Supreme Court of Canada, demonstrates judicial reluctance to infer the existence of a search power from the presence of a seizure power. Moreover, there are some circumstances in which an officer is entitled to seize objects of an incriminating nature, which he may not have anticipated finding at the outset of a search.[21] It is prudent, therefore, to be specific in discussing or formulating these powers. For present purposes, **we view search as the power to perform intrusions in order to find an object. We view seizure as the power to acquire that object.**

C. Search, Seizure and Surveillance

28. If the powers of search and seizure conferred upon police officers are justified generally by the State's interest in controlling or obtaining certain things or information, they are not the only practices exercised in the pursuit of such an interest. Rather, the pursuit of information, particularly in the modern world, may be undertaken by means of the distinct practice of surveillance.

29. The distinction between surveillance and search and seizure is not an altogether obvious one. Indeed, little analysis has been done in the way of articulating a definitional distinction. The distinction adopted in this paper is as follows. **While the purpose of search and seizure is to obtain or control things or information that pre-exist the exercise of the power, the purpose of surveillance is to obtain information that becomes perceivable in the course of its exercise.** This distinction may be understood through a discussion of both juridical and technological factors.

30. While it is now possible to think of search and seizure as information-gathering powers, originally they were regarded exclusively as means of obtaining things. The common law search warrant, as will be detailed later, was brought into existence solely to recover stolen goods from their unlawful possessor. While the ambit of items sought was gradually expanded by statute, it was not until comparatively recently that courts acknowledged a basis of seizure wider than a superior proprietary claim to the items in question. In *Entick* v. *Carrington*, a leading English case from 1765, the common law position was forthrightly stated: the State was not entitled to seize items for purely evidentiary reasons.[22] While this position was overturned in Canada by the 1892 codification, it remained vital both in the United States and in Great Britain for a good deal longer.[23]

31. The acquisition of things involves a distinct progression of events: entry is made into the area to be searched, the presence of the thing sought is ascertained, and the things found are appropriated. The possibility of prolonging the intrusion in order to observe subsequent occurrences has not been recognized as a valid aspect of search powers. Even after evidence gathering became acknowledged as a legitimate objective, courts interpreting search and seizure provisions were interested not in information as such, but rather in information that came from things. This position was maintained as recently as the 1947 decision in the *Bell Telephone* case, in which a warrant to search for and observe certain telephone apparatus was quashed. "[T]he fundamental thing", stated McRuer J., "is that the purpose of the search warrant is to secure things that will in themselves be relevant to a case to be proved, not to secure an opportunity of making observations in respect of the use of things, and thereby obtain evidence."[24]

32. Just as the "thing" to be seized was decidedly material in nature when search powers were conceived, so too the method of intrusion was envisaged as primarily physical. This physical orientation, which has remained basically unchanged to the present day, is reflected in the legal issues attending execution of searches and seizures: the question of whether entry into premises must be announced, the standards regarding use of force, and the procedures regarding detention of goods seized. In essence, the intrusion signified by making a search and seizure is one that calls attention to itself. Certainly this is the universal case in searches of the person, and while it is not unknown for premises to be searched in the absence of an occupant, empirical evidence suggests that such

incidents are the exception.[25] Even in such exceptional cases, the intrusion is likely to manifest itself in the form of traces of the search, the absence of things seized, or notices left for the occupant's information.

33. The visibility and physicality of the exercise correspond to the visibility and physicality of the interests protected by the precepts of Canadian criminal and tort law. These interests reflect an age when the greatest threats to individual security were perceived to be physical. It was in response to the tangible threats of what they identified as "the state of nature" that seventeenth- and eighteenth-century liberal theorists such as Hobbes and Locke developed a concept of the political state that would guarantee such physical rights as life, liberty and property.[26] Search and seizure laws in a sense responded to the physical aspect of this protection by authorizing certain physical exercises as exceptions to it.

34. The neatness of this interface between intrusion and protection, however, has been disrupted by the development of an information-gathering technology that is invisible by nature. In 1967, Alan Westin wrote:

> A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television and data line.[27]

The legal response to this development has been both extensive and diffuse. Primarily, the discussion has focused upon the need to develop new concepts of privacy to meet the technological threat to individuality.[28] In addition, however, the question has been raised as to how the exercises of technological information gathering fit together with the concepts of search and seizure.

35. In the *Berger* case, for example, the United States Supreme Court held that the use of electronic devices to capture conversations qualified as a "search" within the meaning of the Fourth Amendment to the American Constitution.[29] The motive of the Court, to impose constitutional safeguards on the use of a technology of which the framers of the American Constitution had no evident conception, was arguably laudable. Yet it is important to recognize that while technology has facilitated surveillance, it did not introduce surveillance; surveillance was possible long before electronic transmitters came into existence. Indeed, the primitive antecedent of

wiretapping, eavesdropping, was condemned by Blackstone as a nuisance at common law.[30] Although this activity involved, and indeed still involves, different logistics from that of electronic surveillance, the progression of steps in the exercise is identical: the entry is made, and then the observer waits for the occurrence that will provide the information being sought. In other words, while a search is designed to capture an object present at the point in time at which the entry is made, a surveillance is set up to capture or observe occurrences that take place after the entry is made.

36. Surveillance, then, is distinguished from search and seizure not by its technology, but by its chronology. Interestingly, the *ALI Code*, while adhering to the position that surveillance constitutes a category of search, recognizes this distinction:

> Surveillance searches do not seek things or information *in esse* at the time the search is commenced, but rather to observe an individual's continuing conduct and utterances in the expectation that the scrutiny will yield evidence or other information.[31]

From this distinction flow procedural demands. For example, the effectiveness of surveillance, unlike that of search, is likely to depend upon whether it is kept secret from the individuals concerned for a considerable period after entry.[32]

37. It should be noted that since this distinction is not founded on technological factors, it admits the possibility of sophisticated equipment being employed in a search and seizure. An obvious example would be the use of a camera to record the contents of private premises. The use of sophisticated technology, of course, renders it increasingly possible to carry out searches and seizures in less overt and even surreptitious fashion, a development that undermines certain protections inherent in the visibility of the traditional intrusions. The importance of these protections will be discussed later in this paper.[33]

II. Individual Interests Affected by Intrusion

38. Search and seizure powers conflict with four basic types of individual interests: security of the person, enjoyment of property

and related rights, expressions and communication, and informational privacy. In order to put search and seizure powers in perspective, it is useful to examine briefly the protections accorded these interests under law.

A. The Person

39. Security of the person is recognized as a distinct right in both the *Canadian Charter of Rights and Freedoms*[34] and the *Canadian Bill of Rights*.[35] Further recognition of the inviolability of the body has been codified in the civil jurisdiction of Québec.[36] The common law has also developed its special rules to protect the body. Primarily, this protection has been evident in the fields of tort and criminal law, in the definition of the causes of action and offences relating to intrusion upon the body: assault, battery and false imprisonment in the former case, and the various assaults causing bodily harm and the sexual offences in the latter. The variety of these legal protections and the seriousness of the consequences stemming from their violation indicate that security of the person is, under present Canadian law, guarded even more heavily than such associated interests as liberty and enjoyment of property.

40. The distinct protection that the law accords to the person has also been apparent in the specific case-law regarding the purported exercise of search powers. The *Ella Paint* case, in which an officer armed with a warrant to search premises was found guilty of assault for conducting a personal search of an occupant, is the leading Canadian case on this point. Harris J. of the Nova Scotia Supreme Court stated:

> In prosecuting his search the statute enables the constable to break doors, locks, closets, cupboards, etc. But nothing is said about searching the "persons" of the occupants. If it were contemplated to authorize so unusual a proceeding, one would expect the legislature to say so definitely and precisely; for, to search the person of the occupant is pushing farther the invasion of one's privacy than breaking open a door or closet.[37]

The common law, as disclosed in this passage, goes no further than requiring definite and precise authority for personal search; where that authority is conferred, the courts have acceded to it.

41. In fact, the power to search persons is widely, if inconsistently, spread among the relevant provisions in Canadian law. Among the crime-related warrant provisions examined in this paper, powers to search persons could be construed to exist under only four sections: sections 101[38] and 353 of the *Criminal Code*, section 10 of the *Narcotic Control Act*, and section 37 of the *Food and Drugs Act*. The restricted availability of powers of personal search in this context, however, is due less to a heightened respect for personal integrity on the part of Anglo-Canadian lawmakers than to the historical association of the warrant with searches of private dwellings. Indeed, the development over the last three centuries of the warrant, with its safeguards against unjustified entry into private domains, has been accompanied by the accrual of relatively discretionary warrantless powers to search persons.[39] The more traditional of these powers — searches of persons incidental to arrest or for dangerous weapons — have been carried from early English law into modern Canadian law in unbroken lines of descent.[40] To this core have been added new bases for intrusion, such as those currently afforded by narcotics and drugs legislation. When, along with these powers, the unfettered discretion to request a person's consent to a personal search is taken into account, it is evident that Canadian law gives peace officers wide latitude in invoking exceptions to the prohibitions against violations of the person.

42. But how far may a peace officer go in invoking these exceptions? Can all parts of the body be searched in order to find what the peace officer is looking for? In at least one instance, a Canadian court has given a negative answer to this question. In *Laporte* v. *Laganière J.S.P.*, the Québec Queen's Bench quashed a search warrant to extract bullets from a man's body. While Hugessen J.'s comments were directed specifically to the interpretation of section 443 of the *Criminal Code* and the common law power to search incidental to arrest, they also evinced a strong policy orientation:

> I am not the first judge, and I trust that I shall not be the last, to decide that the possibility that some guilty persons may escape the net of justice is not too high a price to pay for the right to live in freedom. If the Crown cannot prove its case against Laporte without doing physical violence to his person then it is better that the case be not proved.[41]

On the other hand, some intrusions into the body, particularly those probing exercises that do not puncture the skin, have been sanctioned by Canadian courts. A number of decisions, including *Scott*[42] and *Brezack*,[43] have upheld the right of peace officers to make searches of

the human mouth to find narcotics or drugs. And in *Reynen* v. *Antonenko*, it was held that a medical examination of the rectum, conducted by a doctor instructed by the police, is not an unlawful act if the force used is reasonable, proper and necessary.[44]

43. As well as arising in the context of traditional search and seizure powers, the sensitive issue of intrusions into the body for evidentiary purposes is relevant to the design of provisions covering the taking of blood and urine samples and other bodily substances. It is noteworthy that the right of an individual to decline to comply with such tests is recognized in the *Criminal Code*;[45] on the other hand, this right has not been translated into such procedural requirements upon the police as mandatory warnings or standardized requests for consent.[46] Although the performance of such tests may fit within the definitions of search and seizure developed earlier in this paper, we believe that the techniques involved deserve separate analysis. Accordingly, they will be considered in another Working Paper.[47] The present paper deals with investigative activities entailed in mouth searches, strip searches, and rectal and vaginal probes for concealed items.

44. Internal search activities prompt special apprehensions related to two major concerns — personal safety and human dignity. The former concern arises, for example, in cases of mouth searches, which may involve a dangerous "throat hold" technique. Before the Royal Commission into Metropolitan Toronto Police Practices, one officer professed the view that "in order to preserve evidence it was permissible to choke a suspect even to the point of risking his life".[48] That the advantages of obtaining evidence truly justify putting life in danger, however, was denied in the *Laporte* case and is indeed contradicted in subsection 25(3) of the *Criminal Code*, which tightly restricts police activity "likely to cause death or grievous bodily harm".

45. The latter concern, and the recognition that human dignity must on occasion outweigh the probing designs of science, has been articulated by Mayrand as follows:

> [TRANSLATION]
> Justice must refuse to collaborate with science when that would involve violating the sacred character of the person. As Rabelais said, "Science without conscience is the ruin of man".[49]

The concern is most relevant to search and seizure in the case of rectal or vaginal searches. Police instructions have made clear that such searches may only be conducted by an officer of the same sex as

the person concerned; they also direct that the officers require the suspect to expose the rectal-vaginal area rather than touch the suspect themselves.[50] However, it is obvious that such exercises involve serious infringements on the modesty and dignity of the individual. Indeed, such infringements begin not with the probing of the body but with the requirement that the individual subject himself to stripping and sexually intimate touching.

B. Property and Related Rights

46. In *Entick* v. *Carrington*, Lord Camden articulated the legal sanctification of property ownership that prevailed in his era:

> The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.[51]

In the two centuries since Lord Camden's decision, the exceptions to the supremacy of private ownership have expanded considerably, to the point where the attitude itself is an anachronism. This was pointed out recently, in fact, by Salmon L.J. of the English Court of Appeal, who described Lord Camden's words as "both archaic and incongruous".[52] It is possible however, to abstract from its obsolete context the very legitimate concern at the root of the judgment — the protection of individual property from arbitrary intrusions by the State.[53]

47. Property has served a number of historical functions, two of which are particularly relevant to search and seizure powers. The first of these has been to protect the individual's rightful possessions from appropriation by others. The second, which is related to the emerging concept of privacy, has given him a spatial domain in which he is free to be left as alone as he wishes.

(1) *Possessions*

48. In effect, the law draws a line around the rightful possessions of an individual; if others attempt to appropriate them, he may seek redress through various legal avenues. In Québec, an individual's right to enjoyment of his possessions has been codified.[54]

In common law jurisdictions, the potential actions of trespass to chattels or conversion are open to him in tort. The criminal law recognizes various offences of mischief, theft and fraud.

49. It is within this protected zone that seizure, as opposed to search, generally has consequences. The consequences of the intrusion are concrete: the possessor is quite likely to lose the enjoyment and use of the thing seized for a lengthy period. When the avenues of appeal and the possibilities of second trials are taken into account, the inconvenience caused by seizure of possessions may become considerable. A recent example in point is the *Pink Triangle Press* case, in which business documents of a newspaper were held for over two years.[55]

50. The subordination of property interests to the demands of criminal law enforcement has been implicit in the expansion of search powers over the past few centuries. Where these demands are legitimate, the individual property-holder must suffer some deprivation. While at one time it was thought that some items, such as "private papers", ought to be immune from seizure altogether,[56] it is now generally recognized that any chattel can be seized so long as it is sufficiently related to an offence.[57] However, the individual's interest has been recognized in restraints upon the way in which the State is allowed to seize and detain such items. Primarily, these restraints come into play after the seizure has been made, in rules dealing with the disposition of things seized and their possible restoration to private possession. They are also relevant, however, in the context of the execution of the search; where the mode of authorization is a warrant, for example, there is a general limitation that only those items named on the warrant be seized.[58]

51. A person's possessions may be damaged as well as seized in the course of executing a search. Police officers acting under existing provisions of the *Narcotic Control Act*, for example, may break open doors, windows, containers and "any other thing".[59] Such damages represent a cost that the public, in the form of either individual losses or compensation for the injury to the individual, is required ultimately to bear.

(2) *Private Domains*

52. The second relevant function of property has been to give the individual a private domain. Within this domain, the individual is supreme; persons who intrude upon it contrary to his wishes may be

prosecuted civilly, and in some provinces, under statutory provisions, as trespassers.[60]

53. The notion of the spatial domain is intimately connected with a concept that has received a good deal of attention recently: the protection of privacy. Indeed, until lately, the deprivation of a property right was one of the two main bases upon which a claimant could assert a violation of his right to privacy.[61] What, then, is "privacy"? Conflicting definitions have been advanced by various commentators, and the theoretical problems are so acute that the best solution may well be to regard privacy as a "principle having a high order of generality", rather than attempting to formulate a specific rule.[62] The foundation of this principle, and the interest it champions, though, have been articulated quite simply:

> Ever since man's emergence as a social animal his right to be private has been one of his essential guarantees of liberty. In this sense he may be considered free to the precise extent that he is let alone in that inner core of his being which concerns only himself, to think and act unfettered by either legal restraint or private curiosity....[63]

In a sense, property has reified this right to be "left alone", by giving each person a spatial domain into which the outside world, including the State, cannot pass in the absence of exceptional authority.

54. For the purposes of search and seizure law, there are two basic categories of "domain" that belong to an individual — privately occupied places and vehicles. The law has differentiated between these categories; vehicles, while affording a certain measure of privacy and security to their occupants, have not been accorded the same degree of protection given to private premises. As the United States Supreme Court has observed, "the configuration, use and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property".[64] This distinction between vehicles and private premises is particularly relevant to the breadth of circumstances in which search should be permitted without warrant; accordingly, it is covered in detail in Chapter Six.[65]

55. Perhaps a more significant question is whether there is any valid distinction between the dwelling-house and other places in which individuals have legitimate expectations of privacy. Certainly, the notion that an individual's dwelling-house is his last place of refuge, a place where he can "retreat ... and there be free from unreasonable government intrusion"[66] has a strong emotional appeal. It underlies the classic declaration that "a man's home is his castle",

first made by Lord Cole in *Semayne's Case*[67] and treasured by decision-writers ever since. But while freedom from intrusion in the home remains, in the words of an American jurist, the "archetype of privacy protection",[68] the ambit of that protection has expanded to cover other domains as well. Indeed, Lord Cole's declaration has been cited in connection with such non-residential domains as offices.[69] The question thus arises whether other privately occupied places are perceived as appropriate for the same protection traditionally accorded to the home.[70]

56. Procedural distinctions certainly remain in the statutes. Both the rules for firearms searches under section 99 of the *Criminal Code* and those for narcotics and drugs require documentary authority for intrusions into dwelling-houses that is not required in the case of non-residential premises.[71] Distinctions are also reflected in common law rules, such as those covering the necessity of a demand to enter, which are stricter if the premises to be searched are a dwelling-house.[72] We take the view, however, that the existence of separate rules for residential and non-residential premises needs to be approached afresh. Searches of offices, for example, may involve as great an interference with expectations of privacy as searches of dwellings. While the residential or non-residential status of private premises may be relevant in certain circumstances, e.g., in terms of whether it is appropriate to authorize a search by night, this distinction no longer seems relevant as a "bright line" for protecting individual privacy interests against arbitrary intrusions.

57. With the proliferation of search powers over time, the inviolability of spatial domains, like that of personal possessions, has of course been subordinated to the interests of criminal law enforcement. It is in any event largely accepted that the interest of the individual in enjoying the degree of privacy and solitude he chooses for himself must give way to the legitimate needs of the police to obtain objects of search and seizure. And while this suspension of the individual's control of his domain remains a serious infringement, it is a more abstract deprivation than the losses an individual suffers in respect of his possessions. The individual affected loses nothing material, but rather his choice of who may occupy his domain. So too, unlike the intrusions upon possessions, which may be of long duration, the intrusion upon such domains effected by search is relatively brief.[73] Still, it is safe to say that the importance of the private domain has inspired more judicial comment than any other concern in the area of search and seizure law. To the extent that this domain affords a critical protection to the individual

in the maintenance of his privacy, this attitude is valid. Yet to the extent that the law has tended to concentrate on protecting the spatial domain to the detriment of other interests, the attitude may have been near-sighted. Is it sufficient to fortify the door to the domain, but leave the intruder unfettered as to what he may do once inside?

C. Expressions and Communications

58. An individual's expressions and communications are affected more by powers of surveillance than by those of search and seizure. This is because expressions and communications are dynamic phenomena, spanning and developing over intervals of time. Accordingly, it is the continuous intrusion of surveillance that is appropriate for obtaining or controlling the information they disclose. It is only when the expression or communication is recorded or summarized, so that it is preserved in a concrete form, that search and seizure powers become relevant.

59. As a general rule, records of expressions and communications are treated just like other possessions. While the reproduction of such records is covered by copyright law, the records themselves, in the form of papers, books, tapes and films, are essentially things that, like other chattels, may be the subject of actions of trespass and conversion in tort, or charges of theft and fraud in criminal law:

> Where civil servant [A] opens [B]'s mail and reads it, [B] will probably succeed in a suit for damages.... However, if [A] merely reads an open letter without touching it, [B]'s suit will fail because there has been no direct interference. It does not matter that [B]'s complaint is basically the same in both cases. [A] is liable in the first instance not for his assault on [B]'s privacy but for his interference with [B]'s chattels. This type of analysis would apply equally to such articles as diaries or personal financial records.[74]

60. Nor are such records specially protected from search and seizure; insofar as they provide relevant information, they are readily seizable with other evidence of an offence. This represents a departure from the common law tradition, according to which "private papers" were held to be particularly sacrosanct. An individual, it was believed, was entitled to select for himself the time and circumstances under which he would "share his secrets with others".[75] Quite simply, the fact that a record may disclose a secret about an individual is no longer a reason *not* to subject it to seizure.

On the contrary, if the secret bears an evidentiary connection to an offence, it may frequently provide the very justification for intrusion.

61. An exceptional instance in which communications are given special protection from seizure is the case in which a special interest or "privilege" is present. This subject, pertaining to items in the possession of solicitors and possibly the press, will be discussed later in this paper.[76]

D. Information

62. All of the individual interests discussed so far have embodied information; the search of his body or premises, and the examination of his possessions or communications, all reveal facts about the individual concerned. But there are other ways in which facts about an individual may be revealed other than by intrusions upon his own conventionally recognized rights. An individual may be observed from vantage points outside his private residence or workplace. Information about him is likely to be in the hands of acquaintances, private institutions and government agencies. Any of these groups may be requested to co-operate, or indeed be subjected to coercive intrusions by the police, in the course of an investigation of the individual concerned. Finally, the police investigation itself is a source of potential information, both to the individual himself, and to interest groups outside the police, such as the press.

63. The phenomenon of information-gathering has already been referred to in passing in connection with modern technological developments and the rise of surveillance.[77] Advances in the methods of reception and classification of information not only call into question the traditional physical concepts of individual protection, but they also raise the spectre of a society in which individuality is crushed because the person is thoroughly known and therefore subject to manipulation. The spectre of such a society, reminiscent of George Orwell's *Nineteen Eighty-Four*, has prompted serious and agonized discussion as to the legal measures that might be taken to prevent such a situation from developing.[78]

64. There is no general right to prevent others from acquiring information about oneself, even when the information relates to a protected interest. Data about an individual that pertain to activities

within his own private domain, for example, may be appropriated and used by another, so long as the domain itself is not violated physically.[79] However, there are two particular ways in which an individual may be protected from the acquisition of information about him from third parties. First, there may be a relationship between the individual and the third party that includes confidentiality as an integral element. This duty of confidentiality may arise from contract,[80] or it may arise from circumstances in which a reasonable man would perceive it.[81] Second, as in the case of government institutions, there may be a statutory duty of non-disclosure imposed upon a particular party in possession of information about members of the public.[82]

65. How does this affect the acquisition of information by the police? Except where the confidential information is "privileged", the duty of non-disclosure does not outweigh the legitimate law enforcement interest in obtaining it. If the information in an individual's diary is seizable in his own home, it would be illogical to prevent similar information from being obtained elsewhere. This proposition seems to be accepted in recent legislative initiatives regarding individual privacy. The federal *Privacy Act*, for example, recognizes that the duty of a government institution to withhold personal information about an individual must give way to both a warrant issued to obtain it, and the request of an investigative body.[83]

66. Insofar as the acquisition of the information represents an intrusion, it is becoming recognized that, quite aside from the fact that the search may involve interference with spatial domains and possessions, it should be subject to procedural safeguards. This was perceived, for example, by the Krever Commission in Ontario, which recommended that no employee of the provincial health insurance plan be permitted to release health information about an individual to any police force in the absence of a warrant to obtain the information.[84] In the private sector, it is common for institutions such as banks and private telephone companies to insist on legal authorization before releasing information about a client to the police. We believe that this recognition of the private nature of personal information represents a healthy trend, and attempt to give balanced recognition to this interest in the course of this paper.[85]

III. Modes of Authorizing Searches and Seizures

A. Warrants

(1) *The Warrant as Authority*

67. "In its primary sense", runs Sweet's definition, "a warrant is an authority."[86] More specifically, in the common law tradition, it is a document, issued by a designated official, that confers authority on its recipient. This authority, in the context of search and seizure powers, is the authority to perform intrusions for the purposes previously described: obtaining things, funds or pre-existing information.

68. The use of a warrant, of course, is not the only way in which intrusions may be authorized. The power to search and seize may be granted by legislation directly to a specified class of individuals, with the possible limitation that they only exercise that power once they have ascertained the existence of given circumstances.[87] Compared to models of direct conferment of authority, the warrant procedure adds an extra step to the process; it entrusts the decision to search and seize to a party other than the prospective executor of the power. While this two-step process may be seen today as a kind of control device, its origin resided not in a perceived need to control power, but rather to extend it.

69. The nature of the warrant as a conveyor of authority can be properly understood only if its history is taken into account. Basically, its emergence in England is tied to the ascendancy of a figure whose own significance in the evolving patterns of authority was critical, the justice of the peace. The justice, during the course of the sixteenth century, became "the workhorse of local government", fulfilling an assortment of administrative as well as law enforcement functions.[88] These functions eventually required him to assert his control over the contemporary policing organization, the local constabulary. This assertion was manifested in the adoption of the warrant.[89]

70. The warrant was basically an extension of the justice's authority, an extension necessitated by the impossibility of the justice's personal performance of all of his newly acquired duties:

> Travel in medieval England was hazardous and difficult even within the relatively small jurisdiction of the justices. Thus the warrant provided a

> means of limiting the necessity of such travel by the justices by giving instructions to the constable. The warrant incidentally served as evidence of authority beyond that of the symbolic staff or baton.[90]

As originally conceived, then, the warrant was a device that simultaneously enabled the justice to delegate responsibilities while maintaining control over their exercise. Moreover, it made the powers of the delegatee visible. As the justice's responsibilities grew, so did the use of the warrant.

71. What prompted the growth of the search warrant was the need to respond to complaints of stolen goods. Hale, in his *History of the Pleas of the Crown*, gave what was to become an influential account of the appropriate procedure to follow in such cases:

> In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them....[91]

The identity of the participants in Hale's model is noteworthy: the applicant was a private citizen coming to the justice in order to obtain the service of the local law enforcement apparatus in the vindication of his complaint; the constable was the officer sent out by the justice when a response was appropriate. These roles have shifted fundamentally in the centuries since Hale's account. The police themselves have become the applicants for the warrant in almost all instances, although they themselves may be acting upon complaints from individuals.[92] So too, administrative control of police activities has shifted from the justice of the peace to other organizational structures — executive officers within the force answerable to Cabinet ministers, municipal councils and local administrative boards.[93] Both of these changes are traceable to the advent of the modern police force in the mid-eighteenth century, a phenomenon that it is safe to say Hale could not have imagined. How is it, then, that the procedure he envisaged is still basically intact, that the warrant still represents a grant of authority by the justice to the recipient to make a requested search and seizure?

72. Essentially, the nature of the authority conferred by the warrant has changed along with the social institutions involved in the procedures. When the justice grants a warrant to a police officer, it no longer represents the delegation of authority from an administrator so much as the authoritative decision of an adjudicator. Indeed, it is the

separation of the decision-making function of the justice from the executive duties of the officer that distinguishes the warrant according to modern case-law. As was stated in the 1965 Ontario case of *Worrall*:

> The police officer is not a judicial officer. It was not his function to decide whether the articles in question should be seized or not. It was the duty of the Justice, upon the evidence before him, to decide this question.[94]

Inherent in this separation of powers is the notion of control: the peace officer cannot perform the search and seizure until the justice, having assessed the officer's application, decides to authorize him to do so.

73. While this control has been emphasized in recent case-law, it is important to realize that its fundamental basis is traceable to Hale's model. Hale developed his warrant at a time when the common law was starting to flex its muscles, and he encountered antipathy from such champions as Coke towards the infringement upon property rights and abrogation of parliamentary sovereignty that the warrant was thought to represent.[95] Hale, too, though, was a sound common lawyer; while he was prepared to countenance the search warrant as a necessary device for the apprehension of felons, he was careful to invest it with features that would assuage some of the worst fears of uncontrolled state intrusion. These features, which have been emphasized in the case-law ever since, boil down to two essential characteristics: judiciality and particularity.

(2) *Judiciality*

74. According to Hale, the search warrants for stolen goods were "judicial acts" which had to be "granted upon examination of the fact".[96] This characteristic has been seized upon by numerous common law courts in the three centuries since Hale's treatise. Canadian decisions have consistently quashed search warrants issued in circumstances indicative of a failure by the issuing justice to act judicially. Perhaps the most definitive pronouncement on the judiciality of issuance proceedings, however, was that made by Dickson J. for the majority in the 1982 decision of the Supreme Court of Canada in the *MacIntyre* case: "The issuance of a search warrant is a judicial act on the part of the justice, usually performed *ex parte* and *in camera*, by the very nature of the proceedings."[97]

75. Whether or not this characterization accurately describes what actually occurs in the justice's office when he is requested to issue a warrant is, of course, a critical question. Evidence that suggests it does not will be discussed elsewhere in this paper.[98] What is relevant from a historical point of view is that this particular judicial function was, in fact, granted to an individual whose comprehensive mix of functions made him anything but the neutral, independent adjudicator that modern jurisprudence associates with judicial office:

> A Justice of the Peace might issue the warrant for arrest, conduct the search himself, effect the capture, examine the accused, and sans witnesses extract a confession by cajoling as friend and bullying as magistrate, commit him, and finally give damning evidence at trial.[99]

Although many of the justice's law enforcement responsibilities have diminished with the advent of the modern police force, he still retains vestiges of his executive functions in modern legislation. By virtue of section 2 of the *Criminal Code*, for example, the justice of the peace remains included within the definition of "peace officer".

76. How is it, then, that the jurisprudence since the days of Hale has articulated a consistent vision of the judiciality of search warrant procedures? It would seem that what the jurisprudence has done has been basically to separate the *function* from the *office*, viewing the former in isolation from the latter. The demands underlying the requirement of judiciality, in other words, come not from what the justice does, but from what the warrant does. As was stated in the *Pacific Press Ltd.* case:

> The search warrant is a tool in the administration of criminal law, allowing officers of the law to undertake the search of a man's house or other building with a view to discovering, amongst other things, evidence which might be used in the prosecution of a criminal offence. From time immemorial common law Courts have been zealous in protecting citizens from the unwarranted use of this extraordinary remedy.[100]

77. It is from its aversion to intrusions upon individual rights, then, that the common law has developed the concept of the warrant as a mechanism of control, or more exactly, of judicial control. The jurisprudence has invested in the warrant the representation that the existence of a justification for intrusion has been objectively and impartially determined. Moreover, like determinations of fact at trials and similar judicial proceedings, the decision to issue a warrant must be made upon information presented under oath. That the warrant

ought to represent a judicial determination is accepted in this paper; in the discussion of appropriate statutory procedures, this proposition will serve as both a yardstick and a goal.

(3) *Particularity*

78. The requirement that a warrant authorize a particularly identified intrusion complements the requirement that it be issued judicially. No matter how carefully the issuer acts in adjudicating the application for authorization to search and seize, it will be of little effect if the authorization gives the executor of the powers ample discretion as to when and how he will make his intrusions. Indeed, Canadian courts have refused to read judicial discretion into writ of assistance provisions, on the basis that the wide powers of execution given to the writ-holder make any exercise of discretion in issuing the writ inconsequential.[101] On the other hand, the specification of a place to be searched, items to be seized, and a relevant offence makes the issuer's role a meaningful one. Indeed, the judicial determination made by the issuer basically links these elements together. As Lerner J. observed in the *PSI Mind Development* case, the question is "whether there were sufficient details ... to satisfy the justice as a reasonable man that in the specified premises, there were the specified things that would be evidence of the [specified] offence".[102]

79. The common law's concern for particularity and the executive branch of government's desire for discretion have existed in a state of constant tension throughout the history of search and seizure powers. The choice of warrant procedures in effect represents a concession to the value of certainty and a preference for the defined intrusions associated with common law jurisprudence. A "general warrant to search in all suspected places is not good", Hale stated, "but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof".[103] This principle of particularity became enshrined in most search warrant legislation, with respect not only to the warrant itself, but also to the application for it. It is expressed today in requirements pertaining not merely to the place to be searched, but also to descriptions of the items to be seized and the offence under investigation. As with the standard of judiciality, that of particularity is accepted in this paper as an objective that warrant provisions ought to strive to meet.

B. Warrantless Powers

80. The exercise of warrantless powers is dependent solely on the status of the prospective intruder as a peace officer and his ascertainment of certain preconditions to the exercise of the power. One might say that this mode of authorization exchanges the benefits associated with the warrant for the greater flexibility that it accords to peace officers. It would be misleading to assert, however, that these powers are the product of any rational process of comparing the advantages of warrant or other documentary requirements against their disadvantages. Rather, warrantless powers, at least in origin, seem to have sprung up at common law and in statute quite independently from warranted powers.

81. A variety of reasons and premises have underlain the growth of different warrantless powers. In some cases, the absence of warrant protections has reflected distinctions in values. For example, warrant powers were traditionally associated with intrusions upon interests in private property, particularly residential premises.[104] By contrast, early warrantless powers were directed to intrusions upon the body of the person. Particularly when the body was that of a suspected criminal, it was accorded little protection against its search.[105] One may also relate certain warrantless powers to dangers perceived as inherent in the presence of firearms and in the distribution and possession of narcotics and drugs. In the case of "consent" searches, the distinct underlying premise has been that since the intrusive potential of a search and seizure activity is negated by the concurrence of the individual affected, no document need authorize the peace officer's actions.[106]

82. What is signified by the absence of warrant protections in these cases? In theory, removing the warrant from the process of authorization may not entail a reduction in the standards that protect the individual from unjustified intrusions. A statutory provision for warrantless search and seizure may set out the "reasonable grounds" necessary to commence the intrusion and describe the permitted scope of intrusion in terms virtually identical to those found in warrant provisions. Subsection 101(2) of the *Criminal Code*, for example, states a detailed series of tests applicable to warrantless searches for firearms, identical to the standards set out for searches with warrants in subsection 101(1), save for the concession that the search need not be authorized by warrant where resorting to the warrant procedure would be impracticable.

83. Nonetheless, it has long been recognized that allowing searches to proceed on a warrantless basis amounts to a diminution of legal control over the exercise of the search power. This point was made effectively by Mr. Justice Jackson of the United States Supreme Court discussing the Fourth Amendment to the American Constitution:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[107]

In permitting the adjudication as to the justifiability and scope of search to be made by the prospective searcher, the warrantless mode of authorization tolerates the possibilities of biases in decision-making that stem from an interest in the outcome of the decision. For this reason, we adopt later in this paper a position in favour of a warrant requirement unless circumstances exist to justify an exception to it.[108]

C. Writs of Assistance

84. Although writs of assistance are sometimes described as a "general" or "blanket" variety of search warrant,[109] they are really nothing of the kind. In essence, they are documents that identify their holders as members of a specific class of peace officers with special powers of warrantless search and seizure. In order to appreciate the character of the writ of assistance, it is necessary to go back to its origins, which lie outside crime-related legislation.

85. The writ actually began as a private equitable remedy used to recover land or chattels.[110] As an instrument of public-law enforcement, it dates back to English customs legislation of 1662, in which it was conceived as an instrument to help regularize and maintain the long-standing practice of searches for unlawfully imported goods by the Crown's customs officers.[111] The effects of the

writ in customs legislation were that it enabled these officers to identify themselves and to obtain assistance in carrying out their search activities. This latter function accounts for the instrument's name: at its inception, it was truly a writ of "assistance".[112]

86. There has always been a significant difference between the functions and characteristics of the writ and the traditional search warrant. Historically, the writ of assistance was essentially a communication in the name of the Sovereign, identifying the writ-holder as a person lawfully competent to exercise a statutory power of entry, search and seizure and to command the assistance of constables and other persons of potential use to him in the execution of his duties. As such, it began as a ministerial or executive instrument that "authorized", in the now obsolete sense of "vouching for", the holder's identity as an agent of the Crown.[113] Thus, the writ did not purport to confer powers of search upon its holder; rather, it sought to facilitate the exercise of discretionary powers that accrued to him by virtue of his status as a customs officer.

87. Although the writ was sealed in the Court of Exchequer, there was never anything judicial about the procedure by which it was issued. In fact, it was originally processed entirely by a court administrator, without even the cursory participation of a judge. While the choice of the Court of Exchequer as issuing authority thus may seem perplexing to a modern mind, it is probable that the Court, with its established jurisdiction over the collection of revenue and impressive calligraphic facilities, was the most appropriate institution of its time to perform this task.[114]

88. Another distinction between writs of assistance and warrant procedures concerns the powers conferred upon the writ-holder. Under the prototypical customs legislation, the conduct of the search for contraband remained entirely within the writ-holder's discretion. He was in fact under no statutory obligation, either before or after the event, to justify his entry onto private domains against any standard of reasonable or probable cause, to confine his search to any particular premises, or to restrict seizures to items identified before commencing the intrusion. Mere suspicion would have sufficed in law as a reason for undertaking the most sweeping search activities.[115]

89. This kind of sweeping discretion has been the focus of bitter conflicts in common law jurisdictions. Confrontations occurred in eighteenth-century England, for example, in connection with the broad warrants used in efforts to muzzle the press. The general

reaction of the English courts was to brand such warrants as "oppressive", "nameless", and "worse than the Spanish Inquisition",[116] and invalidate them in the absence of express statutory authority. The great historical conflict over so-called "general" warrants, however, occurred in pre-revolutionary America, culminating in *Paxton's Case*, in which the Superior Court of Massachusetts, ignoring the example of certain sister courts, agreed to issue the unpopular "Writ of Assistants", thus triggering a series of protests that were to lead to the struggle that became the American Revolution.[117]

90. In this conflict, Canada has been somewhat ambivalent in its position. While maintaining standards of particularity in the cases of statutory warrants fashioned in the Hale tradition, our lawmakers have accommodated themselves to the use of the writ of assistance in the enforcement of customs, excise, narcotic and drug legislation.[118] Consequently, Canadian judges have been able to invalidate search warrants for "vague and generalized" descriptions of the search to be performed,[119] while constrained reluctantly to accede to requests for the far more generalized writ. This double standard has distinct implications — the co-existence of writ and warrant powers in narcotics and drugs regimes undermines the protection that warrant requirements are supposed to secure.

91. Although its juridical character remains similar, a number of modifications have been worked into the writ of assistance in its present Canadian adaptations in the *Narcotic Control Act* and the *Food and Drugs Act*. These modifications have at least partly obscured the original character of the writ. For example, while the writ of 1662 was directed to the persons who would be confronted by the customs officer, commanding them to aid and assist the bearer of the writ, the modern instrument is addressed to the bearer himself. Insofar as this creates the impression that the writ itself is authorizing the bearer to perform individual searches and seizures, it distorts the document's original character. In fact, however, possession of the writ has become relevant in defining its holder's search and seizure powers in a more general sense. This is evident in two modifications from early models. First, narcotics and drugs writs cannot be delegated from one peace officer to another as could early customs writs (and indeed existing writs under the *Excise Act*).[120] Rather, the narcotics and drugs writs confer powers only on "the person named therein", invariably a member of the Royal Canadian Mounted Police. Second, the peace officer with a writ has a power of search and seizure that his writless counterpart lacks — the discretion to

enter a dwelling-house to search for narcotics or drugs without a warrant.

92. Another superficial change is that writs under the *Narcotic Control Act* and the *Food and Drugs Act* are now issued by judges of the Federal Court of Canada. The role of the issuer, however, has remained essentially clerical, giving formal effect to a ministerial decision. As Jackett P. noted with some asperity in *Re Writs of Assistance*,

> [I]f I am right in my construction of the legislation, when a person holding a Writ of Assistance is exercising the powers conferred upon him thereby, he is exercising powers conferred upon him by statute pursuant to designation by the Attorney General of Canada or the Minister of National Health and Welfare, as the case may be, and is not executing an order or judgment of the Exchequer Court of Canada, or a judge thereof. Parliament, in its wisdom, has ordained that the authority conferred upon such officer shall be evidenced in the form of a writ issuing out of the Exchequer Court of Canada and the Court must bow to such statutory direction.[121]

93. Of a more substantive impact are the "reasonableness" restrictions introduced into the exercise of Canadian narcotics and drugs writs. While the writs themselves indicate that the bearer may conduct searches "at any time", the use of the writs is governed by subsections 10(1) of the *Narcotic Control Act* and 37(1) of the *Food and Drugs Act*. Like an officer exercising other warrantless powers of search under these provisions, a writ-holder is required to refer to requirements of reasonable belief that there are narcotics present. Moreover, as a matter of practice, R.C.M.P. officers using writs are required by force guidelines to file *ex post facto* reports justifying each incident of writ usage. However, these latter guidelines represent administrative policies and do not have the force of law.

94. The rationale for retaining the writ of assistance has little to do with its historical functions. In contemporary Canadian practice, the writ may still offer some signification of the holder's authority to perform searches and seizures, but it hardly serves as a device for authenticating a federal officer's identity to a local official. More significantly, its "assistance" function is obsolete. Peace officers from the R.C.M.P. do not use the instrument to obtain the help of their municipal or provincial counterparts. In fact, modern conditions reverse the "assistance" relationship; under some administrative arrangements R.C.M.P. writ-holders have been available to municipal officers who wish to utilize their special writ powers in searches orchestrated at the local level.[122] One R.C.M.P. officer who

fulfilled such a role has described himself as a "walking search warrant".[123]

95. The writ's contemporary rationale, then, is primarily as a mode of authorization that permits an expeditious response to the exigencies perceived to inhere in the enforcement of narcotics and drugs legislation. In a 1978 press release, Ron Basford, then Minister of Justice, referred to "the covert nature and ease of transportation and disposal of illicit drugs" which, he argued, "requires extraordinary measures".[124] Writs of assistance basically serve to designate a class of peace officers exclusively empowered to carry out these measures.

IV. The Constitutional Framework

96. There are two aspects of Canadian constitutional law that bear upon our approach to the law of search and seizure: (1) the limitations upon federal jurisdiction; and (2) the *Canadian Charter of Rights and Freedoms*.

A. Federal Jurisdiction

97. In accordance with the Law Reform Commission of Canada's mandate, the scope of the Working Paper is circumscribed by considerations of federal constitutional jurisdiction. For the most part, this limitation does not inhibit the development of either the analysis or the proposals advanced in this paper. Under subsection 91(27) of the *Constitution Act, 1867*, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within

> [t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

This classification clearly embraces the main subject-matter of this document: search and seizure provisions designed to enforce the

criminal law. All but one of the existing statutory regimes studied in this paper are found in the *Criminal Code*; the new set of rules proposed in Part Two are envisaged as an element in a code of criminal procedure.

98. The one area studied in the present document that is currently outside the parameters of the *Criminal Code* is that of narcotics and drugs legislation. We recognize that in the *Hauser* case, the majority of the Supreme Court of Canada held that the *Narcotic Control Act* was validly enacted by the Parliament of Canada under its general residual power rather than the specific criminal law power set out in subsection 91(27).[125] Without questioning the soundness of the majority decision, however, we consider search and seizure powers pertaining to narcotics and drugs investigations to be sufficiently "crime related" to justify inclusion in the present paper. This position is based on the recognition that like search and seizure powers under the *Criminal Code*, certain *Narcotic Control Act* and *Food and Drugs Act* powers are: (1) exercised by the police (2) as a responsive measure (3) to offences prosecutable in proceedings set out in the *Criminal Code*, including those by way of indictment.[126] Given these attributes, the question of whether or not narcotics and drugs legislation is "criminal law" for constitutional purposes is only peripherally relevant to our purposes. The central issue, rather, is whether there is any justification for treating *Narcotic Control Act* and *Food and Drugs Act* searches any differently than searches in relation to *Criminal Code* offences. In any event, it should be emphasized that the *Hauser* case does not remove narcotics and drugs procedures from federal jurisdiction. Rather it asserts federal jurisdiction over these procedures on a separate, more general basis than that of subsection 91(27).

99. The limitation of the scope of the present paper to federal matters does bear significance in one respect — the consideration of regulatory provincial statutes relevant to practices of criminal law enforcement. Of particular interest are liquor control and highway traffic provisions empowering peace officers to carry out search and seizure activities, most often of motor vehicles.[127] These provisions have been designed ostensibly to serve the purposes of the surrounding legislation. In practice, they enable peace officers to conduct checks related to far more general law enforcement objects.[128] While it may be artificial to expect peace officers to put aside their training and instincts as criminal law enforcers when performing activities mandated by provincial statutes, it is important to recognize the range of possibilities open to them due to these

additional sources of authority. Since the reform of provincial statutes is beyond the scope of this paper, however, we can only urge the provincial jurisdictions to evaluate the construction and use of the search and seizure powers they have enacted. Problems related to police powers of search and seizure cannot be fully addressed by proposals restricted to federal legislation.

B. The *Canadian Charter of Rights and Freedoms*

100. Section 8 of the *Canadian Charter of Rights and Freedoms* reads:

> Everyone has the right to be secure against unreasonable search or seizure.

Any analysis of the significance of this provision is largely speculative since at the time of writing, the *Charter* had not yet been judicially interpreted. There are two aspects of this provision that bear consideration at this juncture, however: (1) the ways in which the constitutional "reasonableness" test could be applied by Canadian courts, and (2) the particular consequences that might be entailed in warranted and warrantless intrusions.[129]

(1) *Application of the "Reasonableness" Standard*

101. Constitutional protection against "unreasonable search and seizure" seems to entail the possibility of judicial application of reasonableness tests at two distinct levels. First, it may permit courts to limit or declare inoperative legislation that departs from the reasonableness standard. Second, it contemplates the granting of remedies for individual police actions of an unreasonable nature.

102. Whether it is proper for courts to invalidate or limit the operation of legislation offensive to their interpretations of constitutional standards is an issue that has been contested in both political and academic forums.[130] However, there is little likelihood that Canadian courts will refrain from assuming this role in cases they deem appropriate. From the earliest days of Confederation, the Supreme Court has demonstrated a willingness to apply the *British North America Act* to invalidate legislation beyond the competence of the level of government enacting it. The exercise of this judicial role has been "tacitly assumed by everyone to be proper".[131] Subject

to the possibility of legislation being enacted under cover of a "notwithstanding" clause permitted by section 33, the *Canadian Charter of Rights and Freedoms* statutorily defines a core group of entrenched rights and hence contemplates the possibility of legislation beyond the competence of any level of government in Canada. If and when a statutory scheme is found to be within this area of forbidden legislation, the court making the adjudication could be expected to assume the power to declare it invalid.

103. The Canadian experience with the *Canadian Bill of Rights* also bears upon the possible approach of the courts to search and seizure legislation. Since the *Drybones* case, the Supreme Court has theoretically reserved two powers for itself: to construe narrowly potentially offensive legislation that can be brought within the borders of the enunciated restraints, and to render inoperative legislation that cannot be so construed.[132] The tendency of the Court, however, has been to affirm these powers while refraining from exercising them on the facts of particular cases.

104. This reluctance has rested, at least in part, on the non-constitutional status of the *Bill of Rights*.[133] The *Canadian Charter of Rights and Freedoms*, on the other hand, is an integral part of the Constitution, governed by subsection 52(1) of the *Constitution Act*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Quite simply, the entrenchment of individual freedoms in the *Charter* invites the Court to view the matter from the other side of the fence: as a judicial body entrusted with truly constitutional prohibitions against laws offending individual rights and freedoms.

105. Some preliminary guidance as to the possible consequences in this respect may be afforded by American case-law. The Fourth Amendment to the American Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the second clause in this provision, which defines the standards applicable to warrants, is not reproduced in any form in section 8 of the *Charter*, the wording of the first clause, guaranteeing

the right "to be secure ... against unreasonable searches and seizures", is quite resonant with the Canadian section. The series of American cases that have interpreted the first clause include a number of decisions in which the constitutionality of legislation has been challenged on the basis of its failure to meet the "reasonableness" standard.

106. A case on point is *Ybarra* v. *Illinois*, in which the United States Supreme Court dealt with the application of a state provision allowing searches of persons found in places being searched pursuant to a search warrant. The Court held that where a personal search was not itself founded on probable cause relating to the individual searched, it violated the protection of the Fourth Amendment against unreasonable intrusions.[134] In essence, the Court narrowly confined the legislation to make it conform to the Fourth Amendment. Where the impugned legislation is so offensive as to make such narrow construction impossible, the Supreme Court has invalidated it. In *Payton* v. *New York*, for example, the same Court recently invalidated legislation providing for warrantless entries into premises to effect arrests on the basis that such intrusions are "presumptively unreasonable".[135]

107. Insofar as remedies for individual police actions are concerned, much will depend upon the procedures available to an individual wishing to challenge or complain about search or seizure activity that has prejudiced him. The question of such procedures is discussed later in this paper.[136] For immediate purposes, it is sufficient to recognize that the constitutional security invoked by section 8 of the *Canadian Charter of Rights and Freedoms* is likely to be construed not only as a limitation on legislation but as a basis upon which to seek redress for individual police actions of an "unreasonable" nature.

108. To some extent, this prospect amounts to an enhancement of existing legal protections. The standard of reasonableness informs most statutory and common law sources of authority for warrantless search and seizure. For example, in such aspects of executing a search as the use of force, announcement prior to entry and "freezing" the premises searched, peace officers generally have been confined to actions that are reasonable under the circumstances.[137] In Anglo-Canadian law, the standard of "reasonableness" has served as a basic norm for the approach to police actions; in the words of Lord Devlin, "The police are expected to act reasonably and so long as they do, the accused is ... unlikely to insist upon his right to immunity from search".[138]

109. On the other hand, the institution of the constitutional provision does raise the possibility of the application of the reasonableness standard to areas of police activity from which it heretofore has been absent. In some cases, this absence has been due to specific statutory provision; subsection 10(4) of the *Narcotic Control Act*, for example, apparently has given peace officers a *carte blanche* to break apart doors, windows, floors, fixtures, compartments and other objects, unrestrained by considerations of reasonableness. If and when the operation of such provisions is found to be limited by the constitutional standard, the rights of individuals to obtain remedies in particular cases may be altered as well.

(2) *Warranted and Warrantless Searches and Seizures*

110. Section 8 of the *Canadian Charter of Rights and Freedoms* deals with searches and seizures in general. It does not distinguish between, or separately advert to, warrants or warrantless modes of authorization. This approach may be contrasted with that manifest in the Fourth Amendment to the American Constitution, in which a special set of criteria are applied to searches with warrant: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation". The absence of such a clause from the Canadian section has two distinct implications.

111. First, it raises the possibility that as a constitutional matter, Canadian courts will not show the preference for warrants that has characterized American law. Although the general prohibition of "unreasonable" searches in the Fourth Amendment is distinct from the subsequent elaboration of standards applicable to warrants, many American courts, reading the Amendment as a whole, have connected the "reasonableness" standard with the protection of warrant requirements:

> [t]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."[139]

While it is not inconceivable that a similar policy of preference for the warrant could be accepted by Canadian courts, this policy would have to be advanced in the absence of supportive wording in section 8 of the *Charter*.

112. Second, it may leave a gap between a basic constitutional standard applicable to search warrants and a more elaborate set of requirements otherwise imposed by law. The "judiciality" feature of warrant procedures may be seen to be implicit in the constitutional "reasonableness" standard; Canadian case-law has discussed the "reasonableness" of the grounds of belief set out in the warrant in terms of the issuer's "judicial" performance of his duties.[140] On the other hand, the link between the reasonableness standard and the formal requirements that have developed in Canadian law is less obvious. It is conceivable that a search conducted with a formally defective warrant, yet supported by an information containing reasonable grounds for belief, could be considered at the same time to be both reasonable and yet unauthorized by law.

(3) *Conclusion*

113. Section 8 of the *Canadian Charter of Rights and Freedoms* informs many aspects of this paper. The standard of "reasonableness" will be kept in mind in assessing both the present laws of warrantless search and seizure and, insofar as it can be captured accurately, the picture of actual police practice in the area. The constitutional provision is also a foundation upon which any reforms in the law must be built. Accordingly, in Part Two of this paper, it is a constant referent in the development of the approaches, justifications and procedures for a new regime of search and seizure.

CHAPTER TWO

The Present Situation

114. The growth of search and seizure powers in Canada has been primarily a statutory one. While this country has continued to recognize many of the common law traditions it absorbed from England, it has relied since Confederation upon legislation for the development of new powers. This is a product of a correspondence between parliamentary initiative and judicial reticence. For the most part, because of the history of abundant statutory development in Canada, there has not been a need for courts to develop expanded common law powers of search. Moreover, even when confronted with a gap in statutory coverage, Canadian courts have been reluctant to develop new search powers to address problem situations.[141]

115. This Canadian approach has differed greatly from that of English courts, which, confronted with gaps in statutory coverage (including the absence of any comprehensive power to search for evidence of crime), have expanded the common law powers in order to meet the demands of the police. The most profound step in this expansion, the 1970 decision in *Ghani* v. *Jones*, in effect developed a general common law power of search for "serious offences", restricted by a range of qualifications pertaining to such factors as the identity of the items sought and the suspected involvement of the person affected by the intrusion.[142] The state of continued improvisation to which English courts have been driven as a result has led to considerable uncertainty and criticism,[143] and the Royal Commission on Criminal Procedure has recently recommended that powers of entry and search of premises be placed on a statutory basis.[144] In having a primarily statutory set of rules to rely upon, Canadian law has at least escaped some of the problems that have appeared in England.

I. Common Law

116. Two major crime-related categories of searches or seizures are still recognized at common law. They are the powers of search and seizure incidental to arrest and the provision for search on consent. In addition, it is relevant to examine the power of entry to prevent danger to life or safety.

A. Arrest

(1) *History*

117. The power of peace officers to search a person as an incident of his arrest is often assumed to be traceable to the earliest days of common law jurisprudence; one finds references in cases to its "undoubted" status at common law.[145] In fact, the *practice* of such searches clearly predated the existence of any specific authority for them, and it may fairly be said that these searches seem to have been simply assumed over the course of time to be proper and valid. This is due in large part to the historical tolerance of intrusive and indeed violent acts towards persons accused of crimes. Moreover, the objects of seizure associated with arrest, such as bags of coins and weapons, could usually have been found without prolonged examination of the person.[146]

118. That powers to search persons could be implied from the fact of arrest is evident in the English legislation enacted in the early eighteenth century. For example, a constable apprehending a suspected carrier of stolen goods was empowered to convey such goods to a justice of the peace;[147] the power to search for the goods was not express, but obviously would be necessary to discovering goods that were in any way concealed. Although it might be thought that the right to search an arrested individual under such vague authority would be contested in court, no reported cases on point appeared until the nineteenth century. In fact, the first cases of prisoners complaining of police search and seizure activities focused not upon the legality of the search activity, but rather upon the extent of the seizure carried out by the police. For example, in the *O'Donnell* case,[148] the court criticized the police practice of depriving

prisoners of money found on their persons which was not connected with any property allegedly stolen. The legality of the search conducted to find the money, however, does not appear to have been contested.

119. The major step in the recognition of personal search incidental to arrest as an intrusion deserving of legal regulation occurred in 1853, with the influential decision in *Bessell* v. *Wilson*.[149] Lord Campbell C.J., at the conclusion of a trial for wrongful imprisonment, made some *obiter* remarks in which he strongly criticized the manner in which the police had searched the plaintiff upon arrest. Such a search, stated Lord Campbell, required circumstantial justification, and such justification was not presented by the case at bar, in which the plaintiff was a tradesman, the occasion for the arrest was a copyright complaint, and there was little foundation for the argument that the plaintiff might have been concealing a weapon. This approach was picked up in *Leigh* v. *Cole*, an action for assault against a police superintendent who had allegedly apprehended, beaten and searched the plaintiff. In instructing the jury as to the legality of the search, Williams J. stated:

> With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reasons of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case.[150]

120. Over time, the articulation of the rule regarding the power to search prisoners has fluctuated somewhat. The traditional American rule, as set out in the *Corpus Juris*, phrases the power in general terms:

> After making an arrest an officer has the right to search the prisoner, removing his clothing if necessary, and take from his person, and hold for the disposition of the trial court any property which he in good faith believes to be connected with the offense charged, or that may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape.[151]

This statement has been accepted as authoritative in some Canadian cases.[152] On the other hand, the more limited rule in *Leigh* v. *Cole* is also cited by Canadian courts. In fact, the distinction between the two positions has been largely theoretical; no modern reported

Canadian case has found the search of an arrested person to be an "unreasonable" precaution.

(2) *Arrest and Custody*

121. There are a number of issues that arise under the present law governing search of arrested persons. First, there is a definitional problem. At what stage or stages of the process of arresting an individual and keeping him in custody does the power of search apply? The rule in *Leigh* v. *Cole* speaks of search of the "prisoner". In a number of Canadian cases, the court has referred to the traditional case-law to validate searches performed in police stations and custodial institutions. At the other extreme are cases in which the relevant search occurs virtually at the moment of initial contact between the peace officer and the person concerned. In the *Brezack* case, for example, one finds the following description of a search for drugs:

> Acting on the information they had, the constables, as appellant approached the Golden Grill, left their place of concealment and, with two other constables, rushed upon him. One of them seized appellant by the arms, and Constable Macauley caught him by the throat, to prevent him swallowing anything he might have in his mouth.... Constable Macauley persistently tried to insert his finger in appellant's mouth, to recover the drug that he assumed was there, and each time he tried appellant bit his finger. A good deal of force was applied by the constables and Constable Macauley at last succeeded in getting his fingers in appellant's mouth, and satisfied himself that there was no drug there.[153]

In practice, peace officers may perform searches of a person at both points in time: the first to facilitate the initial arrest itself, the second to protect both the detained person and the custodial institution in which he is held.

122. To some extent this problem too may seem an academic one, since Canadian courts have been manifestly reluctant to distinguish between "custodial arrest" and other forms of arrest.[154] According to this view, once an accused is arrested, he is in custody. It is misleading, however, to merge investigative searches following arrest with searches of prisoners designed to preserve the order of penitentiaries, prisons and other custodial institutions. In the *Federal Penitentiary Service Regulations*, for example, there is a provision for searches of inmates, members and visitors by institution personnel.[155] This provision is concerned not with the immediate

response to crime characteristic of police powers but with safeguarding the institution in which the inmate is imprisoned. The searches of concern to the present paper are limited to those carried out by the police in the close aftermath of the arrest of an alleged offender.

(3) *Scope of Search and Seizure*

123. The exact parameters of the powers of search and seizure incidental to an arrest are defined somewhat sketchily in Canada. As far as the scope of search is concerned, it appears incontrovertible that the body of the person may be searched. Exactly how intimate or forceful that search may be is determined by "what is reasonable and proper in ... all the circumstances of the case".[156] In fact, few reported Canadian decisions have invalidated actions taken by police officers in this regard. The case of *McDonald and Hunter* is an example of an exception to the rule; it was held that two police officers who arrested a partially paralysed war veteran and threw him to the floor in an attempt to seize property on his person had used unnecessary force in their actions.[157]

124. The power of search incidental to arrest is generally conceded to extend to areas within the control of the accused. According to the *Report of the Canadian Committee on Corrections*,

> [w]here a person has been arrested, either with or without a warrant, the right of search extends not only to the person of the accused, but to premises under his control. In modern times the right to search premises, no doubt, also extends to a vehicle or other means of conveyance under the control of the accused.[158]

Canadian case-law on this point is actually quite sparse,[159] and a number of issues remain unresolved. Are the premises "under the control" of the accused confined to immediate surrounding areas? Are they even limited to the residence or other unit in which he is found? Some English authority has taken an expansive view of the power,[160] but given that the English courts have expanded the powers of search incidental to arrest at least in part to compensate for the lack of a generally applicable crime-related warrant, it might be questioned whether these decisions are applicable to the Canadian context.

125. The question of scope also arises in establishing the range of items that an arresting officer may seize. As was indicated above, early English case-law established the principle that money

unconnected with the offence charged could not be seized from a prisoner.[161] In Canadian law, this principle has been extended to constrain the police from seizing other items found on the prisoner in relation to which the State can show no legitimate interest. Accordingly, in the *McDonald and Hunter* case, it was found that the accused officers had no right to take an arrested person's war button from him against his will.[162]

B. Consent

126. The common law tolerance of search with consent is founded on different premises than the other existing powers of search and seizure. While the other powers establish exceptions to general prohibitive rules against intrusive conduct, and justify these exceptions on the basis of criminal law enforcement interests, the theory of "consent" search is founded on the proposition that the "search" performed does not in fact constitute an actionable intrusion. This proposition is an aspect of the common law doctrine of *volenti non fit injuria*:

> One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.[163]

According to this theory, once an individual consents to police action, he in effect waives the right to invoke the normal legal protections against the intrusions inherent in such actions. In effect, the giving of consent has been treated as a private transaction between individuals, thus rendering irrelevant such public law issues as the sufficiency of the peace officer's grounds for acting and the adherence to procedural prerequisites to intrusion.[164]

127. It is noteworthy that, judging by available decisions, few cases of "consent" search appear to be litigated. This may be attributable to a number of factors, including the traditional absence of an exclusionary principle in Canadian evidence law, the possibility that in the presence of consent police activity may be less injurious than in its absence, and the improbability of the individual challenging the legality of the actions of peace officers to whom he previously has given his consent. The search cases, such as *Reynen* v. *Antonenko*,[165] in which the issue of co-operation was raised, often contain little analysis on point beyond the simple conclusion as to

whether the individual did or did not co-operate with the police. As a result, the law of "consent" search must be inferred from the law of consent generally. In some aspects this is unfortunate, since a number of issues are cast in a new context by virtue of the fact of a police investigation. These issues include the notions of true, limited and informed consent, the problem of proving consent, and perhaps foremost, the question of consent by a party other than the suspect himself. While these issues have been litigated extensively in American case-law on the Fourth Amendment, they have hardly been touched in Canadian search and seizure law.

128. This is not to say that there are no guidelines with which Canadian peace officers may resolve these issues in practice. Some police forces have established their own procedures to guide officers wishing to perform "consent" searches, particularly of premises. Some divisions of the R.C.M.P., for example, have instructed officers to use documentary consent forms, which both potentially alert the individual to his right to refuse consent, and provide evidence of consent if the issue is raised after the fact. The discretionary basis upon which police forces have adopted such practices, however, points out the wide gaps in existing Canadian law.

C. Entry to Prevent Danger to Life or Safety

129. In its Report, the Canadian Committee on Corrections stated:

> We think that a police officer presently has the right to enter premises, including a dwelling house, by force if necessary, without a warrant, to prevent the commission of an offence which would cause immediate and serious injury to any person, if he believes on reasonable and probable grounds that any such offence is about to be committed.[166]

This power appears to be related to the broader historical role of the peace officer as a keeper of the peace, a role that finds expression today in sections 29 and 30 of the *Criminal Code*. Although certain preventive aspects of this peacekeeping role fall outside the ambit of criminal law enforcement (and hence outside this paper), the role does touch on suppression of violent criminal breaches of the peace such as assaults. The occurrence of such breaches, encompassed by

the historical term "affrays", has been viewed in Anglo-Canadian law as sufficiently urgent to justify immediate police entry onto private premises. While to some extent this power of entry has been associated with eventual arrest of the "affrayer", it is not the prospect of arrest that justifies the entry; rather, it is the preservation of the peace itself.[167] In a recent Canadian case, the power was phrased in investigative terms: two police officers were afforded a defence to a trespass action on the basis that they were "investigating a complaint" relating to a "possible breach of the peace".[168]

130. Since this power could permit the peace officer to enter premises without a warrant to rescue persons unlawfully detained, it might be considered to constitute in part a warrantless search and seizure power. It might also appear to entitle entry onto premises to disarm persons possessing a firearm in dangerous circumstances. However, the vagueness of the power has made it an unreliable basis of authority in the eyes of the police. It was partly in response to such uncertainty that the warrantless weapons search provisions of subsection 101(2) of the *Criminal Code* were introduced. A recent report on gun-control legislation prepared for the Solicitor General concludes:

> Peace officers have often conducted search and seizure without a warrant in situations of perceived danger. But, reliance had to be placed on the common law which was, at times, somewhat unclear as to the authority of such acts. The section [101(2)] removes any ambiguity about the legality of such acts.[169]

The presence of subsection 101(2) appears to have eliminated resort to the common law power for this purpose.

II. Statutory Powers

131. The pattern of the growth of statutory search and seizure powers can be traced to English enactments of statutory search powers, passed in the first days of the Restoration. With the movement to parliamentary sovereignty, the resort to the common law to expand these powers had been cut off.[170] Indeed, with the demise of the Star Chamber in 1641 and the emasculation of royal proclamations, the primary expression of all sovereign powers had

come to reside in legislation.[171] Confronted with a problem demanding the assertion of these powers, the tendency of Parliament was to address it with a comprehensive scheme, of which the power to search was an integral, yet incidental part.[172] As more and more social problems demanded and received parliamentary attention, enforcement structures in general, and powers of search and seizure in particular, began to multiply.

132. In the context of criminal law enforcement, the significant impetus for legislative response came during the dramatic urban crime wave of the eighteenth century. By 1718, London had become lamented as a "receptacle for a Den of Thieves and Robbers and all sorts of villainous Persons and Practices".[173] As crime persisted over the next century and a half, the English Parliament replied with a rash of legislation notable, for our purposes, for its introduction of the first generation of crime-related statutory warrants: provisions covering larceny, counterfeiting, vagrancy, explosives and firearms, gaming- and bawdy-houses, and possession of stolen goods. As will be detailed momentarily, many of these provisions were imported into colonial legislation. On the eve of Confederation, the Province of Canada possessed an amalgam of search and seizure powers as diverse, for the most part, as that of its English parent.[174] It was only after the movement for reform in Britain had culminated in the drafts of the Criminal Code Bill Commission in 1880, that Canada took a significant step: the implementation of its own consolidated *Criminal Code* in 1892.

133. In the context of search and seizure powers, this development introduced the sweeping provisions of what has since become section 443 of the *Criminal Code*. These warrant provisions not only embraced all property relating to criminal offences; they also expanded the classifications of seizable objects to include evidence of an offence, and things intended to be used for offensive purposes. The 1892 codification did not collapse all warrant provisions into one. A number of special warrants were retained and indeed others were subsequently introduced to deal with the particular problems of narcotics and drugs, and with the distribution of offensive publications. The creation of this virtually universal warrant provision, though, had the effect of laying a comprehensive foundation for authorizing crime-related searches when and where they became necessary. As a result, the Canadian experience since 1893 has differed markedly from that of the British, who have persisted in the course of restricting warrant provisions to specifically aimed legislation.[175]

134. While the section 443 warrant is thus something of a historical late comer, it is by virtue of its comprehensiveness the logical starting point for an exposition of present statutory provisions.

A. Section 443 and Other General Provisions

135. Subsection 443(1) of the *Criminal Code* reads:

> A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (*c*) 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,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

136. The origin of this provision has already been noted.[176] In the years since its introduction, it has come to epitomize, through judicial interpretation, the features of judiciality and particularity that we identify as essential to the warrant. The "judiciality" aspect is concentrated primarily in the "reasonable ground to believe" that must be expressed in the information; reviewing courts have in effect predicated the justice's "judicial" performance upon the ascertainment of such grounds.[177] The "particularity" requirement pertains to the elements that are requisite to the process: the thing sought, the offence to which it relates, and the "building, receptacle or place" to be searched. The detail with which these elements must be specified, merely implicit in the section itself, has been outlined at great length in the case-law; the list of things sought, for example, is required to be described so as not to leave the peace officers who execute the warrant with any discretion as to what to seize.[178]

137. While the primary authority for the execution of the search is the warrant itself, there are several statutory rules worth mentioning. As subsection 443(1) indicates, the warrant may be executed by either a peace officer or another "person named therein". This evident inclusion of members of the public marks an expansion of the common law rule, according to which the justice was constrained to issue warrants to constables, although private complainants could accompany the officer in order to help identify the stolen property. However, case-law has confined powers of private execution by precluding a private applicant from executing a warrant issued on his own information.[179]

138. Section 444 states that the warrant "shall be executed by day, unless the justice, by the warrant, authorizes execution of it at night". This actually represents a modification of the common law position that prohibited nocturnal searches, both for their "great disturbance" and the apprehension that under the cloak of darkness robberies could masquerade as searches with warrant.[180] Still, the preference for daytime searches remains. There is, on the other hand, no statutory mention of a deadline for making the search after the warrant has been issued, although there have been hints in the jurisprudence that the justice issuing the warrant may limit the date for execution.[181]

139. Finally, there is the matter of what may be seized. Section 445 reads:

> Every person who executes a warrant issued under section 443 may seize, in addition to the things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence, and carry it before the justice who issued the warrant or some other justice for the same territorial division, to be dealt with in accordance with section 446.

This is a feature peculiar to the section 443 warrant; it was introduced into the *Criminal Code* in the 1953-54 revision, despite some concern expressed in parliamentary committee that it violated the principle of particularity inherent in the warrant for the "common sense" purpose of avoiding duplicative issuance procedures.[182] In addition to this general provision for additional seizures, the execution of a section 443 warrant triggers the operation of section 447, which provides for seizure and disposition of explosives intended to be used for unlawful purposes.

140. One legal issue that has been raised consistently in connection with section 443 is its application to statutes other than

the *Criminal Code*. It is clearly inapplicable to offences created by a provincial enactment in the absence of specific provisions to the contrary by the provincial legislature.[183] A measure of disagreement has arisen, however, over its applicability to other federal statutes through the operation of subsection 27(2) of the *Interpretation Act*.[184] Although strong arguments may be made for a position restricting the operation of section 443 to the *Criminal Code* itself, the prevailing view at this time would appear to be that section 443 may be used to enforce another statute unless the other statute provides otherwise, either expressly or by implication.[185] For the purpose of this paper, this issue has significance for its impact upon narcotic and drug searches. In the *Goodbaum* case, it was held that since the *Narcotic Control Act* contained its own code of search, seizure and forfeiture, the provisions of section 443 were excluded by implication.[186] Consequently, the narcotic and drug search and seizure provisions discussed below are not, unlike the other special warrants, alternatives to proceeding under section 443. Rather, their existence has at least theoretically precluded resort to section 443 in response to the commission of narcotic and drug offences.

B. Gaming- and Bawdy-House Provisions

(1) *Subsection 181(1)*

141. Subsection 181(1) of the *Criminal Code* provides that:

> A justice who receives from a peace officer a report in writing that he has reasonable ground to believe and does believe that an offence under section 185, 186, 187, 189, 190 or 193 is being committed at any place within the jurisdiction of the justice may issue a warrant under his hand authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence under section 185, 186, 187, 189, 190 or 193, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before him or before another justice having jurisdiction, to be dealt with according to law.

The offences encompassed by this subsection relate to the use of a common gaming- or betting-house (section 185), betting, pool-selling and bookmaking (section 186), placing bets on behalf of others (section 187), lotteries and games of chance (sections 189 and 190),

and the use of a common bawdy-house (section 193). Things seized under the subsection may be declared forfeited under subsection 181(3) after the expiration of thirty days or when they are no longer required as evidence.

142. This warrant is traceable to a number of measures instituted in the mid-eighteenth century to deal with the "wandering poor" and regulate activities thought to inspire criminal tendencies. As Leon Radzinowicz points out in *A History of English Criminal Law*: "In some ill-defined way, idleness, drunkenness or immorality came to be regarded as immediate causes of crime and therefore in themselves direct threats to stability".[187] The search warrants included in these measures were thus enforcement mechanisms for provisions that were seen not as defining serious criminal activity, but rather as preventing serious criminal activity. The legislative strands that run from these early warrants into the present section 181 are quite complex. It is possible nevertheless to discern quite readily how this bewildering history has given rise to the two major idiosyncrasies of the present warrant: the authority to seize persons found on the premises searched, and the use of the "report in writing".

143. The seizure of persons was actually the focus of the earliest warrants of this genre. Poor-law legislation of 1744 and 1752 referred to sweeping searches with warrant for idle and disorderly "rogues and vagabonds".[188] These were essentially arrest warrants; persons rounded up in the search were brought before justices and examined as to their means of livelihood. The 1752 legislation also included arrest warrants for the keepers of bawdy- and gaming-houses. The association of idle, disorderly persons with these locales was eventually exported to Canada where it was carried right into post-Confederation legislation.[189] As time progressed, this legislation expanded to include seizures of gaming equipment and evidence of the relevant offences.[190]

144. The existence of arrest and search powers in the same provision may seem curious. The true anomaly of the provision, however, is that the seizure of persons is no longer simply a custodial exercise. An 1854 increment to English gaming legislation enabled justices to submit the "found-in" to a compulsory examination on oath, thus giving the seizure an investigative aspect.[191] This aspect is retained in present section 183, which reads, in part:

> (1) A justice before whom a person is taken pursuant to a warrant issued under section 181 ... may require that person to be examined on oath and to give evidence with respect to

(*a*) the purpose for which the place referred to in the warrant is or has been used, kept or occupied, and

(*b*) any matter relating to the execution of the warrant.[192]

145. The "report in writing" procedure originated in 1839 English police legislation. The original provision was extremely complex, reflecting the tensions between the recently created Metropolitan Police Force and the justices of the peace. Basically, the scheme internalized the application procedure within the Force. After receiving a report from a superintendent as to the existence of a gaming-house, the police commissioners were empowered to issue an order in writing permitting a search of the premises. Some formal power, however, was ceded to the justices; appended to the report were compulsory complaints upon oath, sworn by informant-citizens before a regular local magistrate.[193]

146. If this purely formal role for the justice seems to represent an obvious departure from the "judicial" aspect of warrant procedure, it must be observed that the procedure at this time involved no actual warrant. Rather, it was essentially a two-way communication up and down the police chain of command: the "report" to the superior, the "order" to the inferior. The word "warrant" did not enter the section until long after it had been transplanted to Canada; it first appeared in the 1953-54 revision of the *Criminal Code*. By this time, the justice of the peace had come to play a decision-making, rather than on oath-administering, role in the process. In fact, the citizens' oath requirement had been eliminated in England in 1845, before the scheme ever crossed the Atlantic.[194] With the elimination of the police hierarchy from the authorization procedure, the transformation was virtually complete: the section contemplated a simple relationship between peace officer as applicant, and justice as issuer. The only amendment remaining to bring the scheme in line with a true warrant model was to replace the "report" with an information, yet this amendment was never made.[195]

147. The applicant for a section 181 warrant need not present the actual reasonable grounds for his belief in the written application. He must only report that he "has reasonable ground to believe and does believe". The requirement for any degree of factual assertion in the application vanished with the citizens' complaint under oath in the early English revisions. It is worth noting that the case-law has attempted to remedy these omissions somewhat. In the *Royal Canadian Legion* case, it was held that the proper exercise of judicial discretion required the justice to inquire into the basis of the

reporter's belief that grounds existed for the issuance of the warrant.[196]

(2) *Subsection 181(2)*

148. Subsection 181(2) of the *Criminal Code* reads:

> A peace officer may, whether or not he is acting under a warrant issued pursuant to this section, take into custody any person whom he finds keeping a common gaming house and any person whom he finds therein, and may seize anything that may be evidence that such an offence is being committed and shall bring those persons and things before a justice having jurisdiction, to be dealt with according to law.

Like the powers of search with warrant in subsection 181(1), this provision feeds into the forfeiture provisions of subsection 181(3).

149. Subsection 181(2), by its own wording, applies "whether or not" a peace officer is acting under a warrant. However, its powers add little to the warrant. Since it confers no express power of "search", subsection 181(2) cannot be said to authorize warrantless entry onto suspected premises; it merely gives certain discretion to officers otherwise present, whether by warrant or invitation. The particulars of this discretion are largely congruent with the provisions of subsection 181(1). There is little significance to the specific power to seize the person "found keeping" the premises in subsection 181(2); insofar as the keeper could be expected to be found on the premises anyway, he could be seized under subsection 181(1) as a found-in. And while the seizure of "evidence" under subsection 181(2) is not restricted expressly to items found therein, case-law has narrowed the significance of this distinction. In the *Chew* case, it was held that subsection 181(1) only permitted seizures of evidence concurrent in time with the committed offence:

> What this subsection clearly contemplates, in my view, is the type of situation in which a raid is made upon gaming premises, and it empowers the police in such a situation to arrest keepers and found-ins and to seize, with or without a search warrant, anything which might go to show that a relevant offence is being committed at the time the arrests and seizures are made.[197]

(3) *Women in Bawdy-Houses*

150. Subsection 182(1) of the *Criminal Code* reads:[198]

> A justice who is satisfied by information upon oath that there is reasonable ground to believe that a female person has been enticed to or

is concealed in a common bawdy-house may issue a warrant under his hand authorizing a peace officer or other person named therein to enter and search the place, by day or night, and requiring her and the keeper of the place to be brought before him or another justice having jurisdiction to be kept in custody or released as he considers proper.

151. This provision dates back to the English sexual offences legislation of 1885. Although common prostitutes had long since been liable to seizure under anti-vagrancy laws, this warrant legislation was ostensibly protective rather than condemnatory in nature. It reflected what had become by the late nineteenth century a growing concern with the sexual exploitation of young girls, particularly those from the lower classes, who were sold as prostitutes by economically needy relatives. Having defined new laws prohibiting exploitation of young girls and coerced detention of women for immoral purposes, the legislators turned to the warrant as an enforcement tool.[199] In a series of legislative developments over the next fifty years, the warrant provision was incorporated into Canadian law.[200]

152. The procedure set up under this section appears generally to follow the traditional model. It incorporates an information upon oath disclosing reasonable grounds and entrusts the decision to issue to a justice. Like a section 443 warrant, it may be executed by a person other than a peace officer; it differs, however, in that it may be executed "by day or night". The most remarkable aspect of the warrant, however, is the requirement that, like found-ins, and indeed their own "keepers", rescued women may be subjected to compulsory examination by a justice under section 183. This, and the power of the justice to keep a woman in custody or release her "as he considers proper" suggests at the least an aspect of an arrest beneath the semblance of the rescue operation that the provision presents.[201]

C. Narcotics and Drugs

153. Section 10 of the *Narcotic Control Act*[202] reads in part:

(1) A peace officer may, at any time,

(*a*) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic

by means of or in respect of which an offence under this Act has been committed;

(*b*) search any person found in such place; and

(*c*) seize and take away any narcotic found in such place, any thing in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence.

(2) A justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.

(3) A judge of the Exchequer Court of Canada shall, upon application by the Minister, issue a writ of assistance authorizing and empowering the person named therein, aided and assisted by such person as the person named therein may require, at any time, to enter any dwelling-house and search for narcotics.

154. The provisions of subsections 37(1) to (3) of the *Food and Drugs Act* apply a similar regime to searches and seizures for "controlled" drugs. The one difference between the *Narcotic Control Act* and the *Food and Drugs Act* regimes is that under paragraph 1(*c*) of the latter, a peace officer is empowered to seize only "any controlled drug found in such place and any other thing that may be evidence" that an offence related to controlled drugs has been committed. Given the wide coverage of "evidence", however, it is unlikely that there is much significance in the omission from the *Food and Drugs Act* regime of the reference to containers or things "by means of or in respect of which" an offence has been committed. Finally, section 45 of the *Food and Drugs Act* applies section 37 *mutatis mutandis* to situations involving "restricted" drugs. Thus, it may be perceived that searches and seizures of narcotics, controlled drugs and restricted drugs are governed by a set of statutory provisions that are virtually identical except in the specification of the types of contraband involved.

155. Two significant points emerge from a reading of these regimes. First, in the case of authority to search a dwelling-house, the warrant is only an alternative to the writ of assistance. Second, no documentary authority of any kind is necessary when the place to be searched is not a dwelling-house.

156. The presence of alternatives to warrant procedures is the product of a historical trend, reflecting the escalation of government concern in the area. The concern began in response to the perceived opium practices of Oriental immigrants to British Columbia at the turn of the century. The years following saw a crusade against narcotics which, as MacFarlane has detailed in his study of drug legislation,[203] occurred in a climate of sensationalism created by both politicians and the press. This account of marijuana use was current in the 1920s, for example:

> Addicts to this drug, while under its influence, are immune to pain, and could be severely injured without having any realization of their condition. While in this condition they become raving maniacs and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility.[204]

Three decades later the intensity of the language had hardly abated; future Prime Minister John Diefenbaker called trafficking in narcotics "murder by instalment".[205]

157. It is not surprising, therefore, to note the increase in the severity of enforcement powers attached to narcotics and drugs legislation. In 1911, a magistrate could issue a warrant to search for illegal narcotic drugs.[206] By 1923, peace officers had acquired the power to search premises other than dwelling-houses without warrant.[207] The final dilution of the warrant's authority in narcotics cases came in 1929 when Parliament agreed to utilize the writ of assistance as an enforcement tool.[208] Similar provisions were enacted with respect to expanded categories of illegal drugs in 1961.[209]

158. The issuance of warrants under the *Narcotic Control Act* and the *Food and Drugs Act* provisions has been treated as a judicial function, analogous to issuance under section 443. Indeed, the courts have developed special requirements of particularity, insisting that the prohibited substance be sufficiently identified and that one enactment only be invoked in any individual case.[210] These meticulous legal standards, however, may be contrasted with several discretionary powers associated with *Narcotic Control Act* and *Food and Drugs Act* searches, both with and without warrant, as well as in the writ of assistance. For example, under subsections 10(4) and 37(4) of the two regimes, officers executing narcotics and drugs searches are given special, virtually unrestricted discretion to break through obstructive surfaces and containers.

159. What is truly striking about the structure of powers in these provisions is the inconsistency among the various tests

governing the different types and stages of intrusion. The authority to enter and search a dwelling-house is dependent upon the belief that a prohibited substance, and not merely evidence of a relevant offence, is on the premises. However, once inside the door, the peace officer may seize a wide variety of things, including items of merely evidentiary value. The matter is complicated even further, however, in the case of warrantless searches.

160. The complication pertains to the grammatical structure of paragraph 10(1)(*a*) of the *Narcotic Control Act*, duplicated in paragraph 37(1)(*a*) of the *Food and Drugs Act*. The placement of the words "in which he reasonably believes there is a narcotic" after the clause relating to the search with a warrant or writ raises the possibility that no reasonable grounds are needed to support a warrantless search of a non-residential place or, for that matter, the search of "any person found in such place" as permitted by paragraphs 10(1)(*b*) and 37(1)(*b*). However, the lower court authority on point has rejected this interpretation, expressing a reluctance to recognize such sweeping police powers in the absence of unambiguous statutory language requiring such recognition. In the *Jaagusta* case, for example, the British Columbia Provincial Court denied the validity of a random drug search of an individual performed pursuant to a vehicle stop.[211] In the course of judgment, Goulet D.C.J. rejected the wide interpretation of subsection 10(1) that would have allowed such a search on a discretionary basis. Such an interpretation, it was held, "would in effect legalize the most unreasonable and arbitrary searches of individuals".[212] The ratio of the decision, and others like it,[213] however, appears to be restricted to cases in which the individual searched is *not* in a place in which drugs or narcotics are reasonably believed to be present. Once such a belief exists with respect to the place, both the place itself and all individuals found inside it are subject to search. Similarly, when the premises are searched with a warrant or writ, there seems to be no restriction in the statute as to searches of persons found therein.

D. Obscene Publications, Crime Comics and Hate Propaganda

161. Subsection 160(1) of the *Criminal Code* reads:

> A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which

are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of the copies.

Subsection 281.3(1) of the *Criminal Code* reads:

> A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing seizure of the copies.

Following seizure in both cases, a summons is issued to the occupier of the premises requiring him to show cause why the matter seized should not be forfeited to the Crown. Because the adjudication at the show-cause hearing focuses not upon the guilt of the possessor but upon the status of the seized materials as obscene publications, crime comics or hate propaganda, as the case may be, the provisions are often described as *in rem* proceedings.

162. The significant departure from section 443 that these provisions effect is that they allow seizure of *all* allegedly offensive material, and not merely samples that may serve as evidence. This distinction was made clear in the *Nimbus News and Distributors Ltd.* case,[214] in which the Court allowed the Crown to retain only four copies of each allegedly obscene publication seized under what is now section 443. If a section 160 warrant had been used instead, the Crown would not have been so limited. Thus, the warrants have a preventive aspect, ensuring that the materials will not enter public circulation while their legal status is being determined. This preventive aspect of the procedure may be perceived as serving two interests: keeping the materials out of public circulation, and, particularly in the case of obscene publications, curtailing the distributor's profits.[215]

163. The preventive aspect of the section 160 warrant was indeed one of the virtues described by the then Justice Minister, E. Davie Fulton, when he introduced it to the House of Commons in 1959.[216] Moreover, by providing a procedure that would work "quickly, fairly and objectively", the new warrant was said to avoid the delay consequent upon making a regular seizure and then waiting until trial to obtain an adjudication. There was a *quid pro quo* in this, of course: the absence of a charge. As Fulton commented,

> We are really providing nothing different here except that it [the amendment] will make it possible to dispose of the issue without laying a charge against the individual.[217]

Indeed, under subsection 160(7) no charge may be laid with respect to publications confiscated under the warrant, without the consent of the Attorney General.

164. The section 160 warrant was enacted into the *Criminal Code* in 1959. The particular timing of its introduction was related to two factors. First, the 1950s in Great Britain saw considerable focus upon the obscenity issue, culminating in the *Obscene Publications Act 1959*, which included an *in rem* procedure virtually identical to that found in the Canadian legislation.[218] Second, the speeches of the then Minister of Justice indicate that law enforcement officers in Canada found the existing law obsolete.[219]

165. The introduction of the section 281.3 warrant eleven years later followed a similar perception of a social crisis inadequately answered by existing legislation. The Special Committee on Hate Propaganda, formed in 1965, noted the presence of "a steady dissemination of hate propaganda, mainly anti-Jewish, anti-Negro and neo-Nazi in nature".[220] Following its recommendations, new offences were defined to prohibit the advocacy of genocide and public incitement of hatred against identifiable groups. The Committee also recommended that "study be given to the matter of the seizure of hate materials and of their confiscation, after conviction".[221] Rather than making confiscation attendant on conviction, however, the actual legislation adopted an *in rem* procedure, virtually identical to section 160, except in two respects. First, under subsection 281.3(7), the warrant procedure cannot be commenced without the consent of the Attorney General. Second, the consent of the Attorney General is not apparently necessary after seizure in order for charges to be laid under the substantive sections.

166. The issuance procedure for the warrants under these sections bears some resemblance to that under section 443: an information is sworn upon oath, and the same probative test of "reasonable ground to believe" is expressed. On the other hand, the issuer is not merely a justice of the peace, but a "judge" of one of a number of courts of record, depending upon the province. Paradoxically, though, it would appear that despite his higher rank, the judge, unlike the justice in other crime-related warrant procedures, is given no discretion in the matter. Once the prerequisites for issuance are satisfied, it is stated that he "shall" issue the warrant.

E. Weapons

167. Searches and seizures of weapons are covered by sections 99 to 101 of the *Criminal Code*. Basically, these sections encompass one power of search with warrant (subsection 101(1)) and three powers of search without warrant (subsections 99(1), 100(1) and 101(2)).

168. The statutory trend towards warrantless searches for weapons has been fairly recent. Individual post-Confederation powers to search for and seize gunpowder, arms and explosives were generally authorized through warrant procedures, or in association with arrest.[222] Many of the warrants were subsumed in the 1892 codification under the wide provisions of what is now section 443, although some special disposition procedures were retained. The first significant crack in the dam came in 1913 in a package of legislation designed to combat what the then Minister of Justice, C. J. Doherty, termed "a very large increase in the crimes of violence".[223] An officer was empowered to search "any person whom he has reason to believe and does believe has upon his person any [prohibited] weapon, device or contrivance". The warrant remained the general device for searching premises, however, until the 1953-54 revision, when the antecedent to the present section 99 was passed.[224]

(1) *Subsection 99(1)*

169. Subsection 99(1) of the *Criminal Code* reads:

> Whenever a peace officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of this Act relating to prohibited weapons, restricted weapons, firearms or ammunition, he may search, without warrant, a person or vehicle, or place or premises other than a dwelling-house, and may seize anything by means of or in relation to which he reasonably believes the offence is being committed or has been committed.

Weapons and explosives seized under this provision are forfeited if and when a court determines, pursuant to section 446.1,[225] that they were connected to the commission of an offence.

170. Although subsection 99(1) is expansive compared to its statutory antecedents, it is limited in some significant respects. First, the section does not authorize searches of dwelling-houses. Second, the search powers it confers are restricted by certain common law

safeguards against unjustified intrusions. In particular, it only allows the peace officer to act in response to an offence he reasonably believes has been initiated. It thus does not provide the scope of "stop and frisk" provisions under which persons believed to be "about to commit an" offence may be searched for weapons.[226] Although a study prepared for the Solicitor General in 1975 recommended that section 99 be given greater prospective scope, allowing searches for firearms "about to be used illegally",[227] this modification was not made. Instead, as will be detailed shortly, preventive concerns have come to be expressed in section 101.

(2) *Subsection 100(1)*

171. Subsection 100(1) of the *Criminal Code* reads:

> Notwithstanding section 99, a peace officer who finds
>
> (*a*) a person in possession of any restricted weapon who fails then and there to produce, for inspection by the peace officer, a registration certificate or permit under which he may lawfully possess the weapon,
>
> (*b*) a person under the age of sixteen years in possession of any firearm who fails then and there to produce, for inspection by the peace officer, a permit under which he may lawfully possess the firearm, or
>
> (*c*) any person in possession of a prohibited weapon,
>
> may, unless in a case described in paragraph (*a*) or (*b*) possession of the restricted weapon or firearm by the person in the circumstances in which it is so found is authorized by any provision of this Part, seize such restricted weapon or firearm or such prohibited weapon.

Like subsection 181(2), this is manifestly a "seizure" power that does not authorize entry into private domains. After seizure, a weapon may be declared forfeited pursuant to a magistrate's order under subsection 100(3).

172. This provision was originally introduced in the 1930s, as weapons legislation began to concentrate on trafficking in firearms, and in particular the sale of guns to minors. The predecessor to subsection 100(1) was part of this program; it specifically focused on the seizure and forfeiture of weapons illegally carried by minors.[228] As gun control legislation grew more complex in subsequent years, the seizure and forfeiture provisions came to embrace prohibited and restricted weapons as well. Still, like subsection 99(1), the operation of these provisions is restricted to circumstances indicative of the commission of a firearms offence.

(3) *Section 101*

173. Section 101 of the *Criminal Code* reads in part:

> (1) Where, on application to a magistrate made by or on behalf of the Attorney General with respect to any person, the magistrate is satisfied that there are reasonable grounds for believing that it is not desirable in the interests of the safety of that person, or of any other person, that that person should have in his possession, custody or control any firearm or other offensive weapon or any ammunition or explosive substance, the magistrate may issue a warrant authorizing the search for and seizure of any firearm or other offensive weapon or any ammunition or explosive substance in the possession, custody or control of that person.
>
> (2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds for believing that it is not desirable in the interests of the safety of that person, or of any other person, that that person should have in his possession, custody or control any firearm or other offensive weapon or any ammunition or explosive substance and that the danger to the safety of that person or other persons is such that to proceed by way of an application under subsection (1) would be impracticable, the peace officer may without warrant search for and seize any firearm or other offensive weapon or any ammunition or explosive substance in the possession, custody or control of that person.

174. The powers of search and seizure contained in section 101 are manifestly preventive; they are triggered not by the perception that an offence has been initiated but by an assessment of the interests of safety. This feature puts subsections 101(1) and (2) in direct contrast with section 99 and subsection 100(1). To some extent, the provisions have been viewed as complementary:

> Of the four provisions, two (ss. 99 and 100) deal with actual breaches of the Code, and accordingly relate predominately to the reduction and discouragement of criminal usage. The remaining two [ss. 101(1) and 101(2)], apply to situations of *apprehended* danger rather than criminal activities *per se*. Accordingly, they relate more to the objective of reducing access to irresponsible users, i.e., prevention.[229]

As laudable as this objective may be, the departure represented by subsections 101(1) and (2) from conventional crime-related search and seizure powers cannot be overemphasized. It is not even a prerequisite of intrusion under these subsections that a person be believed to be in possession of a weapon. It need merely be believed that he *ought not* to possess a weapon.

175. Section 101, although enacted in its present state in 1977, may be traced back to gun control legislation introduced nine years earlier which provided for a warrant to "seize" firearms in the interests of safety.[230] The target of the warrant provision at that time was described by the then Minister of Justice, John Turner, in quite narrow terms: the threat posed by the possession of weapons and explosives by persons of unsound mind.[231] This warrant provision, however, was limited in certain respects. As was recognized in the *Colet* case, it did not authorize the intrusive *searches* or *entries* necessary to effect the relevant seizure.[232] Rather, it seemed to assume that the presence of the weapon had been ascertained before any intrusion took place. Moreover, the requirement that a warrant be obtained made the provision of little use to a situation of particular concern to the police: the domestic or neighbourhood dispute in which a weapon was accessible.[233] Accordingly, in 1977, the provision was expanded to include an express search power, and a warrantless provision designed to meet the emergencies of neighbourhood and domestic disputes was added as well.

176. As it currently stands, section 101 may be said to have two distinct aspects. The first of these is directed to law enforcement in an immediate sense — the need to defuse a dangerous situation by depriving a person of a weapon that he might use to commit a crime. The second appears to be of the more lasting regulatory nature that characterized the 1968 legislation — to ensure that weapons are not possessed by persons who should not be in possession of them. This latter concern is reflected not only in the search and seizure provisions themselves, but also in the *in rem* aspects of the section, which in many ways reflect the procedures under sections 160 and 281.3. At a hearing initiated by the Crown under subsection 101(4), a magistrate is empowered to determine whether, "in the interests of safety", the person should have weapons in his possession. Upon making a negative finding, the magistrate may, under subsection 101(6), order the weapon to be disposed of on fair and reasonable terms and/or prohibit the possession of a weapon by that person for up to five years.

177. Beyond the significant departures from normal standards represented by the grounds for intrusion and the *in rem* procedures, the subsection 101(1) warrant presents other special features. Unlike the warrants previously mentioned, it could be construed to authorize the search of a person.[234] It must be obtained, not by an information upon oath, but by "an application to a magistrate made by or on behalf of the Attorney General". No reference is made to the

swearing of an oath during the application proceedings, although the magistrate is specifically required to hear evidence at the "disposition" hearing. No time limitations are imposed upon the execution of the warrant, but paragraph 101(3)(*a*) requires that a return be made to the magistrate forthwith after seizure, showing the date of execution.

F. Precious Metals

178. Subsection 353(1) of the *Criminal Code* reads:

> Where an information in writing is laid under oath before a justice by any person having an interest in a mining claim, that any precious metals or rock, mineral or other substance containing precious metals is unlawfully deposited in any place or held by any person contrary to law, the justice may issue a warrant to search any of the places or persons mentioned in the information.

Under subsection 353(2), the issuing justice is given powers to make detention, restoration or forfeiture orders with respect to things seized under subsection 353(1).

179. This search warrant is truly one of the curiosities of our criminal procedure. At first glance, it might appear to deal with stolen minerals, and indeed its origin was a provision in the 1869 Canadian *Larceny Act*. The context of the provision in that enactment, however, indicates a more peculiar purpose: it was at least partly an enforcement provision for an administrative scheme designed to prevent illicit trading in gold and silver.[235] The "unlawfulness" contemplated by the section thus included the failure to properly disclose, conduct or register a transaction in these precious commodities, as well as their theft. The administrative scheme, which had a tenuous relationship at best with truly criminal conduct, did not survive the 1892 codification. The warrant, however, was consolidated into the procedural section of the *Criminal Code*, where it has remained to this day.

180. The procedure envisaged by section 353 is quite similar to that contemplated under section 443. It does allow the search of persons, however, and restricts applications to "any person interested in a mining claim". Since the removal of the administrative scheme, it would appear that there has been only one *Criminal Code* provision to which the warrant has had particular reference: the offence of fraud in relation to minerals defined in section 352.

G. Timber

181. Subsection 299(3) of the *Criminal Code* reads:

> A peace officer who suspects, on reasonable grounds, that any lumber owned by any person and bearing the registered timber mark of that person is kept or detained in or on any place without the knowledge or consent of that person, may enter into or upon that place to ascertain whether or not it is detained there without the knowledge or consent of that person.

182. This provision for warrantless search bears some similarity to the warrant for precious metals in that it may be traced to a regulatory scheme over natural resources, established in the early days of Confederation.[236] While the essential facets of the timber-marking scheme have remained outside of criminal legislation, violation of the scheme was deemed serious enough to justify coverage in the 1892 *Criminal Code*,[237] and it has remained in the *Criminal Code* ever since. Relevant provisions in today's *Criminal Code* include the offences regarding timber marks in subsections 299(1) and (2), and the special rules of evidence set out in subsections 299(4) and (5).

H. Cocks in the Cockpit

183. Subsection 403(2) of the *Criminal Code* reads:

> A peace officer who finds cocks in a cock-pit or on premises where a cock-pit is located shall seize them and take them before a justice who shall order them to be destroyed.

184. This seizure power is traceable to early legislation against cruelty to animals, a cause strongly advanced in the Victorian era both in England[238] and in Canada. Cockfighting itself was singled out for attention in Canada in an 1880 package of legislation amending the existing *Cruelty to Animals Act*.[239] Under the new provisions, cocks found in a pit were forfeited to the municipality, which was then entitled to sell them for its benefit. Subsequently, the legislation prescribed that the birds be destroyed. The actual power to seize the birds was not made explicit until the 1953-54 revision of the *Criminal Code*, when the present wording was adopted. It is significant that under this wording an order for forfeiture, while required to be

pronounced by a justice, is mandatory upon presentation of the bird by the police officer.

I. Items Related to Counterfeiting

185. Section 420 of the *Criminal Code* reads:

> (1) Counterfeit money, counterfeit tokens of value and anything that is used or is intended to be used to make counterfeit money or counterfeit tokens of value belong to Her Majesty.
>
> (2) A peace officer may seize and detain
>
> (*a*) counterfeit money,
>
> (*b*) counterfeit tokens of value, and
>
> (*c*) machines, engines, tools, instruments, materials or things that have been used or that have been adapted and are intended for use in making counterfeit money or counterfeit tokens of value;
>
> and anything seized shall be sent to the Minister of Finance to be disposed of or dealt with as he may direct, but anything that is required as evidence in any proceedings shall not be sent to the Minister until it is no longer required in those proceedings.

186. The power conferred here is once again solely one of "seizure". The items covered are the paper and instruments with which possession offences relating to currency under the *Criminal Code* may be committed; possession of counterfeit money (section 408), for example, or the possession of counterfeiting machines, tools and instruments (section 416). The basis of seizure, however, is not simply that the relevant items are illegal to possess and ought to be forefeited to the State, as in the case of narcotics, gaming-house equipment, cocks in the cockpit and offensive weapons. Rather, the provision declares that ownership of the specified items resides in Her Majesty. Thus, the ostensible legal status of the seizure and disposition of the items becomes one of the State vindicating a right of property. Parliamentary debates occurring upon the provision's introduction in 1925 indicate that the purpose behind this feature was to ensure that, regardless of whether or not the possessor of the paper or instruments was convicted, they would remain under State control.[240]

CHAPTER THREE

The Need for Reform

187. Is the present assortment of crime-related search and seizure powers satisfactory? Simply by looking at the legal provisions themselves, their arrangement and the way they have grown, one may discern a number of fundamental problems.

I. Existing Problems

188. Rather than attempt to represent each individual difficulty relating to particular search and seizure provisions, we have attempted to condense and categorize our observations. This approach conforms with our objective in Part One of analyzing search and seizure provisions as a whole, and reflects our perception that many problems cut across the spectrum of existing laws in this area.

189. Adopting this approach, we perceive the following problems in law and practice:

(a) incoherence;
(b) anachronisms;
(c) expanded powers to intrude;
(d) the abandonment of the warrant;
(e) the gulf between law and practice;
(f) accountability problems; and
(g) constitutional problems.

A. Incoherence

190. Perhaps the first thing one notices about the assortment of available powers is that their features differ so greatly. This is particularly true in the case of warrants. Warrants are obtained through informations, applications and reports, and are issued by justices, judges and magistrates. While all but one of the procedures require the disclosure of "reasonable grounds to believe" on the written application, the structure of this belief varies widely from provision to provision. Section 443 of the *Criminal Code* requires a link between the items to be sought and an offence, primarily of an evidentiary nature. The *Narcotic Control Act* and the *Food and Drugs Act* provisions, however, exclude purely evidentiary items as objects of a warrant, and the belief requisite under section 181 of the *Criminal Code* does not relate to items, but simply to offences. While section 443 runs the gamut from offences past to offences future, section 181 is restricted to offences "being committed", and section 101 is related to no offence at all. And the list goes on.

191. In its Report entitled *Our Criminal Law*, the Law Reform Commission of Canada affirmed the value of rationality as a principle of substantive criminal codification:

> At present we have a complex, cumbersome collection of sections, many of which have been added from time to time *ad hoc*.... Such excess detail blurs the simplicity, obviousness and directness of the general message of the Code.[241]

Similar considerations ought to inform a discussion of procedural schemes such as search and seizure powers. A system of provisions with as many procedural quirks as the existing assortment of crime-related powers is really no system at all. Rather than a structure in the nature of a system, this assortment is truly a product of historical increment and, in many cases, accident.

192. The argument in favour of rational simplification is not simply a theoretical or aesthetic preference. An incoherent assortment of powers produces distinct practical consequences. First, it causes some degree of administrative confusion. This confusion is evident, for example, in decisions such as *Goodbaum*[242] and *Campbell* v. *Clough*,[243] which have invalidated search warrants for narcotics because of the use, incorrectly, of section 443 warrant forms. The instances that appear in the case-law are not atypical. In the Law Reform Commission's survey of police search warrant practices in Winnipeg, for example, it was found that both federal and

municipal forces were using warrant forms that attempted to straddle the requirements of section 443 of the *Criminal Code* and the *Narcotic Control Act* and *Food and Drugs Act* provisions. Of thirty-nine narcotic and drug warrants in the sample, twenty-six were found invalid, twenty-two of them by reason of a confusion of statutory requirements.[244]

193. Second, this incoherence admits the possibility of manipulation. Since procedural avenue *A* may recognize justifications for intrusion unavailable through other routes, the opportunity is presented to a peace officer with ingenuity to use procedural avenue *A* whether or not it was intended to serve the particular type of investigation being pursued. That officers often take advantage of these opportunities is hardly surprising, and in some cases quite understandable. For example, an officer investigating a drug trafficking offence may believe that documentary evidence is concealed in certain premises. Yet the existing *Narcotic Control Act* and *Food and Drugs Act* provisions do not allow him to obtain a warrant to search these premises unless he also believes the contraband itself is there. If the officer is not prepared to swear to this, his alternative in terms of warrant procedures is to resort to section 443 of the *Criminal Code*. Yet, after the *Goodbaum* case, it is clear that the section 443 warrant is unavailable for an offence under *Narcotic Control Act* and *Food and Drugs Act* provisions. Accordingly, he is frequently driven to allege the *Criminal Code* offence of *conspiracy* to traffic, an allegation that may or may not be properly founded.

194. The objective of coherence should not, of course, lead to obstinate single-mindedness; one ought not to disregard demands for specialized provisions in justifiable cases. However, a specialized provision ought only to complicate the picture when a convincing reason is made for it. Quite simply, the reasons for the procedural quirks of our various search and seizure provisions need to be comprehensively examined.

B. Anachronisms

195. Three hundred years after Sir Matthew Hale described the common law warrant for stolen goods, the basic procedure has changed remarkably little. Yet the circumstances that gave rise to the

features of Hale's warrant are in many cases no longer applicable. If the warrant document came into use as a measure for more efficiently transmitting the justice's authority and sparing him the ordeal of travelling in hazardous conditions, how efficient is it now in the light of modern methods of transportation and communication? There is considerable rigidity in the present documentary procedure. Not only does this represent a failure to assimilate technological advances, but it may also render the procedure increasingly ineffective as the technology used by lawbreakers becomes more sophisticated.

196. Another anachronism is the restriction of most search and seizure powers to "things", particularly in the case of those powers concerned with the recovery of the fruits of crime. The original common law search warrant developed by Hale was for stolen "goods". This focus on tangible objects was carried into subsequent provisions for search and seizure covering crimes of theft, including the present subsection 443(1) of the *Criminal Code*. This focus, however, excludes from coverage forms of property such as funds in financial accounts,[245] or information from computers,[246] which may also represent the fruits of a crime. This focus is explicable in large part by the historical concentration of theft and fraud offences on tangible goods;[247] indeed, until 1975 the offence of possession of property obtained by crime currently set out in section 312 was itself restricted to tangible things.[248] The expansion of these offences under criminal law to include intangible forms of property demands a modernization of search and seizure law as well.

197. Aside from such procedural considerations, there is the question of the contemporary validity of certain assumptions underlying special search and seizure provisions. Perhaps the foremost among these are the present gaming- and bawdy-house powers. The issue of whether these provisions reflect contemporary social attitudes to some extent involves the question of abolishing substantive offences as well as procedures.[249] But insofar as these powers manifest not only a recognition of the target activities as crimes but as evils justifying special procedural treatment, the assumptions underlying them merit particular examination here. On a more diminutive note, one might well question the value of the special provisions for precious metals. If the administrative system that the search power was largely set up to serve is no longer in place, what justification can there be for retaining it?

C. Expanded Powers to Intrude

198. The consistent trend in the growth of search powers has been to provide the State with more and more justifications for intruding into zones of individual privacy. Of course, this proliferation has not been restricted to police powers in the enforcement of criminal law. The past fifty years have seen a vast increase in the regulatory and redistributive roles played by government. Yet the increase of police powers is in a sense peculiar in that it has represented, not the assumption of a new role for the State, but rather the steady adjustment of rights and powers in order to fulfil a long-existing mandate. The conception of the State as keeper of the peace and protector of individual security has remained relatively constant in English and Canadian traditions over the past 300 years. What seems to have changed most radically is the relative weight accorded social, as opposed to individual interests and, correspondingly, the style of peace-keeping perceived as appropriate to maintaining the balance thus struck.

199. Many of the ways in which this situation has come about are taken for granted by Canadians as necessary for a well-policed society. Yet the fact is that other common law jurisdictions have been much more reluctant to make the concessions to law enforcement that Canadians have made. An illuminating and perhaps surprising example is that of the search warrant for "evidence of an offence" that is not itself stolen property or contraband. The recent British Royal Commission on Criminal Procedure recommended that, for the first time in Britain, orders and warrants be instituted to seize such evidence. It stated its recommendation, however, with considerable trepidation and qualifications, proposing that the compulsory power of search be one of last resort, invoked in exceptional circumstances, and available in respect only of grave offences.[250] That a section 443 warrant to search for any evidence of any *Criminal Code* offence has been in effect in Canada for ninety years illustrates the comparative ease with which search powers have expanded in this country.

200. One of the critical aspects of this expansion has been the shift from responsive to preventive policing. This distinction is to some extent arbitrary: as one R.C.M.P. inspector has noted, "[w]e *react* by introducing preventive measures in the same way as we react to crime through enforcement — after the fact".[251] However, the distinction is a meaningful one in that it has been at the heart of a

number of significant developments in the history of police powers in general, and search and seizure powers in particular.

201. The first search and seizure powers, predating the police, were essentially responsive to the commission of a crime; indeed they were closely tied to the powers to arrest the offender. The common law warrant for stolen goods envisaged the victim of the crime complaining to a justice, who would issue the warrant to bring the unlawful possessor before him, as well as return the property to the victim. At common law, the warrantless power of personal search was firmly associated with arrest. As the powers have expanded, this association has broken down.

202. The first great departure in warrant procedures from responsive search was effected by the proposal in the 1880 Draft Code covering things *intended to be used* for the purpose of committing an offence. Preventive as it may have been, this provision nonetheless retained the idea of focusing on specific criminal conduct as the justification for intrusion, albeit conduct about to occur. However, the most recent firearms provisions in section 101 of the *Criminal Code* are not so limited. Indeed, the "interests of safety" do not necessarily contemplate even the future commission of criminal conduct. Quite simply, the power afforded by section 101 makes the participants in the search and seizure process not merely preventers of crime, but also judges of what conduct or circumstances demand a preventive intrusion.

203. Another manifestation of expanding justifications for intrusion is the *in rem* proceeding. While section 160 is triggered by the commission of an offence — the keeping of obscene material for sale or distribution — the operation of section 281.3 is not (unless the keeping of publications for distribution constitutes an inchoate offence such as conspiracy or attempt to communicate hate propaganda). What is significant about these procedures, however, is that they represent a parallel system of adjudication outside the regular criminal process of charge, trial, conviction and sentence. Nobody is put on trial in an *in rem* proceeding; rather, it is the material itself that is on trial. Since crime is by its nature personal, the association between crime and intrusion is profoundly altered by the powers under these sections.

204. The shift in justifications to intrude has not been accompanied by any general assessment of its impact upon the balance between police powers and individual rights. Rather, the tendency has been to speak of each new power as striking this

balance in its particular context, without looking at how the larger picture is affected. The larger picture has been affected, though, and it is timely to give proper recognition to that fact. It is therefore important that the general principles that justify intrusive searches and seizures be articulated anew, and that departures from these general rules be recognized as such and analysed accordingly.

D. The Abandonment of the Warrant

205. Another noticeable trend, particularly in recent times, has been the creation of new and wider exceptions to warrant requirements, particularly insofar as intrusions into private domains are concerned. Historically, at common law, the only non-consensual searches of private premises that could be performed without warrant were associated with the power to arrest and the duty to preserve human life or safety. As statutory search powers have developed, however, reliance on the warrant has diminished, both in the cases of federal statutes in general, and crime-related search provisions for weapons, narcotics and drugs in particular. In a way, this trend complements the proliferation of justifications to intrude. Not only has the sequential context of intrusions been relaxed, but so have the procedural requirements for obtaining authority. Both phenomena reflect a trend toward conferring greater authority and greater discretion upon the police: the same intrusion powers as are appropriate for the investigation of crime are increasingly assigned for its prevention; and, correspondingly, the police have increasingly been left to decide for themselves when the exercise of their powers is justified.

206. Earlier in this paper, we noted that, however much it may be limited in theory by "reasonable grounds" requirements, a warrantless power represents a relatively discretionary mode of authorization.[252] In essence, the peace officer has come to acquire discretion, particularly with respect to entry onto private domains, of a breadth and variety unimaginable when the first common law powers of search and seizure were developed. When his coercive powers are combined with the opportunities recognized at law to perform searches on consent, the peace officer's range of discretionary options is formidable indeed.

207. The diminished significance of the warrant is not merely a matter of statutory preference; rather, it appears to be a fact of police

practice. Indeed, the addition of a warrantless provision to a search and seizure regime may virtually preclude the use of the warrant component. For example, since 1977, when the power to make warrantless searches and seizures under section 101 was introduced, it appears to have been used virtually to the exclusion of the section 101 warrant. This tendency has been defended on the basis that the neighbourhood and domestic disputes addressed by section 101 usually involve an emergency.[253] While it is possible that many of the warrantless entries made by virtue of subsection 101(2) might have been made on a peace-keeping basis even if the subsection had not been enacted, there is doubt, particularly in the light of the *Colet* case,[254] that all such entries would have been legal. Of more immediate significance, however, is that the enactment of subsection 101(2) has had the effect of diminishing police reliance on the warrant as the legal basis for entries into premises for the purposes of the section as a whole.

208. The use of warrantless alternatives to search privately occupied places is not restricted to matters involving firearms. In a recent participant-observer study in an Ontario jurisdiction, twenty-seven entries onto property were described; of these, ten were effected without a search warrant. While occupants of the premises were arrested in eight of the ten cases, it appears that the searches themselves often proceeded on a consensual basis.[255] This observation conforms with information received by our researchers in discussions with members of various Canadian police forces about searches of premises with consent. In fact, these discussions revealed a range of attitudes. Some officers took the view that obtaining warrants ought to be preferred in all possible cases, others maintaining that it is often permissible to attempt to gain consent before resorting to warrant procedures. Some police forces stated that consent to search private premises before obtaining a warrant would only be requested of persons arrested outside the premises in question. While the reported presence of consent of the occupant may appear to nullify concerns associated with the absence of a warrant, we believe that these instances raise problems of accountability, which will be discussed shortly.[256]

209. To some extent, the diminished significance of the warrant reflects not a preference for police control over decision-making so much as the conclusion that the inefficiencies of warrant procedures leave no other alternative. In some cases, this is a matter of speed; the warrant procedure is viewed as too slow to meet the exigencies of certain situations. Asked why, in cases of search with writ of

assistance, a warrant was not used instead, approximately 74% of officers responding to a Commission survey cited urgency of some sort as the reason.[257] For one thing, these claims reinforce the need to examine the inefficiencies in warrant procedures themselves. If obtaining a warrant can be technically facilitated without sacrificing its judicial and particular characteristics, then there is less need for alternative, more expeditious forms of authorization. But the arguments of necessity underlying the expansion of warrantless search and seizure powers themselves need to be examined carefully.

210. This question may be addressed with particular reference to specially focused powers, such as those provided to holders of writs of assistance. Defenders of the writ point to the peculiar difficulties experienced by narcotics and drugs investigators, in particular the frequent need for speedy authorization. An R.C.M.P. superintendent appearing before a parliamentary committee, for example, recently cited the "requirement for spontaneous action to allow us to intercept the drug itself".[258] While the special power to make a warrantless entry into private premises with a writ is obviously conducive to "spontaneous action", however, the question arises as to whether or not the use of the writ is necessary. A Commission study has concluded that the writ power may frequently be invoked when other more general options, such as the power of entry ancillary to arrest,[259] are available to the investigating officers.[260]

211. However, the larger question remains that of the justifiability of resort to warrantless powers rather than warranted ones. Both American statutes and jurisprudence on the Fourth Amendment express a preference for authorization by warrant, subject to provision for warrantless modes of authorization in justified instances.[261] Because of the Canadian history of warrantless search and seizure powers being developed one by one to address specific problems, this approach has not been explicitly cast as an informing principle of Canadian law. As indicated earlier this approach may be mandated by section 8 of the *Canadian Charter of Rights and Freedoms*; even if it is not, however, we view the approach as a sound and useful policy.

E. The Gulf between Law and Practice

212. Although the conformity of police practice with applicable legal rules is an important issue in many aspects of search and

seizure, it is perhaps most readily ascertained in the context of warrant issuance. This is largely due to the documentary nature of the procedure, which facilitates examination and evaluation. Accordingly, as part of our research programme, we examined practices of search warrant issuance over four-month periods in seven Canadian cities: Edmonton, Fredericton, Montréal, Saint John, Toronto, Winnipeg and Vancouver. The warrants covered by the survey only included those which could be issued by a magistrate or justice of the peace; hence, the survey was not designed to capture warrants issued pursuant to sections 160 and 281.3. Part of our purpose was to obtain a reliable assessment of the legality of search warrants issued in these cities. Accordingly, we assembled a panel of Canadian judges from superior and appellate courts to evaluate a stratified random sample of the application documents (informations or reports in writing) and warrants captured in our survey. Detailed results of these evaluations are presented elsewhere,[262] but the conclusion may be stated in simple terms: there is a clear gap between the legal rules for issuing and obtaining search warrants and the daily realities of practice.

213. The judicial panel rated 39.4% of the warrants included in their sample as validly issued, and 58.9% as invalidly issued, leaving 1.7% which could not be conclusively rated due to obscured or incomplete documentation.[263] The judicial panel found that fatal defects were most likely to occur in section 443 and *Narcotic Control Act* and *Food and Drugs Act* warrant documents. Only in the case of warrants issued under section 181 of the *Criminal Code*, the requirements of which are noticeably more lenient, did the valid warrants exceed the invalid ones.

214. What went wrong? The bases upon which the invalid warrants were found to be inadequate were usually more than formal. In fact, figures for both the written applications (informations or reports) and the warrants themselves were quite positive in terms of formal tests: of those which could be conclusively evaluated, 85.5% of the applications and 73.5% of the warrants were judged to be formally correct.[264] The formal deficiencies that did appear tended to be in *Narcotic Control Act* and *Food and Drugs Act* warrants, and were fairly significant in character. While there were some purely clerical errors, such as the inadvertent omission of a justice's signature, there were also consistent failures on the part of certain police forces to adhere to existing statutory requirements. For example, *Narcotic Control Act* and *Food and Drugs Act* provisions requiring that the executing officer be named in the warrant were frequently ignored both in Winnipeg and in Montréal.

215. The results turned more negative when probative and substantive tests were applied. In the case of section 443 and *Narcotic Control Act* and *Food and Drugs Act* warrants, the critical probative test is the presentation of reasonable grounds to believe — a test that basically ensures the "judiciality" of warrant issuance.[265] In 67.8% of the warrant applications conclusively evaluated, the judicial panel found the test satisfied; in 32.2%, it did not. If this bare maintenance of a 2:1 "judiciality" ratio is somewhat distressing, even worse is the statistical breakdown relating to the substantive requirements. These requirements, which largely maintain the "particularity" protections of the warrant,[266] identify the search by items to be seized, premises to be searched, and offences alleged. Only 53.8% of the conclusively evaluated applications were found to comply with legal standards in this respect; the corresponding figure for the warrants was 48.7%.

216. The general failure of the warrant documents to adhere to legal standards does not mean that most searches carried out under the warrants *could not* have been legally authorized. The fact that 61.6% of the executed warrants reported in the cross-country survey resulted in a seizure of the item or type of item specified in the warrant supports the inference that in many cases the police officers concerned had an adequate factual basis for their initiative to search.[267] Indeed, an analysis of the documents in the judicial panel sample shows no decisive relationship between the legality of the search and the eventual seizure of the specified item.[268] This argues against the possibility that the widespread illegality of the warrants is attributable to police decisions to search in inappropriate cases. Rather, the indication is that the problem resides with adherence to procedures. In other words, the necessary factual basis for a search may well exist, but the warrant is nonetheless being issued improperly.

217. Perhaps the most striking aspect of the results was the evidence that adherence to warrant requirements was to a large extent a product of local practice. The best record was presented by the warrants received from Vancouver, 71% of which were issued validly; at the other end of the spectrum was Montréal with 17%. In between stood Toronto with 50%, Edmonton with 36% and Winnipeg with 27%.[269] And these variations can be traced further to particular idiosyncrasies of local origin. For example, the low figures in Winnipeg and Edmonton are attributable in part to the inadequate narcotic and drug warrant forms that were in use in 1978. At least one office in Montréal had developed the practice of not requiring any

written elaboration of reasonable grounds to support the issuance of a warrant.

218. This raises a significant issue: Why is it that the various cities have been left, in effect, to decide upon their own procedures? In a legal system under which rules of criminal procedure are purportedly fixed in federal legislation, why have standards become so varied and so relaxed? The first and obvious conclusion is that there is a lack of effective mechanisms to enforce the legal rules. This is unquestionably a serious problem; we address it in detail in Chapter Ten of this paper. In the meantime, we will point to some explanatory factors disclosed by our empirical research.

219. One may discern in local improvisations some attempts to overcome deficiencies in existing legislation. For example, while section 443 requires that informations be in Form 1, this form as outlined in the *Criminal Code* itself does not satisfy the requirements of section 443.[270] Confronted with this dilemma, different cities developed different variations on Form 1; indeed, in Winnipeg and Montréal, different court offices in the same city were found to be using radically dissimilar forms. These forms in turn were often the basis upon which documents for applications under *Narcotic Control Act* and *Food and Drugs Act* legislation (which prescribes no form) were prepared. The fluctuation in validity rates between the various cities reflects to some extent the success of such improvisational ventures.

220. There is a more profound factor that must be taken into account, however — the existence of differing local attitudes towards search warrant issuance. Despite the repeated reference in case-law to the zeal of the common law in preventing unjustified invasions of private rights, the warrant process has not uniformly been viewed as a judicial one. A recent report of a study of detective work in a jurisdiction near Toronto includes the following passage:

> The detectives had developed longstanding relationships with particular Justices of the Peace and relied on their routine co-operation to ease their tasks. Thus, one detective said he regularly used two out of four possible Justices of the Peace available in his divisional area because he had a "good relationship" with them, which translated meant a "co-operative" relationship. Occasionally this co-operation went well beyond the point of signing warrants without question. On one occasion, two detectives went to five addresses, mainly for the purpose of locating a suspect. Anticipating resistance from the various occupants, they took along some unsigned search warrants and "left handed" them (signed a J.P.'s name) as they went. These warrants were

later logged in the divisional records, and the two Justices of the Peace whose names were used were subsequently contacted and their collaboration gained. In another situation the detectives arrived at an address to undertake a property search only to discover that the Justice of the Peace had dated the search warrant but had mistakenly not signed it. Commenting, "Just like the old days, left-handing a warrant," one detective signed the name of the Justice of the Peace and proceeded to effect the search.[271]

221. The more common apprehension, however, remains the suspicion that the justice treats search warrant issuance as a "formality".[272] While obtaining a warrant was by no means a formality in all of the cities surveyed, there were some instances in which the detail presented in the application to the issuer was so sketchy as to call into question whether the issuer really bothered to evaluate the documents he was given. In Montréal, for example, informations rarely included any elaborations of the officer's grounds for belief. In some cases, the applicant simply reported that reasonable grounds arose from inquiries conducted by the police. This sort of description gives an adjudicator no objective basis for making a judicial determination as to whether or not to issue a warrant. To simply concede to the police officer's assertion that he has the grounds for conducting a search is to render the warrant process close to meaningless.

222. This is not to say that no issuers of warrants appreciate the significance of their function. Indeed, the survey discovered instances of local officials not only complying with *Criminal Code* standards, but imposing further safeguards of their own upon the authorized search. For example, the judges and justices in Edmonton developed the practice of imposing expiry dates upon warrants issued, despite the absence of a statutory requirement for doing so. Moreover, it is possible that the standards of some municipalities have improved since the survey. For example, in recent consultations with officials in Montréal, Commission researchers were told that local practices had been upgraded significantly through adoption of new procedures and the removal from office of a number of warrant issuers who had not been sufficiently judicial in their attitude. Ultimately, however, the variation in local standards suggests that assuming a judicial posture is in effect a discretionary local decision made with respect to individual issuers or groups of issuers.

223. To some extent, the police are also responsible for the quality of applications yielding warrants; after all, they generally fill in the documents. Police instructional materials set out the relevant

standards for officers who resort to search warrant procedures. Yet there is some reluctance on the part of both police and court officials to believe that officers can realistically be expected to comply with existing tests. This reluctance, which was expressed to Commission researchers during consultations, might help to explain both the unfavourable judicial panel results and the lenient attitude of some court officials towards badly prepared documents. Some justices quite candidly stated that they were willing to overlook certain legal niceties, particularly late at night when there was a degree of urgency to the matter.

224. Some of the complaints about the difficulties of preparing search warrants reflect problems recognized earlier about the anachronistic and incoherent state of the law. But these features stop short of making the warrant procedures impossible to follow. In Vancouver, at least, the record of compliance appeared strong. Why did officials in this city do so much better than the national average? Only tentative answers emerge from the available data. It may be attributable to the development of local traditions generally, and to the greater care taken to ensure the formal quality of the documentation in use. It is worth noting also that British Columbia's justices of the peace were selected from the ranks of court administrators by the provincial judicial council and given the benefit of extensive educational programmes.

225. It is also perhaps significant that Vancouver's sample of search warrants contained so large a proportion of commercial crime investigations. About one-third of the sets of documents in the judicial panel sample portion from Vancouver were directed towards this kind of investigation.[273] Not all of the commercial crime documents were valid; indeed, only 69% were pronounced valid, a slightly lower figure than that for the Vancouver sample as a whole. However, the errors committed in these invalid cases tended to be isolated, such as the omission of a signature on an otherwise flawless document. On the whole, warrants related to commercial crime were extraordinarily detailed, not only from Vancouver but from other cities such as Toronto and Fredericton in which they also appeared frequently. It was not uncommon for informations to occupy three extra pages relating specifics about the offence alleged and its connection to items possessed by the individual concerned. In other words, even when invalid, the informations provided the justice with an intelligent basis upon which to decide to issue the warrant.

226. Why these documents in particular? Since the transactions involved in a conspiracy or fraud tend to be complex, perhaps it is

natural that their descriptions on warrant documents would be more lengthy. More significant, however, is the perception that searches with warrant in commercial crime investigations carry a greater likelihood of being challenged. It is therefore not uncommon for Crown attorneys to assist in the preparation of the application. Whether or not a Crown attorney is called upon, however, it seems clear that the greater anticipation of a challenge to the legality of such searches has a salutary effect upon the quality of the application process.

227. The warrant is meant to offer protection to all individuals whose rights might be infringed by an intrusion authorized under it, not merely those likely to have the legal resources to challenge the intrusion. That there should be a double standard in the preparation of search warrants suggests, at the very least, that there is a considerable potential for reducing the disparities between law and practice.

F. Accountability Problems

228. In a sense, the deficiencies noted above with respect to warrant issuance reflect shortcomings in standards of accountability. In this regard, however, the problems pertaining to warrantless searches and seizures are more serious still. Even if the warrant is issued in a cursory manner, certain protections are built into warrant procedures. For example, in the *MacIntyre* case, it was held that documents from a search warrant application are matters of court record and available as of right to the individual concerned and the public after the search has been executed and the object seized.[274] Among other consequences, this right of access to a documentary record facilitates review of the legality of the warrant. By way of contrast, accountability for warrantless searches and seizures is generally curtailed by the conditions of "low visibility"[275] typically characteristic of police work — no documentary record of any kind is available as of right to an individual aggrieved by a warrantless intrusion.

229. Aside from procedural impediments to effective review, accountability may also be complicated by the patterns of use characterizing provisions for warrantless search and seizure. We illustrate this problem with specific reference to the use of the

provision for warrantless search with consent. According to participant-observer studies, suspects' consent to personal searches by patrol officers is the norm;[276] this confirms comments offered by police officers consulted by the Commission. That such consent is the product of a voluntary choice on the part of persons affected is contradicted, however, by the results of interviews with suspects themselves. Over half of a recently reported sample of suspects explained that they complied because they believed that the police had general authority to search whenever they wanted. Other suspects referred to threats of force and powers associated with arrest in their explanations.[277] Even if one has reservations about the veracity of some of these accounts, this in itself points out the difficulties of ascertaining true consent.

230. Consent is also a frequent basis for searching private premises, as was noted earlier.[278] In this respect, consent appears to be treated by peace officers as one of a number of options available for gaining entry into private premises and as such is valued more or less highly by different police forces. In this connection, it has been observed that an occupant's consent is frequently sought even after officers have obtained warrants in advance. The peace officers' strategy in such situations is to have the warrant available as a back-up, but to attempt to gain additional psychological and legal advantages perceived to stem from the receipt of consent.[279]

231. The frequent reference to consent as the source of authority for a search frustrates accountability in two ways. First, reliable determination of consent itself may be difficult if the issue is ever raised subsequent to the search; passive acquiescence of an individual to a peace officer's suggestion may not reflect a truly voluntary state of agreement. Indeed, some peace officers conceded to Commission researchers that true consent to a personal search by a police officer might indeed be rare; more likely, the individual would feel intimidated by the officer into co-operating. No procedures were instituted among these officers to ensure or verify the existence of meaningful consent to personal search. On the other hand, various divisions of the R.C.M.P. have used consent acknowledgment forms in the case of search of premises.

232. Second, the possibility arises that consent is being obtained for searches that could not be authorized on a non-consensual basis by any existing power because no grounds for search sufficient to invoke a power exist. In our empirical studies we found an example of this problem in cases of personal search conducted during the execution of warrants issued under section 443

of the *Criminal Code* and other provisions that do not authorize personal search. Only a minor percentage of personal searches were explained with reference to arrest or other protective factors that might have invoked existing powers; ultimately, some 82.6% of the personal searches occurring in the execution of those warrants were reported as performed for purposes outside existing legal parameters.[280] In consultations with Commission researchers, some police officials suggested these incidents could have been authorized by consent. Yet this possibility itself calls attention to the control that existing law fails to maintain over police activity in this area. By obtaining consent to perform searches in such cases, peace officers in effect blur the distinction between those searches for which justification exists, and those for which it does not.

G. Constitutional Problems

233. The enactment of section 8 of the *Canadian Charter of Rights and Freedoms* raises the possibility that a number of existing crime-related search and seizure powers are unconstitutional. The proposition must remain largely speculative until section 8 has received definitive judicial interpretation. However, by any standard, the security against "unreasonable search or seizure" seems to imply the constitutional necessity of certain basic safeguards.[281] These include the prerequisite of "reasonable" basis of belief before an entry onto private domains or a personal search is commenced, and the limitation of forceful actions during the course of the search to those which are reasonable.

234. In fact, a number of existing provisions for search and seizure do not include such safeguards. As was noted earlier,[282] peace officers may search any persons found in premises entered pursuant to *Narcotic Control Act* and *Food and Drugs Act* provisions, regardless of the presence or absence of reasonable grounds linking these persons to a relevant offence. Moreover, the use of force to break doors or containers in pursuit of narcotics and drugs investigations is unconstrained by any standard of reasonableness.[283] Although one could view such departures from the constitutional standard as an issue to be resolved exclusively by the courts, we do not accept this view. Rather, we view these departures as problems in the existing regimes that deserve to be rectified.

235. Beyond the matter of powers that are themselves unconstitutional, there is the matter of the exercise of powers in an unconstitutional way. As we explained earlier, there is little likelihood that formal and technical breaches of procedural rules by a peace officer would be found to violate section 8.[284] On the other hand, the section might well catch instances of the search warrants being issued without reasonable grounds of belief. If section 8 is given such application, then there is an added significance to the proportion of warrants studied in our survey that failed to meet the "reasonable grounds" requirement.[285] If these warrants were issued on the same basis today, they would be unconstitutional as well as invalid.

236. In addition to searches and seizures with warrant, section 8 may also impugn the validity of warrantless street search activities. This would not be true of street searches conducted as an incident of arrest or on reasonable grounds for belief pertaining to the concealment of incriminating objects on the person concerned. However, it might cover activities such as the "random searches" for narcotics or drugs observed in a number of Canadian jurisdictions,[286] or the non-consensual stopping of individuals on an exploratory basis to ascertain whether or not a crime has been committed or a threat of disorder exists. A peace officer interviewed by a Commission researcher defended such supervisory activities at late hours with the comment, "[i]f it's on the street after two a.m. and moving, I want to know about it". Insofar as "knowing about it" entails an intrusive search and seizure, section 8 might well have a limiting effect.

II. Conclusion

237. The preceding observations lead us to believe that there is little doubt that the law governing crime-related searches and seizures needs to be reformed. The significant question is How? While some aspects of search warrant procedure have been highlighted, the paper so far has concentrated on the general picture. In order to propose specific changes, it is necessary to examine the individual components of search warrant laws in more detail. Part Two is devoted primarily to this task.

Endnotes

1. *Criminal Code*, R.S.C. 1970, c. C-34.

2. In referring to warrants under the *Narcotic Control Act*, R.S.C. 1970, c. N-1 and the *Food and Drugs Act*, R.S.C. 1970, c. F-27, as "crime-related", we do not dispute the constitutional basis of the decision in *R.* v. *Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.). Our position in this respect is outlined in the text, *supra*, para. 98.

3. *Canada Shipping Act*, R.S.C. 1970, c. S-9, s. 260; *Canada Temperance Act*, R.S.C. 1970, c. T-5, s. 137; *Excise Act*, R.S.C. 1970, c. E-12, s. 72; *Fugitive Offenders Act*, R.S.C. 1970, c. F-32, s. 19; *Game Export Act*, R.S.C. 1970, c. G-1, s. 7; *Importation of Intoxicating Liquors Act*, R.S.C. 1970, c. I-4, s. 7; *Indian Act*, R.S.C. 1970, c. I-6, s. 103(4); *Official Secrets Act*, R.S.C. 1970, c. O-3, s. 11; *Radio Act*, R.S.C. 1970, c. R-1, s. 10.

   In distinguishing between searches with and without warrant, this study has taken a narrow view of what qualifies as a warrant. Basically, unless a document incorporates all of the judiciality and particularity tests (set out in the course of this paper) that are characteristic of a warrant, it has not been so classified. Accordingly, a number of forms of written authority, such as authorizations issued pursuant to section 134 of the *Customs Act*, R.S.C. 1970, c. C-40, and subsection 231(4) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, have not been included in the above list.

4. These powers are the subject of the Law Reform Commission's pending study on regulatory search. Information was compiled in a preliminary, unpublished paper: Vicki Wong, "Search and Seizure Outside the Traditional Criminal Context" (1979).

5. Patrick Fitzgerald, "The Arrest of a Motor Car", [1965] Crim. L.R. 23, at p. 27.

6. In *R.* v. *Ella Paint* (1917), 28 C.C.C. 171 (N.S. S.C.), it was held that a peace officer had committed assault in exceeding the authority of a warrant to search premises by searching a person as well.

7. See, for example, *R.* v. *Richardson* (1924), 42 C.C.C. 95 (Sask. K.B.), and *R.* v. *Lauzon*, unreported, March 30, 1977 (Ont. Prov. Ct.).

8. *Universal Declaration of Human Rights*, G.A. Res. 217(iii) A, art. 12, U.N. Doc. A/810 at 71 (1948).

9. *Constitution Act, 1982*, s. 8 (hereinafter cited as the *Canadian Charter of Rights and Freedoms*).

10. See note 3, *supra*.

11. See the description of the entry of police officers in *Eccles* v. *Bourque, Simmonds and Wise* (1974), 27 C.R.N.S. 325 (S.C.C.). Until the reader is told that the purpose of the entry was to arrest a person, the description could as easily fit a search.

12. *Scott* v. *The Queen* (1975), 24 C.C.C. (2d) 261, at p. 263.

13. *Ibid.*, p. 265. Although Thurlow J. was writing the dissent in the case, the majority (Urie J. and Smith D.J.) also analysed the incident as a search.

14. American Law Institute, *Model Code of Pre-Arraignment Procedure* (1975), s. 210.1(1) (hereinafter cited as the *ALI Code*).

15. *ALI Code*, s. 210.1(2).

16. R. Thomas Farrar, "Aspects of Police Search and Seizure without Warrant in England and the United States" (1975), 29 U. Miami L. Rev. 491, at p. 493.

17. See text, *infra*, Part Two, paras. 55-63.

18. *R.* v. *Whitfield*, [1970] S.C.R. 46, at p. 48.

19. In *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.), it was held that "freezing" the occupants of premises was permissible in the course of searching the premises for narcotics.

20. *R.* v. *Colet* (1981), 57 C.C.C. (2d) 105 (S.C.C.).

21. *Criminal Code*, R.S.C. 1970, c. C-34, s. 445. See text, *infra*, Part Two, paras. 236-242.

22. *Entick* v. *Carrington* (1765), 19 St. Tr. 1029 (C.P.).

23. Seizure of "mere evidence" was not validated in America until *Warden, Maryland Penitentiary* v. *Hayden* (1966), 387 U.S. 294. The major initiative towards allowing common-law evidentiary searches and seizures in Great Britain was taken in *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.). A recommendation for statutory warrants to seize evidence under certain circumstances was made by the Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), p. 34 (hereinafter cited as the "RCCP Report").

24. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196, at p. 200 (Ont. H.C.).

25. In a self-reporting survey conducted by this Commission of searches with warrant in seven Canadian cities, at least one person was found in the premises in 90.4% of searches conducted with narcotics and drugs warrants, and 85.6% of searches conducted with other warrants. See note 262, *infra*, for details about the survey.

26. For an interesting discussion of liberalism and individual rights, see D. N. Weisstub and C. C. Gotlieb, *The Nature of Privacy* (Ottawa: Departments of Communications and Justice, 1972).

27. Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), p. 365.

28. See Peter Burns, "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1.

29. *Berger* v. *New York* (1966), 388 U.S. 41.

30. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769), p. 169.

31. *ALI Code*, *supra*, note 14, p. 166.

32. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.23 is devoted to this objective.

33. See text, *infra*, Part Two, paras. 349-373.

34. *Canadian Charter of Rights and Freedoms*, s. 7.

35. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, s. 1(*a*).

36. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 1.

37. *R.* v. *Ella Paint*, *supra*, note 6, at p. 175.

38. Whether or not the present wording of section 101, which covers searches for weapons in the "possession, custody and control" of a person permits personal search is a debatable question. See text, *infra*, Part Two, para. 433.

39. See text, *supra*, para. 81, and Lee Paikin, "The Standard of 'Reasonableness' in the Law of Search and Seizure", in *Criminal Procedure in Canada*, edited by Vincent M. Del Buono, (Toronto: Butterworths, 1982), pp. 93-124.

40. For an early English statutory power to seize dangerous weapons, see *An Act for Ordering the Forces in the Several Counties of this Kingdom*, 14 Car. 2, c. 3, s. 14.

41. *Laporte* v. *Laganière, J.S.P.* (1972), 18 C.R.N.S. 357 (Qué. Q.B.), at p. 369.

42. *Scott* v. *The Queen*, *supra*, note 12.

43. *R.* v. *Brezack* (1949), 96 C.C.C. 97 (Ont. C.A.), at p. 101.

44. *Reynen* v. *Antonenko* (1975), 20 C.C.C. (2d) 342 (Alta. S.C. T.D.).

45. *Criminal Code*, R.S.C. 1970, c. C-34, s. 237(2).

46. *Criminal Code*, R.S.C. 1970, c. C-34, s. 237(1)(*b*), and *Attorney General of Québec* v. *Bégin* (1955), 112 C.C.C. 209 (S.C.C.).

47. A Working Paper on Investigative Tests is currently being prepared for this Commission.

48. Royal Commission into Metropolitan Toronto Police Practices, *Report* (Toronto: 1976), p. 5 (hereinafter cited as the "Morand Report").

49. Albert Mayrand, *L'Inviolabilité de la personne humaine* (Montréal: Wilson & Lafleur, 1975), p. 94.

50. These instructions were cited, for example, in Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974, *Report* (1975) (hereinafter cited as the "Pringle Report").

51. *Entick* v. *Carrington*, *supra*, note 22, at p. 1066.

52. *Chic Fashions (West Wales) Ltd.* v. *Jones*, [1968] 2 Q.B. 299, at p. 319.

53. This idea was propounded most notably by the eighteenth-century theorist John Locke in his "Second Treatise of Government". See John Locke, *Two Treatises of Government* (New York: Cambridge University Press, 1960), p. 395.

54. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, ss. 6 and 8.

55. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (Ont. Prov. Ct.).

56. See text, *supra*, para. 60.

57. A person may possess land as well as personal property. The warrant conceived by Hale was for "goods", however: see text, *supra*, para. 71. Accordingly, common law courts have consistently held that realty and its fixtures are exempt from seizure under a crime-related warrant. This exemption might appear to reflect common sense, if one conceives of seizure as a physical taking of an object. However, it cannot explain why in *R.* v. *Munn*, for example, the court held that a set of easily dislodged doors could not be seized under warrant: (1938), 71 C.C.C. 139 (P.E.I. S.C.).

58. Exceptions to this rule are found in the *Criminal Code*, R.S.C. 1970, c. C-34, s. 445; *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(1)(*c*); *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 37(1)(*c*).

59. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(4).

60. Although five other provinces maintain legislation with prohibitions against certain defined trespasses, the two provinces with widely-applicable provisions are Ontario and Manitoba. See *The Petty Trespass Act*, R.S.M. 1970, c. P50, and *Trespass to Property Act*, R.S.O. 1980, c. 511.

61. Burns, *supra*, note 28, at p. 14.

62. Paul Freund, "Privacy: One Concept or Many" (1971), 13 Nomos 182, at p. 197.

63. Donald Madgewick, *Privacy under Attack* (London: Council for Civil Liberties, 1968), p. 2.

64. *Arkansas* v. *Sanders* (1979), 442 U.S. 753, at p. 761.

65. See text, *infra*, Part Two, paras. 146-150.

66. *Silverman* v. *United States* (1961), 365 U.S. 505, at p. 511.

67. *Semayne's Case* (1603), 5 Co. Rep. 91a (K.B.). Most recently, this case was cited in *R.* v. *Colet*, *supra*, note 20.

68. *Dorman* v. *United States* (1970), 435 F.2d 385 (D.C. Cir.).

69. *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C. S.C.).

70. This question was raised but not answered by the Ontario Court of Appeal in *Re Pink Triangle Press and The Queen* (1978), 2 W.C.B. 228 (Ont. H.C.), approved May 2, 1978 (Ont. C.A.).

71. See text, *supra*, paras. 153-155, 169-170.

72. *Wah Kie* v. *Cuddy (No. 2)* (1914), 23 C.C.C. 383 (Alta. C.A.).

73. Data from the Commission's survey of searches with warrant indicate that the searches ranged from one minute to seven hours in length; the average time reported was fifty-three minutes. See note 262, *infra*.

74. Timothy G. Brown, *Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law* (Ontario: Commission on Freedom of Information and Individual Privacy, 1979), p. 156.

75. See the dissenting opinion of Douglas J. in *Warden, Maryland Penitentiary* v. *Hayden*, *supra*, note 23.

76. See text, *infra*, Part Two, paras. 339-348.

77. See text, *supra*, paras. 34-37.

78. George Orwell, *Nineteen Eighty-Four* (London: Secker & Warburg, 1949). For a reference to this book in an established work on privacy, see, for example, John Shattuck, *Rights of Privacy* (Skokie: National Textbook Co., 1977), pp. 23-24.

79. *Victoria Park Racing* v. *Taylor* (1937), 58 C.L.R. 479 (Aust. H.C.).

80. *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345.

81. See Brown, *supra*, note 74, pp. 184-189.

82. *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 52(2). Protection of personal information is now covered by the *Privacy Act*, S.C. 1980-81-82, c. 111, Sch. II, s. 8.

83. S.C. 1980-81-82, c. 111, Sch. II, s. 8(2)(*c*) and (*e*).

84. *Report of the Commission of Inquiry into the Confidentiality of Health Information*, vol. I (Toronto: Queen's Printer for Ontario, 1980), p. 16.

85. See, for example, the discussion of release of information about a search or seizure, *infra*, Part Two, paras. 299-321.

86. Charles Sweet, *A Dictionary of English Law* (London: Henry Sweet, 1882), p. 876.

87. See text, *supra*, paras. 80-83.

88. See J. P. Kenyon, *The Stuart Constitution, 1603-1688* (Cambridge: Cambridge University Press, 1966), pp. 492-497.

89. See F. W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908), p. 233.

90. Farrar, *supra*, note 16, p. 502n.

91. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II (London: Gyles, Woodward & Davis, 1736), p. 113.

92. The warrant survey conducted by the Commission did not disclose any incidents of privately laid informations among the 2,230 returns made. However, the methodology of the study was primarily geared to police search and seizure activity. See *infra*, note 262.

93. An example of a police force responsible to a Cabinet minister is the Constabulary Force of Newfoundland; see *The Constabulary Act*, R.S.N. 1970, c. 58, s. 5. Municipal forces in British Columbia, by contrast, are responsible to boards established under the legislation: *The Police Act*, R.S.B.C. 1979, c. 331, s. 19. The third model, that of control by the municipal council itself, is followed in Manitoba: *The Municipal Act*, S.M. 1970, c. 100, ss. 285 and 286.

94. *Re Worrall*, [1965] 2 C.C.C. 1 (Ont. C.A.), at p. 5.

95. Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: E. & R. Brooke, 1797), pp. 176-177.

96. Hale, *supra*, note 91, p. 150.

97. *MacIntyre* v. *Attorney General of Nova Scotia* (1982), 40 N.R. 181 (S.C.C.), at p. 185, *per* Dickson J.

98. See text, *supra*, paras. 213-222.

99. J. Pollock, *The Popish Plot* (1903), cited in Farrar, *supra*, note 16, at p. 552.

100. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.), at p. 489.

101. *Re Writs of Assistance*, [1965] 2 Ex. C.R. 645, at p. 651.

102. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (Ont. H.C.), at p. 266.

103. Hale, *supra*, note 91, p. 150.

104. See text, *supra*, para. 55.

105. See Paikin, "Standards of 'Reasonableness' ", *supra*, note 39.

106. See text, *supra*, paras. 126-128.

107. *Johnson* v. *United States* (1948), 333 U.S. 10, at pp. 13-14.

108. See text, *infra*, Part Two, paras. 35-38.

109. See, for example, John Faulkner, "Writs of Assistance in Canada" (1971), 9 Alta. L. Rev. 386.

110. See, for example, E. W. Trasewick, "Search Warrants and Writs of Assistance" (1962), 5 Crim. L.Q. 341, at p. 345.

111. *An Act for Preventing Frauds and Regulating Abuses in Her Majesty's Customs*, 13 & 14 Car. 2, c. 11, s. 5(2).

112. Much of the factual material about the customs writ in this paper has been gleaned from M. H. Smith, *The Writs of Assistance Case* (Berkeley: University of California Press, 1978).

113. *Ibid.*, pp. 38-39.

114. The calligrapher was the King's remembrancer, an official in the Court of Exchequer. See Smith, *supra*, note 112, at p. 35.

115. See note 111, *supra*.

116. See, for example, *Entick* v. *Carrington*, *supra*, note 22, at p. 1069, and *Huckle* v. *Money* (1763), 2 Wils. K.B. 206 (K.B.), at pp. 206-207.

117. *Paxton's Case* (1761), as published in Samuel M. Quincy ed., *Reports of Cases argued and adjudged in the Superior Court of the Province of Massachusetts Bay, between 1761 and 1772 by Josiah Quincy, Junior* (Boston, 1865). In a letter of March 29, 1817, Adams wrote to William Tudor, "Then and there the child Independance was born";

see C. F. Adams, ed., *Life and Works of John Adams*, vol. 10 (Boston: 1856), p. 248.

118. See the *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10; *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 37; *Customs Act*, R.S.C. 1970, c. C-40, s. 145; *Excise Act*, R.S.C. 1970, c. E-12, s. 78.

119. See, for example, *Regency Realties Inc.* v. *Loranger* (1961), 36 C.R. 291 (Qué. S.C.).

120. *Excise Act*, R.S.C. 1970, c. E-12, s. 79.

121. *Re Writs of Assistance*, *supra*, note 101, at pp. 651-652.

122. Recent R.C.M.P. operational manuals have instructed officers holding writs not to use the writ at the request of another police department unless the R.C.M.P. officer is in charge of the search.

123. Faulkner, *supra*, note 109, at p. 393.

124. Department of Justice Press Release, April 6, 1978.

125. *R.* v. *Hauser*, *supra*, note 2.

126. We do not include in our analysis the regulatory powers of inspection conferred on inspectors under subsection 22(1) of the *Food and Drugs Act*, R.S.C. 1970, c. F-27.

127. Search powers related to motor vehicles may be found in the following provincial liquor legislation: R.S.B.C. 1979, c. 237, s. 67; R.S.A. 1980, c. L-17, s. 115; R.S.S. 1978, c. L-18, s. 131; R.S.M. 1970, c. L160, s. 248; R.S.O. 1980, c. 244, s. 48(2); R.S.N.B. 1973, c. L-10, ss. 163, 165; R.S.N.S. 1967, c. 169, s. 126; R.S.P.E.I. 1974, c. L-17, s. 60; S.N. 1973, c. 103, s. 93.

128. The practice of using provincial powers to stop vehicles for criminal law enforcement purposes does not seem to be in dispute. It was described to Commission researchers by peace officers in various forces across Canada. For a published account of this practice, see Richard V. Ericson, *Reproducing Order* (Toronto: University of Toronto Press, 1982), p. 84.

129. Much of the analysis here has been advanced in Paikin, "Standards of 'Reasonableness' ", *supra*, note 39.

130. See, for example, Paul Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307.

131. Paul Weiler, *In the Last Resort* (Toronto: Carswell, 1974), p. 165.

132. *R.* v. *Drybones*, [1970] S.C.R. 282.

133. *Curr* v. *The Queen*, [1972] S.C.R. 889, at p. 899, *per* Laskin J.

134. *Ybarra* v. *Illinois* (1979), 444 U.S. 85.

135. *Payton* v. *New York* (1980), 445 U.S. 573.

136. See text, *infra*, Part Two, paras. 443-468.

137. *Wah Kie* v. *Cuddy (No. 2)*, *supra*, note 72, and *Levitz* v. *Ryan*, *supra*, note 19.

138. P. Devlin, *The Criminal Prosecution in England*, rev. ed. (London: Oxford University Press, 1960).

139. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443, at pp. 454-455.

140. See, for example, *Re Worrall*, *supra*, note 94.

141. *R.* v. *Corrier* (1972), 7 C.C.C. (2d) 461 (N.B. S.C. A.D.).

142. *Ghani* v. *Jones*, *supra*, note 23.

143. See, for example, *Jeffrey* v. *Black*, [1978] Q.B. 490 (D.C.) and subsequent comment on the decision: (1978), 37 Camb. L.J. 200.

144. RCCP Report, *supra*, note 23, at p. 33.

145. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (Alta. S.C. A.D.), at pp. 301-302.

146. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II, *supra*, note 91, p. 94.

147. *An act for more effectually discouraging and preventing the stealing, and the buying, and receiving of stolen lead, iron, copper, brass, dell-metal, and solder, and for more effectually bringing the offenders to justice*, 29 Geo. 2, c. 30, s. 3.

148. *R.* v. *O'Donnell* (1835), 7 Car. & P. 138, 173 E.R. 61 (N.P.).

149. *Bessell* v. *Wilson* (1853), 20 L.T.O.S. 233 (Q.B.).

150. *Leigh* v. *Cole* (1853), 6 Cox C.C. 329, at p. 332.

151. *Corpus Juris*, Vol. 5 (New York: American Law Books Co., 1916), p. 434.

152. *Gottschalk* v. *Hutton*, *supra*, note 145; *Reynen* v. *Antonenko*, *supra*, note 44.

153. *R.* v. *Brezack*, *supra*, note 43, at p. 75.

154. *R.* v. *Whitfield*, *supra*, note 18.

155. *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251, s. 41(2), as amended by SOR/80-462.

156. *Reynen* v. *Antonenko*, *supra*, note 44, at pp. 348-349.

157. *R.* v. *McDonald*; *R.* v. *Hunter* (1932), 59 C.C.C. 56 (Alta. S.C. A.D.).

158. *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 62 (hereinafter cited as the "Ouimet Report").

159. The R.C.M.P. has itself offered an interpretation of the governing law in its operational manuals. According to a recent guideline, the power to search areas within the person's control is limited to the person's immediate surroundings, *i.e.*, the room in which he is arrested.

160. *Jeffrey* v. *Black*, *supra*, note 143.

161. See text, *supra*, para. 118.

162. *R.* v. *McDonald*, *supra*, note 157.

163. *Smith* v. *Baker*, [1891] A.C. 325 (H.L.), at p. 360.

164. A recent example of this approach by a court, although not specifically a consent search case, is the Ontario Court of Appeal decision in *R.* v. *Dedman* (1981), 32 O.R. (2d) 641, in which it was held that a motorist stopping his vehicle pursuant to a policeman's signal to pull over was acting voluntarily. In effect, the Court analysed the peace officer's signal not as a use of coercive police powers but rather as an exercise of the officer's own legal liberty to perform the non-intrusive act of requesting the motorist's compliance.

165. *Reynen* v. *Antonenko*, *supra*, note 44.

166. Ouimet Report, *supra*, note 158, p. 59.

167. *Thomas* v. *Sawkins*, [1935] 2 K.B. 249 (C.A.).

168. *Carpenter* v. *McDonald* (1978), 4 C.R. (3d) 311 (Ont. Dist. Ct.).

169. Elisabeth Scarff, Ted Zaharchuk, Terrence Jacques and Michael McAuley, *Evaluation of the Canadian Gun Control Legislation: First Progress Report* (Ottawa: Supply and Services, 1981), p. 129.

170. *Entick* v. *Carrington*, *supra*, note 22.

171. See Maitland, *supra*, note 89, p. 302.

172. For example, the earliest statutory search warrant for weapons was included in a general national security package that included provisions for training and supplying troops, investigating breaches of military duty, and punishing offenders. See 14 Car. 2, c. 3, s. 14, *supra*, note 40.

173. Charles Hilchin, *A True Discovery of the Conduct of Receivers and Thief Takers in and about the City of London* ... (1718), p. 7.

174. While the amalgam may have been as diverse, however, there was some tendency in pre-Confederation legislation to generalize powers beyond the narrow limits of their British antecedents. A provincial Canadian justice of the peace, for example, unlike his British

counterpart, could issue a warrant for any "property on or in respect to which *any* offence" had been committed: C.S.C. 1859, c. 99, s. 2. And with the need to assimilate the various provincial criminal procedure enactments upon Confederation came some effort towards consolidation, although this trend occurred despite the professed affection of Canadian parliamentarians for the compartmentalized approach of English legislation. Sir John A. Macdonald, introducing an assortment of criminal law bills to the First Session of Parliament, stated that he "had adopted the principle of separate Bills rather than a code for various reasons, one obviously being that in case any particular statute were materially altered it would be more convenient to repeal it *in toto* and re-enact it than make gaps in any code. Following the English system, therefore, they had been divided into separate Bills." See *House of Commons Debates*, 1867-68, First Session, First Parliament, April 1, 1868, p. 442.

175. Crime-related search warrant provisions, for example, may be found in the following: *Betting, Gaming and Lotteries Act, 1963*, (U.K.), 1963, c. 2, s. 51; *Coinage Offences Act, 1936*, 26 Geo. 5 & 1 Edw. 8, c. 16, s. 11(3) (U.K.); *Firearms Act 1968*, (U.K.), 1968, c. 27, s. 46; *Obscene Publications Act, 1959*, 7 & 8 Eliz. 2, c. 66, s. 3 (U.K.); *Sexual Offences Act, 1956*, 4 & 5 Eliz. 2, c. 69, s. 43 (U.K.); *Theft Act 1968*, (U.K.), 1968, c. 60, s. 26.

    Powers of search with warrant for evidence would be generalized somewhat according to the recommendations advanced by the Royal Commission on Criminal Procedure in its Report, *supra*, note 23. See further the background study by the RCCP, *The Investigation and Prosecution of Criminal Offences in England and Wales*, Cmnd. 8092-1 (1981), pp. 108-118.

176. See text, *supra*, paras. 132-133.

177. *R.* v. *Kehr* (1906), 11 O.L.R. 517 (Ont. Div. Ct.), at p. 521.

178. *Re R. and Johnson & Franklin Wholesale Distributors* (1971), 3 C.C.C. (2d) 484 (B.C. C.A.), at p. 489.

179. Hale, *supra*, note 91, at pp. 113-114; *Fanning* v. *Gough* (1908), 18 C.C.C. 66 (P.E.I. S.C. *in banco*). See, *infra*, Part Two, paras. 220-224.

180. Hale, *supra*, note 91, p. 150.

181. *R.* v. *Execu-Clean Ltd.*, unreported, January 30, 1980 (Ont. H.C.).

182. *House of Commons Debates*, 1953-54, vol. III, First Session, Twenty-second Parliament, February 26, 1954, p. 2516 and March 9, 1954, p. 2826.

183. *Norland Denture Clinics Ltd.* v. *Carter* (1968), 5 C.R.N.S. 93 (Sask. Q.B.).

184. *Interpretation Act*, R.S.C. 1970, c. I-23, s. 27(2).

185. See, for example, *Re Abou-Assale and Pollack and The Queen* (1978), 39 C.C.C. (2d) 546 (Qué. S.C.); *contra* see *Re McAvoy* (1970), 12 C.R.N.S. 56 (N.W.T. Terr. Ct.).

186. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

187. Leon Radzinowicz, *A History of English Criminal Law*, vol. II (London: Stevens and Sons, 1956), p. 3.

188. *An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds and other idle and disorderly Persons, and to Houses of Correction*, 17 Geo 2, c. 5, s. 6.; *An Act for the better preventing Thefts and Robberies, and for regulating Places of Publick Entertainment, and punishing Persons Keeping disorderly Houses*, 25 Geo 2, c. 36, s. 12.

189. *Vagrants Act*, S.C. 1869, c. 28, s. 2.

190. *An Act for suppressing Gaming Houses, and to punish the keepers thereof*, S.C. 1875, c. 41, s. 1.

191. *Gaming House Act*, 17 & 18 Vict., c. 38, s. 5.

192. Bill C-53, 1980-81, containing proposals to amend the *Criminal Code* in relation to sexual matters is before Parliament. Section 11 of the proposed legislation would repeal section 183. Since the legislation has not yet been enacted, this study deals with section 183 as current law. [Ed. note: Section 11 of Bill C-53 was passed by the House of Commons. See S.C. 1980-81-82, c. 125, s. 12.]

193. *Metropolitan Police Courts Act*, 2 & 3 Vict., c. 71, s. 48.

194. *Gaming Act*, 8 & 9 Vict., c. 109, s. 6.

195. See *House of Commons Debates*, 1953-54, vol. III. First Session, Twenty-second Parliament, February 24, 1954, pp. 2409-2413. The present section 181 was approved in Committee without comment.

196. *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*, [1964] 3 C.C.C. 82 (B.C. S.C.).

197. *R.* v. *Chew* (1964), 44 C.R. 145 (Ont. S.C.), at p. 149.

198. As explained in note 192, *supra*, legislation in relation to sexual offences is before Parliament. Section 182 would be repealed by section 11 of this draft legislation. [Ed. note: See S.C. 1980-81-82, c. 125, s. 12.]

199. See Vern and Bonnie Bullough, *Prostitution: An Illustrated Social History* (New York: Crown Publishers, 1978), pp. 241-253.

200. It is of historical note that this anti-exploitation legislation was bound up with Victorian prohibitions against homosexuality and sexual

activity between minors. When Canada purported to follow the British model in 1886, anti-exploitation provisions were again combined with these same prohibitions. See *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157.

201. This is in fact supported by the present title given to section 183 of the *Criminal Code*: "Examination of Persons Arrested in Disorderly Houses". See *Martin's Annual Criminal Code 1981* (Aurora: Canada Law Book Ltd., 1981), p. 185.

202. All references to narcotic control legislation, unless otherwise noted, pertain to the *Narcotic Control Act*, R.S.C. 1970, c. N-1.

203. Bruce A. MacFarlane, *Drug Offences in Canada* (Toronto: Canada Law Book Ltd., 1979), pp. 19-28.

204. Emily Murphy (writing as "Janey Canuck"), *The Black Candle* (Toronto: Thomas Allen, 1922), pp. 332-333. See MacFarlane, *supra*, note 203, pp. 23-24, for background information about Judge Murphy's polemic.

205. *House of Commons Debates*, 1953-54, vol. V, First Session, Twenty-second Parliament, June 1, 1954, p. 5312.

206. *The Opium and Drug Act*, S.C. 1911, c. 17, s. 7.

207. *The Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22, s. 18.

208. *The Opium and Narcotic Drug Act, 1929*, S.C. 1929, c. 49, s. 22.

209. *An Act to amend the Food and Drugs Act*, S.C. 1960-61, c. 37, ss. 1 and 36.

210. See, for example, *Re R. and Kellet* (1973), 14 C.C.C. (2d) 4 (Ont. C.A.).

211. *R.* v. *Jaagusta*, [1974] 3 W.W.R. 766.

212. *Ibid.*, p. 768.

213. See, for example, *R.* v. *Erikson* (1978), 39 C.C.C. (2d) 447 (Ont. Dist. Ct.).

214. *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (Ont. Prov. Ct.).

215. For a discussion of obscenity provisions, see Law Reform Commission of Canada, *Study Paper on Obscenity* (December, 1972), p. 66 (copy available in Commission library).

216. *House of Commons Debates*, 1959, vol. V, Second Session, Twenty-fourth Parliament, July 6, 1959, p. 5547.

217. *Ibid.*

218. *Obscene Publications Act*, 7 & 8 Eliz. 2, c. 66, s. 3. The antecedent legislation was 20 & 21 Vict., c. 83, s. 1.

219. See note 216, *supra*, p. 5548.

220. *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966), p. 12.

221. *Ibid.*, p. 71.

222. See, for example, *An Act Respecting the Seizure of Arms Kept for Dangerous Purposes*, R.S.C. 1886, c. 149, s. 2. An exception to the warrant requirement did exist, however, in the case of searches for weapons taken to public meetings. See *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 113.

223. *House of Commons Debates*, 1912-13, vol. V, Second Session, Twelfth Parliament, May 16, 1913, pp. 10070-10071.

224. *Criminal Code*, S.C. 1953-54, c. 51, s. 96.

225. *Criminal Code*, R.S.C. 1970, c. C-34, s. 99(2).

226. See, *ALI Code*, *supra*, note 14, s. 110.2(1)(*a*).

227. Martin L. Friedland, "Gun Control: The Options" (1975-76), 18 Crim. L.Q. 29.

228. *An Act to amend the Criminal Code*, S.C. 1938, c. 44, s. 9.

229. *First Progress Report*, *supra*, note 169, pp. 127-128.

230. *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 6. The relevant search warrant provision, introduced as section 98G in this statute, became section 105 in the 1970 revision of the *Criminal Code*.

231. See the *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs*, First Session, Twenty-eighth Parliament, March 6, 1969, p. 206.

232. *R.* v. *Colet*, *supra*, note 20.

233. See, for example, the testimony of then Solicitor General Warren Allmand: *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirtieth Parliament, April 27, 1976, p. 39:50.

234. See text, *infra*, Part Two, para. 423. Some police forces appear to take the position that section 101 does not authorize the search of a person. While this interpretation by the police demonstrates commendable self-restraint, it does not seem to be required by the wording of the section, which refers to rights to seize weapons in the person's "possession, custody or control".

235. *Larceny Act*, S.C. 1869, c. 21, ss. 30-33.

236. *An Act respecting the marking of Timber*, S.C. 1870, c. 36.

237. *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 572.

238. *An Act for the more effectual Prevention of Cruelty to Animals*, 12 & 13 Vict., c. 92.

239. *Cruelty to Animals Act*, S.C. 1869, c. 27.

240. *House of Commons Debates*, 1925, vol. IV, Fourth Session, Fourteenth Parliament, June 8, 1925, p. 4004.

241. Law Reform Commission of Canada, *Our Criminal Law* [Report to Parliament] (Ottawa: Supply and Services, 1976), pp. 36-37.

242. *Re Goodbaum and The Queen*, *supra*, note 186.

243. *Campbell* v. *Clough* (1979), 61 A.P.R. 249 (P.E.I. S.C.).

244. See note 262, *infra*.

245. Problems dealing with financial accounts are discussed *infra*, Part Two, paras. 62-63.

246. Problems relating to computer information as the subject matter of a theft are not addressed specifically in this paper. Recommendations 1 and 2, (Part Two) however, would allow the seizure of stored information that represented "takings of an offence".

247. Law Reform Commission of Canada, *Theft and Fraud* [Working Paper 19] (Ottawa: Supply and Services, 1977), pp. 37-48.

248. The *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93 expanded what is now section 312 of the *Criminal Code*, R.S.C. 1970, c. C-34, to cover "any property ... or any proceeds of any property" obtained contrary to its provisions.

249. The Law Reform Commission has recommended the reconsideration of gaming offences. See *Our Criminal Law*, *supra*, note 241, p. 35.

250. RCCP Report, *supra*, note 23, p. 34.

251. Inspector J. W. Cooley, "The Social Aspect of Crime Prevention" (1978), 2 Can. Police C.J. 382, at p. 386.

252. See text, *supra*, para. 83.

253. See, *First Progress Report*, *supra*, note 169, p. 130.

254. *R.* v. *Colet*, *supra*, note 20.

255. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 148.

256. See text, *infra*, paras. 229-232.

257. As part of its programme of empirical studies, the Commission studied writ usage over a four-month period in seven Canadian cities: Edmonton, Montréal, Toronto, Winnipeg and Vancouver (all of which reported some writ usage) and Fredericton and Saint John (which reported none). The writs of assistance study will be published and released separately from this paper. The "urgency" figure cited in the text actually comprises four categories of response to a self-reporting questionnaire completed by writ users. These categories were: "unspecified urgency" (32.7%), "urgency — to prevent destruction or removal of evidence" (40%), "urgency — safety of police in jeopardy" (0.6%) and "urgency — to prevent harm from contaminated drugs or liquor" (0.6%). The writs covered included those under the *Customs Act*, R.S.C. 1970, c. C-40, and the *Excise Act*, R.S.C. 1970, c. E-12, as well as narcotics and drugs legislation.

258. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirty-second Parliament, November 26, 1981, p. 56:25.

259. See *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 11. The question of entry to effect arrest is again before the Supreme Court of Canada in *R.* v. *Landry* (1981), 63 C.C.C. (2d) 289 (Ont. C.A.).

260. See note 257, *supra*.

261. See text, *supra*, para. 83.

262. The survey's strategy, methodology and results have been presented in consultation documents prepared for five of the seven cities surveyed. At present, a documentary account of the survey as a whole is being prepared. Each of the studies was of four months' duration and sought to bring together, on a transaction-by-transaction basis, every search warrant issued during the period of the study, the written application, information or report prepared to obtain it, and a questionnaire completed by the police officer who executed the warrant. A total of 2,219 cases of warrant issuance were reported; 1,869 of these warrants were reported as having been executed. Of the *executed* warrants, 1,245 were issued under section 443, 91 under section 181, and 479 under *Narcotic Control Act* and *Food and Drugs Act* provisions; the remainder were issued under an assortment of other provisions and statutes, e.g., the *Customs Act*, etc.

Following the completion of the surveys, the documents received were subjected to two different types of evaluation. First, data from both the warrant documents and the questionnaires were submitted to analysis by computer. This analysis focused primarily on the execution of the search, including details about the executor, the time of execution, the scope of search and the nature of items seized.

Second, a stratified random sample of 236 sets of documents was selected from the larger total of 2,219 and divided up among a panel of judges from appellate and superior courts across Canada. Each panellist evaluated the legality of the documents presented to him and then discussed his findings with the other panellists at a conference organized by the Commission.

263. The problems of incompleteness and obscured portions that produced "unknown" evaluations may have represented not defects in the documents as originally presented to the warrant issuer, but rather problems in the reproduction or collection of these documents for the Commission researchers. Accordingly, one could not make a negative assessment of the application or warrant in question simply by virtue of the incompleteness or illegibility. If no other defect appeared in the documents, and the evaluator felt incapable of making a final assessment due to the problem, the evaluation was noted as "unknown".

264. See text, *infra*, Part Two, paras. 225-226.

265. See text, *supra*, paras. 74-77.

266. Due to incomplete documentation, 2% of the 250 sets of documents analysed by our judicial panel could not be conclusively evaluated.

267. Since it seems that the wording of section 181 does not require a warrant issued under that provision to specify any objects to be seized, no attempt was made to compare objects seized to objects named on the warrant. Rather, for the purpose of this tabulation, all seizures made in connection with section 181 warrants were treated as if the objects seized had been named on the warrant.

268. The ratio of seizures of specified items to non-specified items was 2.4:1 under valid warrants and 2:1 under invalid warrants.

269. Because the samples received from Fredericton and Saint John were small, it would be misleading to present figures for these cities separately. Of eleven warrants issued in both cities, three (27%) were valid.

270. See text *infra*, Part Two, para. 174.

271. Ericson, *Making Crime*, *supra*, note 255, pp. 153-154. While some suggestion was made (*ibid.*, p. 232) that apparently offensive police actions were carried out solely as "practical jokes" on the researcher, this does not appear to pertain specifically to the two cited cases.

272. David Humphrey, "Abuse of Their Powers by the Police", in Law Society of Upper Canada, Special Lectures, 1979, *The Abuse of Power and the Role of An Independent Judicial System in Its Regulation and Control* (Toronto: Richard de Boo Ltd., 1979), pp. 565-566.

273. The warrant was identified as a "commercial crime warrant" if it either (i) pertained to a fraud or an offer of a secret commission (*Criminal Code*, R.S.C. 1970, c. C-34, s. 383) or a conspiracy to commit one of these offences, or (ii) was obtained by a "commercial crime squad" of a police force. A total of sixteen such warrants were identified in Vancouver and eleven (69%) were found to be valid by the judicial panel.

274. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 97.

275. See J. Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice" (1959-60), 69 Yale Law Journal 543, and Ericson, *Making Crime*, *supra*, note 255, p. 11.

276. Ericson, *Reproducing Order*, *supra*, note 128, p. 148.

277. Richard V. Ericson and Patricia M. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process* (Toronto: University of Toronto Press, 1982), pp. 46-49.

278. See text, *supra*, para. 208.

279. Ericson, *Making Crime*, *supra*, note 255, p. 148.

280. This self-reporting survey was integrated with the collection and analysis of documents in the warrant survey. See note 262, *supra*.

281. See text, *supra*, paras. 101-109.

282. See text, *supra*, para. 160.

283. See text, *infra*, Part Two, para. 246.

284. See text, *supra*, para. 112.

285. See text, *supra*, para. 215.

286. See, for example, the discussion of random searches in Edmonton in Peter K. MacWilliams, "Illegality of Random Searches" (1979), 27 Chitty's Law Journal 199.

PART TWO:

DEVELOPING A NEW REGIME

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Part Two: Developing a New Regime

CHAPTER FOUR

The Approach to Reform

I. Limits of Law Reform

1. The focus of this Working Paper is the reform of legal rules governing crime-related powers of search and seizure. This focus both reflects and entails the acceptance of certain limitations. Among these is the jurisdictional limitation discussed earlier: the recognition that legal powers under provincial as well as federal legislation are used by peace officers to enforce the criminal law.[1] Other limitations upon our task bear on the relationship between procedural law and criminal law enforcement practice. We recognize that there is a point at which rules of criminal procedure must allow for the disparate influences of the institutions and localities by, and in which, the criminal law is enforced. And we must also take account of the limited value offered by legal reform in itself as a solution to problems of police practice.

A. Disparate Influences

2. Rules of criminal procedure aim in part to standardize the practices they govern. The extent to which the standardizing impulse is carried in a particular regime is reflected in the detail to which these rules are reduced. It would be possible to devise a set of rules governing crime-related powers of search and seizure so thorough that if put into practice, they would make uniform, say, the fine print

on an inventory of items seized from Bonavista, Newfoundland to Vancouver, British Columbia. We believe, however, that such a set of rules would be undesirable, for it would be insensitive to the legitimate influences that various institutions and localities bring to the enforcement of criminal law.

3. Policing in Canada is organized and maintained at federal, provincial and municipal levels. This complex situation reflects constitutional allocations of jurisdiction. On the one hand, law enforcement within each province has been viewed primarily as a matter coming within the classification of "administration of justice", which is assigned to provincial legislatures under subsection 92(14) of the *Constitution Act, 1867*. As a result,

> each province has enacted legislation placing obligations for policing and the maintenance of law and order on local authorities, such as municipalities, and others. These obligations have then been discharged, in certain cases, by the creation of municipal and provincial police forces or, by contracting for the supply of policing services from the provincial police force (if there is one) or from the R.C.M.P.[2]

In addition to decisions respecting policing, subsection 92(14) gives the provinces responsibilities for the administration of the system of officials assigned the warrant issuing functions of justices of the peace.[3]

4. On the other hand are the responsibilities assumed by the Royal Canadian Mounted Police. As well as performing a contractual role in provincial policing, the R.C.M.P. fulfils certain responsibilities of a national character, including the enforcement of federal statutes other than the *Criminal Code*, the policing of the Northwest Territories and the Yukon, and the protection of national security.* Constitutional authority for these duties has been perceived to derive from the "peace, order and good government" clause in section 91 of the *Constitution Act, 1867*.

5. This state of different levels and structures of policing produces certain variations in practice, orientation and capability, which may reflect on the search and seizure activities carried out by a particular force. For example, the Royal Canadian Mounted Police has been associated with a distinct capability of policing sophisticated non-violent property crimes, an orientation that entails relatively frequent seizures of business records. Small local forces, on the other

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* Since this Working Paper was drafted, Bill C-157, which would significantly modify the role of the R.C.M.P. as regards national security, was introduced in Parliament.

hand, may be directed towards little more than a "watchman" function, using motor vehicle checks to monitor individuals within their jurisdictions.[4] Even when performing similar functions, the R.C.M.P. is often seen to be more technical and regulated in its approach than municipal forces.[5]

6. This assortment of policing structures complements other variables pertaining to the areas and communities within Canada in which criminal law and procedure are applied. The size, history and composition of the community served by a police force, and the patterns of criminal activity peculiar to it, all contribute significantly to the character of local law enforcement. On the question of community size, for example, the Task Force on Policing in Ontario observed that while there was evidence of a breakdown of communication between the police and individuals in larger centres, closer relationships were being maintained in smaller communities.[6] This state of relations affects the degree to which police feel it appropriate to resort to specific powers as opposed to less formal, consensual approaches. In interviews with police officers in various Canadian forces, Commission researchers were told of the increased likelihood of obtaining citizen co-operation in rural settings.

7. The delicate task in developing rules of search and seizure is to strike the correct balance of standardization. In exercising restraint in this regard, we do not diminish the importance of police accountability for law enforcement policies and activities; rather, we recognize that such accountability may be achieved at the institutional and local levels as well as through a federally imposed system of procedural rules. But even this limited position assumes that changing or imposing legal rules is meaningful in defining actual police practice. It is to this assumption that we now turn.

B. Legal Rules and Actual Practice

8. That legal rules do not necessarily govern the practice of law enforcement is hardly a controversial proposition. In the present context of search and seizure powers, we have already referred to the empirical studies which show widespread deviation from warrant standards,[7] and acknowledged that warrantless powers are difficult to monitor.[8] One might wonder accordingly whether changing the rules could have any meaningful impact on existing problems. In order to

address this issue, it is useful to consider certain aspects of the relationship between police powers and police practice.

9. Rules defining police powers have a specific function in Anglo-Canadian tradition — they set out exceptions to the ordinary prohibitions against intrusions upon an individual's person, private domain and possessions.[9] While this function is a critical one it is also in a sense quite modest. Our legal tradition does not purport to devise permissible enforcement strategies or define situations in which intrusions *should* be performed. Rather, it establishes when intrusions *may* be performed, by requiring that when law enforcement officers determine to pursue an investigation through an intrusive action, they justify the intrusion, obtain the proper authorization and perform it within the limits set down in the law.

10. Accordingly, it has been observed by social scientists that legal rules serve a secondary, "enabling" function:

> [A]ccording to legal ideas, the enforcement of the criminal law is supposed to be governed by the rule of law and the principle of legality....
>
> In practice, the system operates according to men who use laws to accomplish their enforcement tasks. The law is very enabling in this respect, because it is effectively formulated for the pragmatic use and benefit of law enforcement agents, allowing them to accomplish crime control in accordance with their organizational interests.[10]

That law enforcement personnel "use laws to accomplish their enforcement tasks" is not in itself an alarming notion. Indeed, so long as the law "used" by police in turn exerts control over their resort to intrusive conduct, the situation is quite consistent with the tradition of the rule of law. The problem begins if and when the law ceases to exert this control and becomes instead a set of rules with merely symbolic value.

11. How does procedural law, so to speak, lose its grip? A number of factors are relevant. Particularly in the case of warrantless powers, the application of rules is confided to police personnel whose experience and involvement in an investigation cannot be realistically separated from their decision-making tasks. Peace officers often advert to proceeding on "gut feelings" that defy quantification. Yet although the peace officer's frame of reference is instinctive, the law envisages him applying legal criteria, often elaborate in nature, to his decision to intrude.

12. Another problem resides in the inevitable gaps and conflicts in the factual pictures to which the law must be applied. Whether or

not a warrant is used, it is often difficult to be assured of achieving accurate conclusions as to the basis upon which, and the manner in which, the intrusion took place. As one commentator has observed:

> That otherwise honorable citizens resort to lying as a defense against police is well established. It is also clear that some police officers lie to justify action they have taken. The task of getting at the truth is further complicated because many of the people with whom the police have contact are unscrupulous individuals. Hard-core criminal offenders do not hesitate to make a false allegation if they think it might help to cloud the issue of their own guilt.[11]

Where the ambiguity or conflict in a factual picture relates to the application of a police power, effective review or monitoring of the power becomes difficult.

13. In practice, particularly at the search and seizure stage of an investigation, peace officers have considerable control over the factual pictures that determine the application of their legal powers. Detectives in particular work in conditions of "low visibility" to the outside world, and indeed other officials, such as superior officers and warrant-issuers, rely heavily on the investigator's account. Although recent developments have opened documentation from search warrant proceedings to public scrutiny and hence introduced higher visibility into these proceedings,[12] the facts that underline an investigation and, indeed, a consequent decision to apply for a search warrant inevitably will and must remain within the primary control of the police. This state of control admits the possibility of manipulation of facts and inferences to obtain the legal authorization for, or subsequent condonation of, intrusive police activity.

14. Finally, there is the fact that not only police strategies but also police objectives may be defined outside rules of criminal procedure. Just as the criminal law is sometimes enforced through the use of search and seizure powers in regulatory legislation, so too the powers afforded in criminal procedure are subject to use for the broader purposes of order maintenance, which are not strictly related to criminal law enforcement.[13] The resort to crime-related search powers to serve such purposes is as inevitable as the discretion built into these powers. Insofar as such purposes continue to inform the use of crime-related search and seizure powers, it is evident that reform of these powers will be of limited impact on police practice.

15. It would be naïve to expect that the tensions between law and practice would be completely resolved through alteration of the existing legal rules; to address these tensions comprehensively, one must delve into the administrative and policy structures governing

police work. But this does not make reform of the rules a worthless task. Even those commentators who have argued for an emphasis on extra-legal initiatives to address police discretion concede that there is merit in clearly defining the scope of the legal powers conferred upon the police.[14] Indeed, insofar as the legal rules are obsolete and confused, they may be perceived as inviting the disregard or manipulation they sometimes receive at the hands of the police.

16. Moreover, to concede that police practice inevitably will diverge from the law to some degree does not justify a refusal to strive to ensure that it complies with the law to the greatest extent possible. The ideal of a criminal law enforcement system in which agents of the State are confined to the exercise of powers accorded by law has been implicit in the traditional notion of the rule of law which pre-existed Canadian Confederation.[15] If this ideal model has not been attained, nevertheless it has served historically as a valuable goal for the participants in this system. That this goal is still a valid one is underlined by two provisions of the new *Canadian Charter of Rights and Freedoms* which have been already discussed: section 7, which articulates the right to liberty and security of the person, and section 8, which affords security against unreasonable search or seizure.[16] To assert the uncontrollability of police discretion by legal rules is to concede that these provisions, as well as the procedural rules for crime-related searches and seizures, are meaningless symbols. We neither make nor accept this concession.

II. Guidelines for Law Reform

A. Codification

17. The present law of search and seizure is complicated by the coexistence of common law and statutory sources of authority. We believe that it would be beneficial to move to a purely statutory scheme of law. This is not to suggest that the content of common-law rules ought to be discarded; rather, the intention is to incorporate those valuable policies and procedures presently found in the common law into a harmonious and coherent code of crime-related powers of search and seizure.

18. There are a number of reasons why extra-statutory powers ought not to be maintained. The first of these is the need for clarity. In its recent Report, the Royal Commission on Criminal Procedure examined search and seizure law in England and Wales and concluded:

> A principal theme of the evidence put to us has been the need to place on a rational basis and bring into line with modern conditions these procedures and practices, some of which date at least from the last century and in which anomalies are apparent. There is a consensus in favour of codification and rationalisation of the provisions.[17]

While Canada has not experienced problems of vague, expanded common law powers to the same degree as England, there is still a sufficient degree of uncertainty in some areas to justify taking a similar approach to that of the Royal Commission. For example, the permissible ambit of the search incidental to arrest, while generally conceded to extend to areas within the individual's control, remains undefined. And the parameters of common law "consent" search by the police — questions such as when it may be performed and what may be seized — have never been addressed thoroughly by Canadian courts.

19. The current situation regarding "consent" search also points to another problem with extra-statutory powers — the absence of generally applicable procedural safeguards. If it is accepted that certain conditions should be satisfied when the police request individuals to consent to infringements on their person, private domains or possessions, then it becomes useful to articulate these conditions in legislation. While it may be beneficial to allow procedures to be accommodated to differing local traditions and conditions, the present law goes much further than this; it permits individual police forces to decide whether the individual will be granted any measure of protection at all. Indeed, the absence of standard procedures is not only detrimental to the interests of individuals; some peace officers interviewed by Commission researchers were concerned that their tasks were made more difficult by the absence of clear guidelines.

20. In addition, some degree of significance should be attached to the introduction of constitutional protection against "unreasonable search and seizure".[18] While the fact that a search or seizure power is granted at common law does not render that power "unreasonable", it may admit a heightened potential for uncertainty as to the limitations governing the exercise of the power. This may be particularly the case where the power is a warrantless one; the removal of warrant

protections, which incorporate certain "reasonableness" features, may be perceived to create some onus to ensure that similar or substitute features are built into the warrantless power. The most effective context for meeting this onus is a statutory regime.

21. The advantages of codification have been expounded for the Law Reform Commission in considerable detail in a previous Study Paper, *Towards a Codification of Canadian Criminal Law*. The authors of the study concluded:

> Codification would thus enhance the two qualities that society looks for in the law: predictability and certainty. The lawyer who can refer to a code for guidance will find it easier to determine the impact of a particular law and to predict how the courts are likely to apply it in given cases. He will find that legal rules are not made rigid by codification, they simply become more precise and certain with greater opportunity for continuous adaptation to new conditions and society's changing needs.[19]

We conclude that these values apply to the law of search and seizure and that a codification in this area is therefore in order.

B. Simplification, Balance and Control

22. Precision and certainty would not be advanced much further by a codification if that codification remained as complex and mystifying as the system it replaced. A problem that has arisen in the American law of search and seizure is that some of the distinctions drawn by the courts between various fact situations are bewildering to judges, legal scholars and police officers alike. This has led the United States Supreme Court in some cases in recent years to favour the drawing of a "bright line" — a clear demarcation between legal and illegal activities of warrantless search and seizure.[20] Paradoxically, some of the "bright lines" that have been drawn are themselves quite elusive.[21] The importance of avoiding such entanglements in Canada may have become heightened by the prospect of augmented remedies for breach of constitutional rules offered by section 24 of the new *Canadian Charter of Rights and Freedoms*.

23. Aside from assisting specialists in the law enforcement system, simplification of the rules promotes the objective of enabling the individual affected to be informed of the peace officer's legal position. It is true that the achievement of this objective may be complicated by factors quite independent of the organization and nature of the legal rules; these factors were canvassed in a study

conducted for the Law Reform Commission of Canada entitled, *Access to the Law*. The study observed, however:

> Almost all the people we encountered at various information sources agreed that the major problems with the present form of statutes are their technical and convoluted language, the inadequate or non-existent indexing, their complex structure, and the difficulty in keeping track of recent amendments.[22]

Simplifying search and seizure procedures would address these problems at least in part.

24. The goal of simplification must inevitably be compromised, however, by the need to balance the interests at stake in the design of search and seizure powers and to take account of the variables that differentiate the situations which demand the exercise of these powers. These variables include the object of search (e.g., stolen property, narcotics), the subject of search (e.g., a person, place or vehicle), the urgency of the situation, the attitude of the individual affected, the seriousness of the offence under investigation, other particular circumstances of the case, the likely extent to which the particular provisions will be relied upon and the potential for abuse. If the goal of simplification cannot be permitted to suppress recognition of all of these variables, however, it may entail on occasion giving priority to some of them at the expense of others.

25. Informing the task of developing a new regime of rules is the paramount consideration of keeping the ambit and variety of the provisions controllable. The struggle to select and balance out the various relevant factors may be discerned in a number of recent law reform initiatives and codifications: the *Model Code of Pre-Arraignment Procedure* developed by the American Law Institute,[23] the *Criminal Investigation Bill* flowing from the recommendations of the Australian Law Reform Commission,[24] and the recommendations of the Royal Commission on Criminal Procedure in England.[25] The exact balance proposed in each case differs somewhat, but the need to prevent the sum of the individual powers from becoming unmanageable remains a common and paramount goal in all cases. This is our goal as well.

C. A Comprehensive Approach

26. One could approach the task of reforming crime-related search and seizure laws in two different ways. One could accept the

structure of the present rules as a basis, and move through the various aspects of existing procedures, discussing appropriate modifications along the way; or one could start from square one: not only changing the context of the rules where appropriate, but also organizing them into a new structure. This Working Paper takes the latter course, for to take the former is to concede to one of the basic problems with the existing rules — the structural incoherence of their arrangement.

27. The incoherence of the present state of the law has stemmed from the historical tendency to allow individual crime-related problems to dictate the adoption of individual procedures. This paper adopts a different approach: that procedural rules as an initial matter must cut across the distinctions between various offences and found themselves instead on factors relating to offences generally. This approach is implicit in most *Criminal Code* procedures from arrest to trial to appeal. There are not, for example, different arrest provisions for murder, drug possession, precious metals, fraud and firearms offences; there is rather a code of procedure that covers grounds for arrest without warrant (sections 449 and 450), the issuance of warrants (section 455.3), the laying of informations (sections 455 and 455.1) and post-arrest procedures (sections 451, 452 and 453). While distinctions are made between certain offences and classes of offenders, these distinctions derive not from historical particularization but from the need, within a set of general rules, to take account of such social interests as the need to protect the public and ensure the accused's attendance at trial.

28. There is no valid reason why search and seizure rules should not begin from such a general basis; indeed, the virtues of such an approach for warrant procedures were recognized somewhat when the present section 443 of the *Criminal Code* was enacted ninety years ago. But the usefulness of section 443 as an organizational framework for a general set of rules is limited. For one thing, it applies to searches with warrant only and thereby associates grounds for intrusion with a specific mode of authorization, an association we will shortly reject.[26] For another, the proliferation of special provisions since section 443 was enacted makes it somewhat misleading to view this section as the comprehensive warrant regime it once was. While still the broadest and most utilized of the warrant regimes, section 443 is essentially one of many. To develop a comprehensive set of rules, one must draw on all of the various grounds and procedures and not merely on section 443.

29. The adoption of a fresh structural approach does not entail a wholesale rejection of the present rules. On the contrary, these

rules and the policies underlying them are the obvious starting points in a discussion of what the content of the general rules ought to be. The approach taken in this paper basically brings these rules and policies into a central and accessible focus, where they can be evaluated effectively. Accordingly, in Chapters Five, Six and Seven, we develop a set of rules applicable to search and seizure generally. In Chapters Eight and Nine, we assess the legitimacy of departing from the general rules to meet the demands presented by special problems. Finally, in Chapter Ten, we address the apparent problem of the enforcement of procedural rules.

III. Underlying Premises

30. Before beginning the discussion of appropriate rules, it is useful to recognize and explain two premises upon which it is predicated. Firstly, this paper accepts that the question of the grounds upon which searches and seizures are justified is separate from, and prior to, that of the procedures by which they should be authorized. Secondly, it adopts the presumption that the only means of authorizing any search should be a warrant, unless it is shown that resort to the warrant is inappropriate.

A. Separating Justifications from Procedures

31. Under the present state of the law, grounds or justifications for intrusive searches and seizures are identified with their modes of authorization. One might speak, for example, of grounds for searching premises with warrant, comprehending within this description all of the grounds for obtaining warrants in the various statutory provisions discussed in the previous Chapter. To know the legal justifications for searches and seizures in general, one must piece together the grounds for search with warrant with the grounds for search under other procedural mechanisms. In fact, there is a considerable overlap between the justifications offered within the different procedural contexts. That these justifications are identified with their modes of authorization owes more to their history of

growth in separate strands than to any meaningful difference between them.

32. Consider, for example, the warrantless search incidental to arrest. What is the justification for the intrusion this power authorizes? To simply answer "the arrest itself" is to beg the question; why should an officer arresting an individual be allowed to search him and seize items from his possession? The case-law gives a number of different answers: the fruits of the offender's crime may be in his pockets, there may be other evidence of the offence concealed on his person, or he may be carrying a weapon which could injure his captors and aid his escape.[27] The interests inherent in these answers — denying the fruits of crime to the offender, obtaining evidence to prove the offence, protecting the police and other members of society — are indeed inherent in warrant provisions as well: sections 443 and 101 of the *Criminal Code* and the relevant sections of the *Narcotic Control Act* and the *Food and Drugs Act*.

33. This is not to say that the fact of arrest is irrelevant to the question of whether or not a search is justified. Indeed, this paper adopts the position that the protective rationale for search is stronger when arrest has occurred than when it has not.[28] However, what is critical here is that while the items sought may be identical in an arrest situation and a search of premises, the search in the former case may be performed without warrant, while the latter search may not. Why? The answer lies in the circumstances under which the search is conducted. In performing a search incidental to arrest, a peace officer is presented with a situation of heightened urgency. For example, to delay searching an arrested person for a stolen watch until a warrant is obtained increases the possibility that he will get rid of the item, whereas the delay in obtaining a warrant to search a home for the same item does not entail the same degree of danger.

34. The discussion of the interests that justify intrusive searches and seizures is thus separate from that of the circumstances which determine the procedure that ought to be employed to authorize them. And of the two issues, it is justification that is logically prior. There is no point in deciding how to authorize an intrusion until and unless the intrusion is deemed to be worthy of authorization. This order of priority has been recognized in the codifications proposed by both the Australian Law Reform Commission[29] and the American Law Institute.[30] In each case, the model code begins by establishing objects of search and seizure (*viz.* objects in which the State has a sufficient interest to justify the intrusions consequent upon an exercise of these powers). Then, the

model legislation goes on to set out the procedures under which these objects may be obtained. This order of priority will be followed in this Working Paper.

B. The Warrant as General Requirement

35. This paper has already acknowledged the characterization of the warrant as a judicial, particular mode of authorization.[31] These features respectively purport to ensure that no intrusion occurs until the existence of a justification for it has been objectively determined, and that the scope of the intrusion requested and permitted is clear to applicant, adjudicator, executor, and any individual affected by the exercise of the power. These safeguards are rooted in the common law's perception that the intrusions which may flow from the authority to search and seize are serious ones, and therefore ought to be carefully controlled. Although empirical evidence points to certain shortcomings in the control over police discretion exerted by warrant procedures, it also shows that warranted searches remain relatively constrained compared to warrantless ones. In addition to the control factors introduced before the intrusion takes place, the warrant procedure with its reliance on documentary authority possesses certain advantages in terms of review.

36. If it is accepted that respect for individual rights is still a critical social value, then it follows that the control the warrant purports to exemplify ought to be generalized as much as possible. The preference for controlled intrusions over discretionary ones was indeed central to the acceptance of search powers in the first place; Hale could only validate the power conferred by the warrant by incorporating into this mode of authorization the features which would ensure that the power was not improperly exercised.[32]

37. Although times have changed considerably since Hale's day, the argument for carefully controlled searches is still vital; if it is clearly unrealistic to advocate a hard and fast prohibition against intrusions without warrant, the preference in favour of warrants remains. This preference has been explicitly articulated in American jurisprudence[33] and is arguably implicit in the Canadian cases, such as *Pacific Press*, which have adopted strongly protective positions.[34] In the task of developing rules, this preference argues for the streamlining of procedures to make the warrant a more efficient, accessible and therefore utilized mode of authorization. As a matter

of basic principle, it argues that the warrant is always *an* appropriate device for authorizing a search and seizure. In other words, there should not be any instance in which, the justification for intrusion being present, the authorization for intrusion cannot be received through a warrant. The question of whether or not another alternative ought to be made available to a prospective searcher resolves itself into a discussion of whether or not circumstances of particular situations render compulsory resort to warrant procedures impracticable or unnecessary. The comprehensive discussion of these circumstances is reserved for Chapter Six of this paper.

38. It may be argued that statutory preference for a warrant is somewhat misleading and misconceived in that modern practice makes warrantless intrusions the rule rather than the exception. An argument to this effect has been made with particular reference to arrest.[35] On the other hand, the frequent use of the warrant in searches of premises is proof that even under the highly disorganized state of the present law, a warrant requirement is not ignored in practice. Conceding that circumstances often prompt and indeed justify an officer's decision to proceed without the warrant does not mean that there is no point to viewing the power to so proceed as an exception to a general requirement. The generality of the requirement is not a matter of factual likelihood, but rather one of preference, in principle; this principle merely requires that before a warrantless intrusion can be permitted in a particular case, it must be established that resort to the warrant is inappropriate.

CHAPTER FIVE

Justifications for Intrusion

I. Criminal Law Enforcement

39. Criminal law mirrors, or should mirror, a society's perception of its fundamental values. Violations of the prohibitions protecting these interests may lead to serious infringements upon an individual's liberty and privacy. These infringements appear most stark in the context of sentencing the offender following an adjudication of his guilt. However, the primary issue in the discussion of police powers is that of the justification for intrusion prior to an adjudication of guilt. The thesis adopted in this paper is that these justifications are rooted in the need to effectively respond to and prosecute the commission of a criminal offence.

40. The enforcement of criminal law has not always been so elevated among interests. Although the apprehension of felons was one of Hale's articulated aims in his promulgation of search warrants,[36] the only items that could be seized under their authority were the stolen goods themselves. Indeed, for centuries, a necessary basis of the seizure of goods was the belief that their possessor was not entitled to them. This extended not merely to stolen goods but also to contraband, and even, according to the opinions of some commentators, to the instruments of crime, to which primitive notions of fault, justifying confiscation, appear to have been attached.[37]

41. That the State need no longer assert a superior property claim in order to justify seizure is a product both of the decline of property from its sanctified plateau, and the rise of criminal law

enforcement as a dominant social concern. The great landmark in this latter development[38] was the institution of the police force in the nineteenth century; soon afterwards, the case-law began to recognize criminal law enforcement as a strong interest, which could justify seizures in its own right. An accused's proprietary rights in items of evidentiary value, for example, became subordinated to the State's need to preserve proof of guilt for trial. This expansion of the basis for seizure, however, carefully respected certain limitations. These limitations, which have remained in place up to the present day, reside in the "responsive" nature of the criminal justice system.

A. The Sequence of Crime and Response

42. It seems trite to observe that the accusation and prosecution of a criminal offence, around which our system of criminal procedure is built, are responsive measures. The prosecution pursues the charge, and the charge itself responds to the initiation of the offence it comprehends. But the fact that our criminal law enforcement system is founded on this sequence of crime and response to crime is itself noteworthy. A responsive, accusatorial system is by no means the only obvious structure according to which a State can enforce its laws; indeed, England itself experienced its share of inquisitorial bodies, such as the Star Chamber and the High Commission. That the accusatorial system has prevailed is attributable in large part to the recognition of a concept that has achieved an elevated status over the years: the rule of law.

43. The first principle of the rule of law was formulated by Dicey as follows:

> [N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[39]

Followed literally, this principle might be interpreted so as to preclude pre-trial intrusions upon "body or goods", such as seizure and arrest. However, in a later passage Dicey quite clearly countenanced the existence of pre-trial powers so long as they were not exercised "in any manner that does not admit of legal justification".[40]

44. Although the wide application of the rule of law to such concerns as the powers of administrative agencies is perhaps problematic in this day and age, the specific thrust of this first principle is cogent and sound. Dicey took his inspiration, not only from British history, but from a reading of European politics that led him to conclude that "wherever there is discretion, there is room for arbitrariness".[41] Accordingly, the "legal justification" for intrusion had to be clearly defined in terms of individual conduct. It might be said that Dicey recognized that an individual should not be vulnerable to state intrusion because of the kind of person he is, but rather only because of the kind of act he may have committed.[42]

45. Dicey himself declared that the protection of liberties was afforded by a tradition of judicial decisions rather than by a set of rules in constitutional documents.[43] Today, however, his principles are to some extent enshrined in the *Canadian Charter of Rights and Freedoms*: equality before the law, the protection against arbitrary detention, the right to a fair trial and, most importantly for our purposes, the security against unreasonable search and seizure.[44] More significantly, perhaps, they have served as assumptions upon which much intrusive legislation has been based. But while these expressions of the rule of law confirm its continued vitality at a general level, they leave open many critical issues as to its application in the day-to-day reality of criminal law enforcement. In particular, it is worth enquiring how the restraining principles mesh with the mandate of the modern police force.

B. The Modern Police Force and Crime Prevention

46. It is fair to say that much of the impetus for the creation of the modern police organization sprang from the need for systematic crime prevention. The 1829 general instructions to the newly formed London force read in part:

> It should be understood, at the outset, that the principal object to be attained is "the prevention of crime". To this great end every effort of the Police is to be directed. The security of person and property, and all the other objects of a Police Establishment, will thus be better effected, than by the detection and punishment of the offender after he has succeeded in committing the crime....[45]

By and large, however, this preventive strategy was expressed in non-intrusive exercises, such as patrols, rather than in intrusive ones.

Even the most vehement of the crime prevention theorists of the eighteenth and nineteenth centuries in England drew the line at actually intruding upon individual rights before an offence had been committed. Bentham, for example, the great exponent of "prophylactic" measures, recognized this limitation quite expressly: the task of the police, he stated, should be "to intervene as soon as an offence may announce itself in various manners".[46]

47. The years since the introduction of the police force have seen discussions of new and efficient techniques of law enforcement. Yet the principle that the police ought not to intrude upon individual rights until an offence has been initiated has not been seriously challenged. Is this principle still a valid one? The argument against it may be put in straightforward terms: prevention is better than cure.[47] By acting in advance of the commission of the offence, this argument runs, the police ultimately benefit everyone concerned. The public is spared the cost consequent upon the violation, the criminal justice system is relieved of the burden of a prospective prosecution, and the individual himself suffers a relatively minor infringement compared to the detention, trial and sentence which would potentially await him if the crime were actually perpetrated.

48. The problem with this argument is that it seriously compromises individual security. It is possible to couch preventive powers in terms of reasonable beliefs or suspicions, but once these beliefs or suspicions cease to be attached to clearly defined and perceived conduct, their "reasonableness" ceases to provide meaningful protection. Personality becomes a factor in susceptibility to intrusion. The problem has an acute contemporary dimension; insofar as "proactive" strategies involve the police in performing intrusions based on perceptions of a person's criminal propensities rather than the belief that he has committed a particular crime, they create the kinds of dangers that Dicey feared.[48] That such intrusions have been carried out under the surface of a system that ostensibly applies the rule of law has enabled policy-makers to avoid facing a critical question: Is the prevention of crime an objective of sufficient importance to justify derogating from traditionally expressed limitations upon criminal law enforcement?

49. Ultimately the answer to this question reflects the values of the decision-makers. In our Report, *Our Criminal Law*, we recognized limitations upon sentencing techniques:

> Above all, our society has too much respect for freedom and humanity to countenance measures stern enough to make deterrence really

> bite.... In short, the very nature of our society prevents our criminal law from fully organizing the future.[49]

The same values insist upon limitations at the earlier stages of criminal law enforcement. That the prevention of crime is an important social goal is undeniable; its pursuit through both traditional methods such as patrol, and relatively modern ones such as public education and participation programmes, is to be encouraged. But out of an overriding respect for individual rights, the general rule must be that intrusions upon these rights can only be justified following the initiation of an offence.

50. This does not mean that an intrusion cannot have a preventive aspect to it; indeed, one of the basic reasons for infringements upon the interests of an individual who has committed an offence is to safeguard the public against its repetition. This is perhaps most evident in the *Criminal Code* provisions dealing with arrest, detention and bail;[50] the need to "prevent the continuation or repetition of the offence or the commission of another offence" must be considered by the arresting officer, the officer in charge, and the judicial official presiding at the show-cause hearing. The legitimacy of this factor, which has also been relevant to search incidental to arrest, is accepted in this Working Paper. So long as the intrusion is performed after the initiation of a relevant crime, it is not objectionable merely by virtue of its preventive effect.

C. Search and Seizure as Responsive Powers

51. Though our system of criminal procedure may be built around the accusation and prosecution of a criminal offence, the relationship between powers of search and seizure and these procedural touchstones is a qualified one. In practice, searches both with and without warrant are often carried out without any charges being laid as a result.[51] Conversely, many investigations and prosecutions are conducted without resort to any power of search and seizure.[52] Although associations between search and prosecution continue to exist in law, they are more flexible than those that characterized early search and seizure powers which were specifically focused upon suspects or apprehended criminals. This focus may have remained relatively constant in the laws governing warrantless searches of persons; if such searches are now statutorily authorized in cases other than arrest, they are still associated with

items, such as weapons or drugs, possession of which by the individual affected is likely to comprise an offence. In the case of search with warrant, however, the focus has changed substantially.

52. It used to be that the prerequisite to the performance of a search with warrant was not merely the initiation of an offence, but a distinct charge or accusation. Hale's warrant, for example, was issued in response to a complaint against the individual in possession of the stolen goods; when executed, it authorized an arrest as well as a search.[53] This requirement has long since been abandoned, however. In *Re Liberal Party of Québec and Mierzwinski*, Barrette-Joncas J. concluded,

> [t]he case authority recognizes that the name of an accused or of an eventual accused is not necessary to obtain a search warrant.[54]

Indeed, as we confirmed in our warrant survey, a substantial number of warrants are executed against parties whom the police do not even suspect to be implicated in the offence; 20% of the warrants examined by the judicial panel we assembled fell within this category.[55]

53. It is quite proper for the police to decide to conduct the search first, then lay any charge disclosed by the investigation. This sequence is a sensible one, both because the laying of a charge is ultimately a more lasting infringement upon the individual, and because of the increased likelihood of the destruction of evidence after the charge has been laid. Moreover, in the case of search without warrant, any factor of urgency that made the obtaining of a warrant impracticable would similarly militate against the prior laying of a charge. It remains critical, however, to ensure that search and seizure powers are exercised only in situations in which the interests of criminal law enforcement are sufficiently served to justify the intrusion at stake. These interests may be identified by looking to the purpose of search and seizure: to obtain things, funds or information. The question thus becomes: What categories of things, funds or information should the police be empowered to search for and seize in response to the initiation or commission of a criminal offence?

54. Posing the question in this manner involves assumptions that depart from the traditional legal approach somewhat. First, it assumes that obtaining pre-existing information from the persons, places or vehicles to be searched is as valid a form of the exercise as actually taking *things*. Yet the traditional approach, as embodied in the *Bell Telephone* case,[56] has been to restrict search, at least with warrant, to the physical taking of things to be used as evidence. Similarly, insofar as we contemplate the acquisition of control over

funds in intangible form, we also expand beyond restrictive interpretations of present law. Before proceeding to define the classifications of objects that should be seizable under crime-related procedures, therefore, it is useful to clarify the inclusion of information and funds within the ambit of these procedures.

D. Things, Funds and Information

RECOMMENDATION

1. To accord with modern techniques of acquiring and storing things and information, it should be specified that powers of seizure may authorize:

- **(a) taking photographs of a thing which is an "object of seizure";**
- **(b) obtaining records which are "objects of seizure", regardless of the physical form or characteristics of the storage of the records; and**
- **(c) acquiring control over funds which are "objects of seizure" in financial accounts.**

(1) *Things and Information*

55. The first search warrants were for concrete things: stolen goods or instruments of crime, over which the State or the applicant for the warrant could assert a superior property interest to that of the possessor. The effect of the seizure was to hold the item until it was either confiscated or restored. Yet if the evidentiary nature of the item seized was not explicitly recognized in the early legislation, this does not mean that the item was unavailable to the trier of fact; indeed the trier of fact for charges of possession of stolen goods was likely to be the same magistrate to whom the goods were presented following the seizure.[57]

56. Indeed, the evidentiary purpose of items seized began to creep into legislation in cases of felonies, specifically coinage offences, which the justice or magistrate could not himself try; it then became his reduced function to secure the items for their use at a future trial.[58] Once this new purpose became explicit, it became apparent that the goods were not simply being seized for restoration or confiscation; rather, they were being used also for the information

they afforded to the trier of fact. And as modern police began to take over investigative duties, the recognition began to emerge that the recipients of the information disclosed by the items were not simply the eventual triers of fact, but also the police themselves. The current law clearly sanctions the use of seized items for police investigation; in the *PSI Mind Development Institute* case, the warrant was described as one of the "procedures and aids lawfully available" to the police "to conduct their own investigations".[59]

57. The use of a search power to provide information to the police was manifest quite early in the case of the warrantless search incidental to arrest. In *Dillon* v. *O'Brien*, the preservation of the material evidence of guilt was recognized as a justification for detention of an arrested person's possessions.[60] Yet, in a sense, the search of the person incidental to arrest had long since implicitly recognized another sort of informational interest: the ascertainment of whether or not the person was concealing a weapon that could endanger his captor;[61] in other words, it was the information as to the presence of the thing, not the thing itself, that was primarily important.

58. Once the informational aspect of things or the presence of things is regarded as a separate and sufficient basis for intrusion, it is illogical to exclude forms of obtaining information that do not constitute the physical taking of items from the definition of seizure. In fact, the acquisition of information in secondary, recorded form is likely to cause a good deal less inconvenience to the affected individual than the physical taking of things revealing that information. Consider, for example, the following situation. A murder is committed on *X*'s premises, without any involvement by *X*. Bullet holes are found in a number of pieces of furniture. It is clear that under paragraph 443(1)(*b*) of the *Criminal Code*, the police could obtain a warrant to seize the furniture; on the other hand, there is no clear authority which would allow them to enter *X*'s premises without *X*'s consent, and merely photograph and measure the bullet holes. Yet the intrusiveness of the exercise is far greater in the former case.

59. The alternative of recording information rather than removing items from premises is explicitly recognized in subsection 29(7) of the *Canada Evidence Act*, which covers searches for documents in financial institutions, and provides in part:

> [U]nless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything therein shall, as regards

> the books or records of such institution, be construed as limited to the searching of such premises for the purpose of inspecting and taking copies of entries in such books or records.[62]

While it may be that financial institutions have a particularly acute interest in keeping their records on their own premises, the principle in favour of minimal disruption of an individual's interests is a general one. Where the photographing of information, rather than the taking of things, is sufficient to serve the interests of law enforcement, it should be not only authorized but encouraged. This encouragement entails some modification to evidentiary rules as well as laws of search and seizure; as such, the subject is beyond the scope of this Working Paper. What can be done here is to recommend that the definition of seizure encompass making copies or taking photographs. To ensure that search and seizure powers are not used as a pretext for surveillance of premises, it should be made clear that the definition does not include recording any events occurring subsequent to the commencement of the intrusion.[63]

60. The definition of seizure also should include the collection of data from computers. There is, in principle, no reason why information that would be seizable if contained in a document should be immune from seizure because it is stored in a computer record. Equal treatment of documents and computer records appears, for example, in the proposed federal freedom of information legislation, under which access is granted to government records:

> "record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.[64]

We accept that a similar breadth of definition is appropriate to search and seizure laws.

61. Permitting police officers to photograph objects or obtain information from computers creates certain dangers of invasion of privacy. Because these activities are less physical or visible than the removal of objects, apprehensions may be raised of systematic monitoring of individuals without their knowledge. While appreciating such concerns, we do not accept that they dictate that search and seizure laws be confined to primitive technological methods. Such a result would discriminate in favour of the technologically sophisticated criminal. Rather, in expanding search and seizure law, we seek to make the acquisition of information subject to the same

principles and protections as the acquisition of things. In part this entails certain procedural decisions, which will be discussed in later Chapters. Primarily, it requires that the same categories which limit things subject to seizure also cover information recorded or stored in other ways.

(2) *Funds*

62. The final component of our recommendation is directed towards clarifying the situation with respect to financial accounts. We begin with the observation that illegally obtained money in tangible form has long been seizable. For example, the 1836 English case of *Burgiss* held that coins found in possession of a prisoner charged with forgery could be retained on the basis that there was reasonable ground to suppose that the coins were proceeds of the crime.[65] Proceeds, of course, may be converted into different forms of property, and Anglo-Canadian courts have recognized the legitimacy of following the money for purposes of restitution insofar as it can be traced through these conversions. Specifically, it has been noted that the mere fact that money has passed through a bank account does not impede the common law right to trace.[66] Moreover, by virtue of the extended definition of "property" in section 2 of the *Criminal Code* so as to include "a right to recover or receive any money or goods", it has been suggested that offences concerning property may cover the possession of funds in accounts.[67] We firmly agree with these positions.

63. The problem with respect to seizing the money in the account under present crime-related law is that subsection 443(1) of the *Criminal Code* refers to seizure of "anything" fitting within the designated classifications, an expression that may not cover intangible forms of obligation represented by a debt or loan.[68] In the recent House of Lords decision in *Cuthbertson*, for example, it was found that a forfeiture provision covering "anything" related to drug offences did not apply to profits of drug trafficking held in bank accounts since these were not "tangible things".[69] While the merits of this decision might be debated and perhaps ultimately resisted by Canadian authority, it would seem prudent to explicitly cover funds in financial accounts in search and seizure provisions intended to apply to them.

II. Objects of Seizure

RECOMMENDATION

2. "Objects of Seizure" means things, funds and information which are:

(a) takings of an offence;

(b) evidence of an offence; or

(c) possessed in circumstances constituting an offence.

"Takings of an offence" means stolen property or other property taken illegally from the victim of an offence. It includes property into, or for which, takings of an offence originally in the possession of an individual have been converted or exchanged.

64. In this subchapter, we develop a definition of "objects of seizure", *viz.* those objects that will always justify a search or seizure, whether with a warrant or, if an exception to the warrant requirement obtains, without one. An examination of the statutes and jurisprudence discloses that there are five classifications of things, funds or information in which the criminal law enforcement system traditionally has asserted an interest. These are things, funds or information:

(a) necessary for the physical protection of peace officers and other individuals;

(b) which represent the "fruits of crime", an expression comprehending both the "takings" and "profits" received in connection with an offence;

(c) which are possessed in circumstances constituting an offence;

(d) which provide evidence of the commission of an offence; and

(e) which are the instruments or means by which an offence has been or may be committed.

Our recommendation, which is set out following paragraph 100, condenses and rationalizes these classifications. To explain our position, however, it is useful to analyse them in turn. In addition, it is relevant to consider the use of search powers to rescue persons detained illegally.

A. Protection

65. Traditionally, this justification for intrusion has been associated with common law searches incidental to arrest. However, it also finds expression today in section 101 of the *Criminal Code*, which allows searches for, and seizures of, various weapons on the basis of a belief that "it is not desirable in the interests of the safety" of the individual searched, or of any other person, that the individual have a weapon in his possession, custody or control. In practice, as might be expected, protective searches are most frequently conducted upon the person of the individual and are usually performed without a warrant.

66. What is immediately remarkable about protection as a justification is that it looks not to the past, nor even to the present, so much as to the future. In other words, at first glance it seems to reverse the sequence of crime and response to crime which is integral to intrusive practices under our law enforcement system. When put in the context of an arrest, however, the sequence is restored; the arrest is itself a response to the commission of an offence, and the search, insofar as it is protective, basically serves to effectuate the arrest by preventing escape, and ensuring the safety of the police and the public. As was recognized in *Leigh* v. *Cole*, "the police ought to be fully protected in the discharge of an onerous, arduous and difficult duty — a duty necessary for the comfort and security of the community".[70] We develop proposed rules regarding protective search and seizure incidental to arrest later in this paper.[71]

67. It might be argued that "the interests of safety" test in section 101 is simply an extension of the rationale underlying the protective search incidental to arrest. The significance of the extension cannot be overemphasized, however. By failing to conform to a sequence of crime and response to crime, the provision opens the door to the dangers of focus on criminal propensity rather than conduct, the projection of uncertainty into the criminal law, and the fostering of opportunities for arbitrary intervention. The legitimacy of the provision as a necessary measure to deal with the use of firearms basically involves an argument for an exception to a general rule, and the topic will be discussed accordingly later in this paper.[72]

68. The seizure of weapons for protective purposes essentially subordinates the individual's possession of the weapon (if it is indeed his own) to the interests of safety of the peace officer and/or of other individuals. The State asserts no superior property interest in the

weapon; in fact, the legislation has recognized, to some extent, the propriety of compensating an individual for the loss of his weapon under such circumstances in which no offence has been committed. Such, at least, was the finding in the *Thomson* case, a decision of the Ontario Provincial Court interpreting section 101, in which an individual was entitled to the proceeds from a judicially sanctioned sale of certain weapons taken from her possession.[73] The legal situation in case of a purely protective seizure is to be contrasted with that obtaining in the case of seizures of weapons illegally possessed or used in the commission of a crime; by virtue of sections 100(3) and 446, such weapons are forfeited.

69. The protective rationale for search and seizure may overlap with other justifications. There are many sections of the *Criminal Code* prohibiting or regulating the use and possession of weapons.[74] Accordingly, a weapon often may be reasonably believed to have been possessed in circumstances constituting an offence or it may serve as evidence in a prosecution for a violent crime. When neither of these circumstances obtains, however, we conclude that as a general rule the protective rationale is not a sufficient justification for an intrusive search or seizure outside the context of arrest. Thus, we do not include a separate classification concerning protection in our basic definition of "objects of seizure".

B. Fruits of Crime

70. The term "fruits of crime", which appears in both the *ALI Code*[75] and the American Federal Rules,[76] actually embraces two distinct classifications of items. First, there are those things or funds that either correspond to or represent the proceeds of transactions traceable to property wrongfully taken from a victim who is its rightful possessor. Examples of this classification under present law would include stolen property,[77] property received from fraud, forgery, extortion or the sale of stolen property,[78] and a motor vehicle taken without the consent of the owner.[79] For the sake of precision, this classification will be called "takings". Second, there is property that represents income from the commission of an illegal act, such as the sale of prohibited narcotics,[80] restricted or controlled drugs,[81] or obscene publications.[82] Unlike takings, this income does not rightfully belong to anyone other than the individual searched; however, the State has often asserted that it is entitled to confiscate

it, since the individual would not have received it had he remained obedient to the law. This classification will be referred to as "profits".

71. A number of procedural and technical problems arise with respect to both of these classifications — problems pertaining, for example, to the depositing and mixing of funds in bank accounts. These problems will be discussed later in this paper.[83] Our immediate concern is with the justifications for seizing these classifications of things under crime-related search and seizure powers.

(1) *Takings of Crime*

72. The recovery of takings is the oldest justification for search with warrant, dating back to the time of Hale. In practice, takings are frequently identifiable as the objects of such searches, even though the warrant itself is likely to specify that the property is sought as "evidence of an offence".[84] The same objective has also appeared in the context of search incidental to arrest. In the *Percival and McDougall* case, for example, an application for return of money used as exhibits at trial was refused, partly on the basis that the money, taken from the accused upon their arrest, was stolen.[85]

73. A purpose of the State's acquisition of control over takings is their return to the victim of the offence. Indeed the law has long recognized that the victim himself has certain remedial powers to recapture chattels wrongfully possessed by another.[86] The involvement of the State introduces a new element into the situation; the State, in effect, acts as intermediary in a restitutionary transaction. The final step in the process may be made by means of an order at the end of trial, under section 655 of the *Criminal Code*, which provides for the restoration of "property obtained by the commission of the offence". This is not, of course, the only restitutionary provision available; in the *Criminal Code* one also finds section 653 (which allows a court to make an order of compensation for loss of property), section 654 (which provides for compensation to *bona fide* purchasers), and paragraph 663(2)(*e*) (which makes restitution a possible condition of a probation order). We do not accept, however, that search and seizure provisions should anticipate restitution in this wide sense. Rather, we take the view that objects seized must be traceable to objects wrongfully taken.

74. The reason for our position derives from Dicey's principle prohibiting punishment before conviction. The seizure of takings and their return to their rightful possessor, while undoubtedly

inconvenient to the party searched, is primarily redistributive rather than punitive; it re-establishes the pattern of holdings that existed before the offence was committed. Indeed, the power under section 655 to make a final distribution of property is not dependent upon a conviction; rather it springs from the State's interest in ensuring that at the end of the trial process, everyone involved has what belongs to him. To deprive the accused of such property is not punishment in a true sense; he is not denied anything the State recognizes as a rightful possession.

75. On the other hand, the seizure of objects not traceable to the offence itself is essentially punitive. Not only does it anticipate the conviction of the accused and the making of a restitution order as an incident of sentencing, it also effectively punishes him before trial, by denying him items that are indisputably his own. Unless the State has a distinct justification for the control of these things, such as their use as evidence, we propose that their seizure and detention before trial be unacceptable.

76. On the other hand, we accept the legitimacy of seizure of items traceable to the original takings. In adopting this position, we refer to the extended definition of "property" found in section 2 of the *Criminal Code*, which includes property into, or for which, other property has been converted or exchanged. As well as applying to restitution proceedings under section 655, this definition could be used at present in conjunction with section 312 of the *Criminal Code* to obtain a section 443 search warrant for objects traceable to the crime at issue; where an information alleged commission of possession of "property obtained by crime", a justice could issue a warrant to seize the items on the basis that they comprised "anything ... in respect of which an offence" had been committed. While agreeing with the principle served by such construction, we find it unnecessarily complex. Accordingly, we recommend that a classification of takings be included in the definition of "objects of seizure" and that this classification itself incorporate by reference the relevant part of the definition of property.

(2) *Profits of Crime*

77. The common law has also asserted a strong interest in denying an individual any profits from a crime he has committed. Where these profits are not traceable to a victim of the offence, the courts have asserted their susceptibility to forfeiture to the Crown.

This policy has been evident in recent sentencing decisions concerning drug trafficking. In the *Kotrbaty* case, for example, Berger J. imposed a fine that deprived the accused of profits made from the sale of heroin.[87] Should this policy be recognized at the search and seizure stage, as well as in the context of sentencing?

78. Profits of an offence, as such, would appear to be seized relatively infrequently. This may be attributed to a number of factors. Unlike stolen property, profits almost always first come into the offender's possession in the form of money, which is difficult to follow. So too, since the payer of the money is likely to be implicated in the offence, he is less likely to be co-operative with the police than a victim of a theft or fraud; accordingly, the difficulties of following and segregating funds are compounded. Indeed, the most likely opportunities for seizing profits would appear to be either situations in which undercover police are parties to the exchange of funds, such as drug purchases, or situations in which the offence itself, gaming or betting for example, involves the use of money.

79. In fact, no crime-related search and seizure law mentions the possibility of seizing or detaining profits as such. In the case of section 181 of the *Criminal Code*, money may only be seized and detained if it is "evidence" of a gaming offence. While money is often seized in narcotics and drugs searches as either evidence or "any other thing ... in respect of which" an offence has been committed, the evidentiary potential of the money must be established if a restoration application is made by its lawful possessor.[88] Recently, some police and prosecutors have taken the view that warrants under subsection 443(1) of the *Criminal Code* may be used to seize profits by alleging that such profits constitute property possessed contrary to section 312.

80. The issue of the seizure of profits deserves clarification. We take the view that only when and if profits of crime are either illegal to possess or declared forfeit should the State have the power to seize them. In strict terms of ownership, profits, unlike takings, belong to the searched individual; indeed, in the *Smith* case, Addy J. went so far as to assert that "an absolute right of property" was at stake in restoration proceedings regarding moneys seized in a drug investigation.[89] And unlike the case of takings, no other individual stands to suffer if profits are dispersed by their possessor before his conviction; if the State cannot exact its penalty upon the money of the accused, there are other variables of sentencing that may be adjusted accordingly.[90] It may be argued that the deprivation of profits ought not to be just one in a number of sentencing options, and

that an individual ought to be denied such ill-gotten gains. Steps to implement such a policy, in the form of *in rem* divestiture procedures, have been introduced into American organized crime statutes[91] and discussed here in Canada.[92] For reasons that will be elaborated later, however, we believe that *in rem* procedures ought not to exist in a *Criminal Code*.[93] As to whether or not possession of profits of an offence is at present or should be a crime in itself, we take no position in the present paper. Absent such a crime, we adhere to the position that steps to acquire profits must await sentencing.

81. Given the position outlined above, we find it unnecessary to specify a separate classification for "profits of an offence". If possession of such profits is itself a crime, their seizure will be clearly mandated under the classification, which we are about to develop, of "objects possessed in circumstances constituting an offence".

C. Objects Possessed in Circumstances Constituting an Offence

82. There is a direct connection between offences that deprive individuals of the right to possess certain items, and search and seizure powers; the latter enforce the prohibitions that the former define. The prohibition on individual possession may still, as in the case of counterfeiting provisions, be linked to an assertion of ownership by the State;[94] more often, it simply reflects a perception of dangers that attend possession. The paramount examples of such a perception are those inherent in narcotics and drugs legislation, and in the weapons provisions in the *Criminal Code*.[95] Searches for, and seizure of, narcotics are quite frequent in practice under all modes of authorization, including the writ of assistance. As indicated earlier, weapons searches are also quite frequent and occur predominantly without warrant.[96] Although a moratorium on writ applications has been imposed, the Commission survey of writ usage indicated that, particularly in Edmonton and Vancouver, the existing writs were commonly employed in *Narcotic Control Act* and *Food and Drugs Act* searches.[97]

83. Although some of the items seized may be used for evidentiary purposes, the scope of the seizure we envisage is not restricted to what is required for these purposes. It is difficult to argue that the police, finding a large shipment of counterfeit money,

for example, should seize only that portion of it that would enable them to prove the offence. Since the person cannot lawfully possess any of the money, it follows that he should be deprived of all of it. The matter is not so simple, however, where the item is illegal to possess only for a particular purpose. This category of item includes controlled drugs,[98] burglary tools,[99] obscene publications and crime comics.[100]

84. First, since mere possession of the items is not an offence, it follows that there is no justification for seizing them, unless grounds exist for believing that the possessor has the requisite illegal purpose in mind. This qualification would appear to be recognized in existing legislation. Subsection 37(2) of the *Food and Drugs Act*, for example, makes it clear that the drug must be one "by means of or in respect of which an offence ... has been committed"; an offence would not be committed by a possessor of amphetamines, for example, unless and until the "purpose of trafficking" attended the possession.

85. Second, the scope of intrusion justified as a response to such an offence is called into question. Plainly, it would be legitimate to seize those items or that quantity of substance which serve an evidentiary purpose. But what about the rest? It might be argued that since it is not *per se* illegal for these items to be possessed privately, the State has no basis for acquiring control over them. In the *Nimbus News* case, for example, it was observed that conviction of an offence of possession of obscene matter for the purpose of distribution would not in itself make continued possession of the magazines unlawful.[101] The logic of this position would dictate that items such as obscene publications or controlled drugs be left with their possessor unless required at trial. Yet the shortcoming of such a conclusion is obvious: it countenances the possibility that the unseized items will be distributed or used in precisely the illegal manner apprehended when the search was authorized.

86. To address this possibility we recommend expanding the scope of seizure to include all the relevant items. In a sense this is a preventive measure; indeed, it is the capacity to seize all offensive publications that has been said to distinguish the preventive power of search under *in rem* proceeding provisions from the conventional section 443 power.[102] However, the rationale for comprehensive seizure of, say, illegally possessed amphetamines, is not entirely preventive; rather, the seizure aims to stop the continuation or repetition of an offence — the further pursuit of the purpose of trafficking. Since the illegal possession precedes the intrusion, it is

plain that the seizure falls within the sequence of crime and response to crime which is fundamental to criminal procedure. It is also relevant to note that, at least in the case of controlled drugs and offensive publications, the absence of an offence covering simple possession does not necessarily represent any perception that possession in itself is harmless to society. Rather, it may reflect a decision to focus the attention of criminal law enforcement institutions upon the distributor rather than the possessor.[103] Insofar as this is true, it seems somewhat self-defeating to permit the police to search and charge an individual believed to be a distributor, yet to withhold from them the power to seize from him the very items the criminal prohibition was designed to suppress.

87. This does not imply that the *in rem* procedures presently set out in the *Criminal Code* are adequate; problems with these procedures will be discussed later in this paper.[104] Rather, it calls for the recognition in a set of general rules of the legitimacy of seizing all items, or the whole of a substance possessed for an unlawful purpose. This position concedes the possibility of a subsequent finding being made at trial that the items or substance seized were not so possessed, a possibility that may connote a substantial and mistaken deprivation to the individual concerned in the interim. However, this possibility applies to all categories of objects: money seized as the takings of an offence, for instance, may turn out to be acquired lawfully. The concern about mistaken intrusions and deprivations must be general, expressed in standards of proof and provisions for disposition of things seized. It should not preclude the seizure of items which, in certain correctly-identified circumstances, should not be allowed to remain with their possessor.

D. Evidence of Crime

88. Particularly in connection with warrants, the evidentiary justification for search and seizure has been emphasized both by the courts and in practice. It has been estimated that over 80% of the Canadian case-law on section 443 warrants deals with informations in which exclusive reliance was placed upon paragraph (1)(*b*), which authorizes search for evidence of an offence.[105] The results of the Commission's warrant survey are even more lopsided; 134 out of 136 section 443 warrants examined by the judicial panel we assembled were issued on the basis of paragraph (1)(*b*).[106] The evidentiary

justification, of course, has long been recognized in the context of warrantless searches incidental to arrest. While Canada historically may have taken a rather brash step in allowing purely evidentiary seizures under warrant outside of arrest, accepting without apparent difficulty a rationale for intrusion questioned in other jurisdictions, this ground for search is too strongly entrenched to question seriously now.

89. To some extent, the evidentiary justification overlaps with others. Both takings of an offence and contraband may serve evidentiary purposes; a narcotic, for example, is seized not only because its possession is prohibited, but also because a conviction under narcotics legislation requires proof that the substance seized was indeed a narcotic. However, the seizure of items of exclusively evidentiary value (particularly documents) is still the predominant practice of peace officers acting under warrant. In affirming this ground for seizure, we recognize that even when lawfully possessed, the value of evidence to our criminal law enforcement system outweighs the inconvenience seizure may cause to its possessor.

90. The courts have been generally lenient in their interpretation of what constitutes "evidence" of an offence. In the *Worrall* case, Porter C.J.O. elaborated upon the meaning of the test:

> It means, I think, that the Justice must consider whether the production of the articles ill afford evidence which would be relevant to the issue, and would be properly tendered as evidence in a prosecution in which the alleged fraud is in issue.[107]

In focusing upon potential relevance, the courts have, in effect, given the Crown considerable discretion; they have balked, at least at the issuance stage, at considering the *necessity* of actually taking the items away from their possessor. Necessity, rather, has only arisen in cases such as *Nimbus News*[108] and *Pink Triangle Press*[109] which have involved applications for return of items seized. This state of affairs represents a compromise of sorts. To tolerate the seizure of items that the State may not actually need for its law enforcement purpose is to concede a degree of inefficiency in the exercise of police powers. On the other hand, particularly in instances in which evidence may be buried somewhere amidst a large volume of documents, it is unrealistic to demand that the police make a binding selection of the items they intend to use before making a seizure. Accepting the validity of the compromise, however, does not mean accepting the present provisions which purportedly effect it. This is primarily a

problem of post-search procedures, and accordingly will be reserved for the Working Paper dealing with this particular subject.

E. Instruments of Crime

91. The search for instruments or means of an offence is not given precise statutory authorization in Canada, but strands of recognition do exist. Both *Narcotic Control Act* and *Food and Drugs Act* provisions and section 99 of the *Criminal Code* allow the seizure of things "by means of which" a relevant offence has been perpetrated; paragraph 443(1)((*c*) of the *Criminal Code* covers things "intended to be used" for serious criminal purposes; this wording, although ambiguous, would seem to contemplate not only the fitness of the thing for an offensive use, but also the actual intention of its possessor to so use it. In England, where no search warrant provision as general as section 443 exists, the "instruments" of a crime have been held to be seizable at common law.[110]

92. Indications are that warrants are used infrequently to seize instruments as such. Paragraph 443(1)(*c*) appears to be used rarely, if at all.[111] One area in which instruments of crime are relevant is that of drug offences; the police may wish to seize the paraphernalia associated with narcotic or drug use, trafficking and manufacturing. Since the *Narcotic Control Act* and *Food and Drugs Act* provisions do not allow for the issuance of warrants to search for such items but only for narcotics or drugs themselves, these items did not show up in warrant documents captured in the cross-country survey. However, given the officer's power to seize these items once in possession of a warrant, they did appear in reports of seizures. Among the items often seized were pipes, scales, knives, baggies, smoking devices, and laboratory components.[112]

93. Instruments of an offence such as drug paraphernalia would in most cases constitute potential evidence of that offence; other instruments such as weapons might in themselves be illegal to possess or seizable on a protective basis. In any of these events, no discrete justification would be required for asserting the State's control over the instrument as such. The question may thus be posed: Outside of their potential status as evidence, contraband or weapons seized on a protective basis, what basis is there for the seizure of instruments of an offence? There would appear to be two distinct answers to this question on the basis of common law authority.

94. First, there is the historical notion that items, once used by their owner in the commission of an offence, must be forfeited to the State. This notion has been traced to the medieval law of the "deodand" under which objects such as wagons or swords that caused injury to an individual were seized, condemned, and after purification, sold by the Crown. In essence, a degree of fault was attributed to the object itself.[113] If this seems somewhat primitive, it is worthwhile to ask what interest is served by subsection 10(9) of the *Narcotic Control Act*, under which conveyances used in drug offences are forfeited to the Crown. The absence of a justification for retention of such conveyances, after seizure and pending conviction, was recognized by the Manitoba Court of Appeal in the *Hicks* case:

> It is possible to order that property be forfeited even though it is not in the possession of the Crown. If such property is disposed of so as to make unenforceable an order of forfeiture, that is a fact situation that may affect the sentence to be imposed on the offender.[114]

The argument can be taken a step further. If there is no compelling reason to allow the Crown to retain a seized conveyance before forfeiture, it is difficult to see why seizure of the thing ought to be allowed in the first place, unless it serves an evidentiary function. Once again, it is worth emphasizing that the service of a sentencing function, be it punishment or deterrence, is not in itself a sufficient justification for pre-trial search and seizure.

95. The other rationale behind discrete powers to seize instruments of an offence is a preventive one; indeed, this is the rationale expressed in paragraph 443(1)(*c*). The primary objection to this rationale is that it violates the sequence of crime and response to crime which this paper has adopted as a basic limitation upon intrusions. Indeed, paragraph 443(1)(*c*) itself illustrates the arbitrariness and uncertainty that potentially flow from the most careful and narrow departure from this sequence. While it is possible to identify certain types of apparatus, such as counterfeiting equipment, as things which by their nature are susceptible to criminal use, there are many items, in themselves innocuous, which may be "intended to be used for the purpose of" committing an offence. A kitchen knife may be used to murder, a pen and paper may be used to forge documents, a test tube may be used to manufacture illicit drugs.

96. We conclude that the appropriate way in which to control the possession of truly dangerous items is to enact prohibitions against their possession. In the absence of such a prohibition, an individual should not be vulnerable to intrusion before forfeiture or sentencing because of the illegal potential of an item which he

lawfully holds. A possible exception to this rule, the case of weapons that may endanger human life or safety, will be discussed later in this paper.[115] Given our general position, however, we do not include instruments of crime in the definition of "objects of seizure".

F. Persons Illegally Detained

RECOMMENDATION

3. In addition to their powers regarding "objects of seizure", peace officers should be empowered to search for and rescue persons detained in circumstances constituting an offence.

97. Besides the things or informations the State may wish to control, the object of a search may in rare cases be a person. The usual reason why the police want to obtain control over a person is that they suspect that person of participating in an offence, and wish to arrest him. Yet there may be another reason — the person may be detained illegally by another individual. Situations of detention constituting offences under the present *Criminal Code* include kidnapping[116] and hijacking.[117] The police, in such circumstances, intrude in order to rescue the person, not arrest him.

98. The only crime-related search provision under existing law that recognizes this justification is section 182, which deals specifically with women in bawdy-houses. On the other hand, the purpose is explicit in a number of provincial statutes, notably those dealing with child welfare.[118] It has been accepted in the *ALI Code* that individuals "unlawfully held in confinement or other restraint" ought to be regarded as "permissible objects of search and seizure";[119] an amendment to allow for search warrants for persons was recently made to the American Federal Rules.[120]

99. What, then, accounts for the absence of powers to search for such persons from the *Criminal Code*? The answer may lie in a perceived absence of need. To some extent, rescue efforts might well be authorized as incidental to the arrest of an offender, and in the light of *Eccles* v. *Bourque*, it is likely that a peace officer would not need a warrant to enter private premises to make an arrest.[121] Moreover, peace officers retain their residual common law authority to preserve the peace, a power that extends to entering premises without a warrant to prevent the commission of an offence that would

cause immediate and serious injury to a person.[122] Police authorities, however, informed Commission researchers of a reluctance to proceed in such cases without documentary authority. Moreover, it is not inconceivable that a victim of a *Criminal Code* offence such as kidnapping might be unlawfully detained at a different location than that at which the offender is to be found.

100. We recommend therefore that peace officers be specifically empowered to search for and rescue persons illegally detained. Due to the definitional and practical distinctions between such a power and the powers to search for and seize things, funds or information, we propose that the search and rescue power be developed separately rather than recognized in a classification of "objects of seizure". As in the case of search and seizure powers, however, the illegality of detention should be connected to a criminal offence. Otherwise, the problem arises of the potential use of a search power in lieu of the writ of *habeas corpus*. *Habeas corpus* is obtained from a superior court to test the legitimacy of a wide variety of forms of detention, including incarceration of persons committed for trial or pending deportation, confinement of the mentally ill, and custody of children. In many of these cases, the basis of the illegality is likely to be procedural impropriety, rather than the commission of an offence by the custodian. Since the basis for intrusion accepted in this Working Paper is that of responding to crime, it follows that in such cases, the search power should be inapplicable.

CHAPTER SIX

Exceptions to the Warrant Requirement

RECOMMENDATION

4. Unless otherwise specified, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. A warrant should not be required:

- **(a) for a search performed with consent obtained pursuant to Recommendations 5 and 6;**
- **(b) for a search and/or seizure following arrest as specified in Recommendations 7 and 8;**
- **(c) for a search and/or seizure in circumstances of danger to human life or safety, as specified in Recommendation 9;**
- **(d) for a search of a movable vehicle in circumstances of possible loss or destruction of "objects of seizure", as specified in Recommendation 10; and**
- **(e) for a seizure of "objects of seizure" in plain view, as specified in Recommendation 30.**

101. In defining the categories of "objects of seizure", we have identified those occasions in which an intrusive search and/or seizure is justified. We now turn to defining the procedures by which individual searches and seizures should be authorized. Our basic rule is that unless it is otherwise provided, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. Our task in this Chapter is establishing the exceptions to the warrant requirement. As indicated earlier, we maintain that there are essentially two different kinds of situation in which a search or seizure should be authorized without a warrant: situations in which obtaining a warrant is unnecessary, and situations in which obtaining a warrant is impracticable.[123]

102. The "unnecessary" standard relates basically to the understanding that searches and seizures represent intrusions upon individual rights. It follows that when the seeking of things, funds or information involves no such intrusion, it is unnecessary to confer any authorization upon the police. For example, in investigating a murder committed in a public park, the police require no exceptional power to attend at the scene, take photographs and collect physical evidence. On the other hand, such powers are relevant when the evidence of the crime is in a private home; entering the home intrudes upon the occupant's private domain. The law recognizes, however, that an occupant may consent to the entry; once the consent has been given, the entry in effect ceases to be regarded as intrusive. We address the "consent" exception to the warrant requirement in Recommendations 5 and 6.

103. The "impracticability" test, on the other hand, contemplates situations of urgency. This test is recognized, at least implicitly, in a range of powers to make warrantless searches under existing law: the common law power incidental to arrest, and the statutory provisions relating to firearms, narcotics and drugs. The question of whether this range truly or adequately comprehends situations of urgency is one that has long merited careful examination. Our own analysis suggests that there are three classifications of urgent situations in which exceptions to the warrant requirement may be appropriate: arrest, danger to human life or safety, and potential loss or destruction of objects of seizure. We address these situations in Recommendations 7 to 10.

I. Consent

RECOMMENDATIONS

5. A peace officer should be authorized to search without a warrant:

(a) any person who consents to a search of his person; and

(b) any place or vehicle, with the consent of a person present and ostensibly competent to consent to such a search.

A peace officer should be empowered to seize any "objects of seizure" found in the course of a consent search.

6. The consent should be given in writing in a document warning the person of his right to refuse to consent and to withdraw his consent at any time. The absence of a completed document should be *prima facie* evidence of the absence of consent.

A. The Need for Limitation

104. Our proposal reflects our dissatisfaction with the present law respecting "consent" search.[124] The advantages of resorting to consent as the basis of authorization for a search or seizure are many — a diminished likelihood of review, a possible psychological edge over the person searched, the less burdensome procedural requirements, and the absence of confinement to the usual "grounds of belief".[125] While the law should continue to recognize the existence of true co-operation between a peace officer and a private individual, it is important to put the matter of consent in the context which its common law history has not supplied. It is important, that is, to regard "consent" searches as an intrinsic part of the scheme of police procedures and not as privately sanctioned transactions that fall outside the concern of the public law-maker. This view has been accepted by both the Australian Law Reform Commission and the American Law Institute, in the *Criminal Investigation Bill*[126] and the *Model Code of Pre-Arraignment Procedure*[127] advanced by each respectively. It also reflects the empirical perception that police often use consent much like they use their coercive powers — to accomplish objectives pertaining to the search of suspects.[128]

105. To the extent that the law encourages resort to consent as a basis of authorization, it promotes certain objectives and policies. One obvious policy relevant to the law in this area — the recognition of the dependency of police investigation upon citizen co-operation — has received widespread emphasis in Canada. As the Ouimet Committee observed, "[t]he police cannot effectively carry out their duties with respect to law enforcement unless they have the support and confidence of the public".[129] While this recognition argues in part for keeping law in sufficient harmony with existing community values to ensure public co-operation, it also has a procedural aspect: encouraging the police to gain the co-operation of individuals rather than asserting coercive powers against them.

106. The value of reliance upon policing by consent has its limitations, however. For one thing, it has been suggested by

American sources that such reliance may have some counterproductive effect on police practice and investigations:

> The seeking of consent is often an officer's substitute for the thinking, writing and "leg work" involved in obtaining a search warrant. In this context, if consent is denied, the target of the search is put on notice that the police suspect him of wrong-doing. What then occurs is either a do-it-yourself emergency, upon which the courts look with disdain, or destruction of evidence by the alerted wrongdoer. Neither of these results is acceptable.[130]

While the likelihood of gaining the individual's consent might be expected to be a significant factor in a peace officer's decision to request it, the argument remains that by making resort to consent a more easily invoked option than a warrant application, the law discourages the police from obtaining a warrant in cases in which it might be truly appropriate. This argument is contradicted, however, by the empirical evidence that the police may often obtain a warrant as a back-up in case consent is not forthcoming.[131]

107. More significantly, the unfettered discretion to use "consent" as the basis of authorization may actually undermine the policy of promoting public co-operation with the police, if it results in submission out of apprehension rather than a true state of co-operation. An experienced Canadian criminal lawyer has observed, "[m]uch of the disrespect law violators have for authority generally can be traced to early encounters with police officers who instilled sentiments of fear into them rather than of trust and respect".[132] The Ouimet Committee, citing this observation, called for the maintenance of fairness in procedures governing police contact with the offender.[133] In the matter of the "consent" search at issue in this paper, a similar concern calls for the entrenchment of rules and guidelines to help ensure that the use of this exception to the warrant requirement is restricted to appropriate cases.

108. This approach may seem to impose an unnecessary burden on the police. If an individual is prepared to give consent to another person to enter his premises or touch his person, why should the law make the second individual subject to special constraints by virtue simply of his identity as a peace officer? The answer is that it is misleading to view a peace officer's requests for permission to enter and search premises, frisk persons and take away items consequently found, on the same footing as hypothetical requests of a similar nature from private individuals. Peace officers do not only exercise special powers; they hold a special and imposing office. Accordingly, a factor of potential intimidation is presented when a private

individual is confronted with a police request. As "consent obtained by show of authority is no consent", the danger arises that the compliance obtained from the individual is not truly consensual.[134]

109. This approach may seem to conflict somewhat with recent Canadian case-law. Notwithstanding a show of authority, our courts have regarded an individual as acting voluntarily in complying with a peace officer's request in various contexts. For example, since the *Chromiak* case it seems to be established that the response of a person faced with a demand to provide a breath sample may be considered to be voluntary.[135] Canadian authority, however, goes no further than making specific determinations of voluntariness of individual action on the facts of specific cases. It does not necessarily argue against subjecting the relevant police activity to specific statutory rules. In this regard, it is interesting to note that in *Chromiak*, the police activity of demanding a breath sample was governed by a *Criminal Code* provision.[136]

110. It may be useful to emphasize here that consent to a search or seizure is primarily relevant in legal terms in cases in which either the grounds for a non-consensual intrusion do not exist or the procedures to obtain authorization for a non-consensual intrusion have not been followed. Although peace officers may seek a person's consent as a strategic matter in cases in which they have authority for a non-consensual search, it is misleading to view consent as the legal basis for the frisk, entry, search or seizure at issue in such cases. In reality, consent is used to facilitate an activity the officer is prepared and authorized to conduct as an exercise of power. Nothing in our proposals impedes peace officers from continuing to seek compliance in such cases. Rather, our proposals affect those situations in which the authority or power to search does not exist outside of the consensual transaction. In such situations, the law envisages the individual being protected by the normal tortious and criminal prohibitions against intrusions upon private interests. Insofar as "policing by consent" entails encroachment upon such interests through acquiescence based on fear or misinformation, it undermines the force and meaning of those protections.

111. A final argument for statutory limitations is a specific application of the position advanced earlier — that the constitutional prohibition of "unreasonable search and seizure" set out in section 8 of the *Canadian Charter of Rights and Freedoms* makes it desirable to codify search and seizure procedures in conformity with the constitutional standard.[137] This argument rests on the premise that notwithstanding the existence of consent, a peace officer's intrusion

upon an individual's interests may still amount to a "search" or "seizure". This position parallels the view articulated by some American theorists that consent cases are instances of "warrantless governmental intrusions which nevertheless remain subject to the ... standard of reasonableness" set out in the American Fourth Amendment.[138] If and how the reasonableness standard in section 8 of the *Charter* is related to consent search here in Canada are questions that remain to be resolved in our jurisprudence. It seems likely, however, that a properly obtained and truly voluntary consent could establish at least on a *prima facie* basis that the search or seizure agreed to is reasonable.

B. "Voluntariness"

112. In order to be legally effective, consent must be "voluntary". This aligns the matter of consent search with legal tests applied to contexts quite apart from that of search and seizure. Most relevant to the present study are the tests applicable to confessions and to the interception of private communications. Discussion of these tests demonstrates that the degree and nature of "voluntariness" demanded by law may differ according to the context in which it is required.

113. The test of "voluntariness" for confessions was set out in the *Ibrahim* case as follows:

> It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Hale.[139]

This rule was adopted by the Supreme Court of Canada in the *Boudreau* case, in which Rand J. referred to the possibility of "doubt cast upon the truth of a statement arising from the circumstances in which it is made".[140]

114. The application of this test to paragraph 178.11(2)(*a*) of the *Criminal Code*, which allows the interception of a private communication with the consent of a party to it, was rejected by the Supreme Court of Canada in the *Goldman* case.[141] The basis of the majority decision was that certain inducements or compulsions which

could affect the truth of a confession would not influence the content of an intercepted private communication. Accordingly,

> [t]he consent must not be procured by intimidating conduct or by force or threats of force by the police, but coercion in the sense in which the word applies here does not arise merely because the consent is given because of promised or expected leniency or immunity from prosecution. Inducements of this nature or compulsion resulting from threats of prosecution would render inadmissible a confession or statement made by an accused person to those in authority because the confession or statement could be affected or influenced by the inducement or compulsion. Different considerations arise, however, where a consent of the kind under consideration here is involved.[142]

This assertion squared with conclusions reached contemporaneously in *Rosen* v. *The Queen* which concerned not a consent to intercept, but rather a consent to admit, evidence of a wire-tap at trial. In particular, the Court's observation in *Rosen* that the nature of the evidence was already "fixed and determined"[143] was cited by MacIntyre J. in *Goldman.*[144]

115. Where should the matter stand with regard to consent to search? The reasons expressed by the Supreme Court of Canada in *Rosen* may seem relevant to search and seizure as much as to interception of communications; since the evidence that might be seized is "fixed and determined", the dangers of altering testimonial evidence in response to compulsion or inducement are inapplicable. On the other hand, there are values at stake in consent search and seizure other than those of evidentiary reliability. We are concerned also that the individual in question retain effective discretion upon his private interests. While this matter ultimately must fall to be decided by case-law, we observe that to regard as consensual the acquiescence of an individual obtained through inducement, threat or manipulation would be to undermine much of the policy we have advanced here.

C. Documentation

116. The proposals we make regarding documentation represent a departure from traditional legal approaches, which have been content to let the question of voluntariness be decided on the facts of each individual case. This position has been expressed by the United States Supreme Court as follows:

> Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.[145]

But while this position may be acceptable as a basic rule for *ex post facto* adjudication by courts, it does not respond to the need we perceive to regulate the actual transaction between police officer and the individual contacted. Nor does it take into account the serious evidentiary difficulties in accurately reconstructing the search incident at trial. Our proposals attempt to address these problems at least in part.

117. Documentary caution and acknowledgment procedures seek to regulate the consent transaction by giving the individual concerned notice of his right to refuse consent and maintain discretion over when and by whom his private interests may be compromised or infringed. It has been observed that Canadians seem to naturally accord legitimacy to police actions;[146] an individual confronted with a peace officer's request to search his person, vehicle or premises seems likely to assume that the police intention to conduct a search has a legal basis. Permitting this assumption to gain the actual legal foundation for the search (*viz.* the individual's own consent) is to tolerate a certain degree of finesse in police practice. In this connection it seems fair to observe that the average citizen's appreciation of the complexities of search and seizure law is understandably less than comprehensive; accordingly, the possibility that the lawfulness of a police initiative to search might be based exclusively on the consent requested might not be appreciated by the prospective consenter. An objective of our recommendation is to make the situation clear to all parties. This objective is best served if a warning to the individual is printed on the acknowledgment form; this also relieves the need for any personal onus on the peace officer.

118. Second, a written form affords clear evidence of the existence of consent. The evidentiary problems associated with consent have been recognized in many of the recent law reform initiatives undertaken in different jurisdictions. Simplifying the matter has been viewed as desirable, not only in the interests of the individual searched, who may wish to ascertain his position with respect to subsequent legal action, but also from the point of view of the peace officer; it assists him to make an informed decision as to whether to rely on consent as a basis of authorization beforehand, and to respond to any challenge to this decision after the fact.

Accordingly, the Royal Commission on Criminal Procedure in England suggested that "for the protection of the officers concerned" police officers should obtain a written consent signed by the individual.[147]

119. In the absence of any legal requirement that any document be completed in the course of the transaction by which the peace officer receives consent from the private individual, different administrative policies regarding the use of forms and cautions appear to be adopted by various police forces.[148] It is also relevant to note that while documentation is not expressly required under *Criminal Code* provisions concerned with consent to interception of electronic communications, experts in the field and police instructional materials advise officers to obtain consent in writing.[149]

120. While we recognize that there are a number of arguments that can be made against requiring documentary cautions and acknowledgments, we do not believe that these arguments refute our proposals. Many police officers commented to our researchers about the burden of more paperwork; however, it should be noted that with a properly prepared form the only person required to fill out information would be the individual affected. Some police officers also expressed the fear that by requesting confirmation of consent in writing, a peace officer might influence a consenting party to withdraw his consent. Yet some officials conceded that "a little coercion" might be involved in the unwritten consent; in this respect, we prefer the approach of another group of police officials who took the view that obtaining consent in writing would rarely be difficult in cases of true co-operation. It may be argued that production or completion of a consent form may be impracticable in certain situations; acknowledging this, we make resort to the documentary procedures a matter of evidentiary presumption as to voluntariness rather than an inflexible rule.

121. Finally, we realize that legal rules may be of limited value in achieving goals such as police deference to individual decisions not to co-operate in an investigation. Based both on empirical observations about consent search here in Canada and studies of the effects of the somewhat analogous requirements for mandatory cautions before custodial interrogations in the United States, it seems fair to query how much protection our rules will provide in everyday practice. We do not believe that the possibility of limited practical success, however, should deter us from doing what is possible at present. If the documentary procedures recommended here are

implemented and prove ineffective in practice, we concede that their utility will have to be re-examined.

122. The details and effects of obtaining written consent differ slightly from proposal to proposal among the various recent law reform initiatives. The Marin Commission has recommended that consent to searches performed by Canadian postal inspectors should be given in writing.[150] The British Royal Commission has recommended that the fact of consent be recorded in the officer's notebook and signed by the person concerned;[151] indeed, this is a course of action some Canadian peace officers have deemed to be prudent at present in the absence of legal guidelines. A comprehensive and persuasive treatment of the subject has been offered by the Australian Law Reform Commission:

> Although we do not wish to multiply unduly the number of pieces of paper that police officers must carry about with them, we think that the rights in question here are sufficiently important of protection to require that any consent on which the police rely in conducting a search should be acknowledged in writing. The absence of any such written acknowledgment would be prima facie evidence that no such notification was made or consent given.[152]

We recommend that a scheme similar to that recommended for Australia be adopted in Canada.

II. Arrest

RECOMMENDATIONS

7. Peace officers should be empowered to search a person who has been arrested if such a search would be reasonably prudent in the circumstances of the case. This power should be extended to spaces within the person's reach at the time of the search.

8. In addition to "objects of seizure", a peace officer arresting an individual should be empowered to seize:

(a) anything necessary to identify the arrested individual; and

(b) any weapon or other thing that could either assist the arrested individual to escape or endanger the life or safety of the

arrested individual, the peace officer or a member of the public.

123. The power to conduct a warrantless search incidental to arrest is a valuable and indeed necessary one. It has been justified on the basis of a number of factors, which were perhaps best summarized by Hugessen J. in the *Laporte* case: "to make the arrest effective, to ensure that evidence does not disappear and to prevent the commission of a further offence".[153] In addition to the supporting case-law on point, the legitimacy of performing searches to serve these objectives is implied by subparagraphs 450(2)(*d*)(ii) and (iii) of the *Criminal Code*; these provisions permit an officer to arrest a person without a warrant for relatively minor offences rather than compelling his appearance through a form of process, in order to either secure or to preserve evidence, or prevent the subsequent commission of a similar or different offence.

124. The issues that arise in connection with this power concern the limitations, if any, that ought to be placed on its exercise. There are three questions in this regard which we have addressed in our recommendation: (1) Should the search be authorized automatically upon arrest, or must other circumstances be present to justify it? (2) How far should the permitted scope of search extend? and (3) How far should the permitted scope of seizure extend?

A. Should the Search Be Automatic upon Arrest?

125. In theory, Canadian law appears to stipulate that a search incidental to arrest is authorized only if it is a reasonable precaution in the circumstances of the case; this position is derived from the influential nineteenth-century cases of *Leigh* v. *Cole*[154] and *Bessel* v. *Wilson*.[155] While these cases contemplate that there may be situations of arrest in which a personal search would be unfounded, Canadian courts have been decidedly reluctant to invalidate searches incidental to arrest. The issue is thus raised as to whether the additional requirement of reasonableness derived from British authorities serves any useful purpose. Once the grounds for arrest are present, should the police not be permitted to perform searches automatically?

126. This position offers the advantages of apparent simplicity and common sense, particularly when the arrest is seen as the initial step in placing an individual in institutional custody. It is misleading, however, to group together all arrest situations and attribute to them the factors obtaining in the archetypal instance of full-scale custodial arrest. A peace officer acting under section 450 of the *Criminal Code* may legitimately arrest a person suspected of the commission of a relatively minor offence, such as dangerous driving,[156] and soon afterwards, having ascertained his identity, release him with a form of process pursuant to section 452. It seems difficult to maintain that the need to perform a search in such a case would correspond to that obtaining in, for example, the situation of a robbery suspect apprehended after a chase.

127. The distinction between these two kinds of situations has been recognized in the *ALI Code*, which provides:

> The searches and seizures authorized by the other Sections of this Article shall not be authorized if the arrest is on a charge of committing a "violation" ... or a traffic offense or other misdemeanor, the elements and circumstances of which involve no unlawful possession or violent, or intentionally or recklessly dangerous, conduct....[157]

The exact parameters of any codified power of search incidental to arrest must take into account the possibilities of changes to the existing structures of arrest and, indeed, classification of offences.[158] It is suggested, however, that the limiting policy evident in the *ALI* provision is a sound one; it demands, at the least, that the power of search incidental to arrest should not be an automatic one in all cases.

128. A similar criticism may be advanced at a more theoretical level. To wed search to arrest is to ignore the distinct purposes that distinguish the two powers: the control of things, funds or information on the one hand, and the control over the person on the other. Laying down a rule that the former purpose can be served automatically once the latter has been achieved establishes a sequence without sense. The critical question is not: When has the freedom or dignity of the individual been sufficiently reduced to permit a warrantless search of his person or areas within his control? Rather, it is: When does the State's interest in the control of things or information outweigh the individual interest at stake? In the instance of arrest, as in all other instances, the justification for the search must come from the circumstances of the case. Accordingly, we propose the retention of the present requirement that a search be a reasonably prudent measure in order to be authorized as an incident of arrest.

B. What May Be Searched?

129. At present the power of search incidental to arrest is generally conceded to extend to areas within the control of the accused. This is a vaguely defined limitation; arguably some degree of vagueness is necessary to accommodate the exigencies of individual cases. It is useful, however, to attempt to put the matter in sharper focus by looking at the rationale for proceeding without a warrant. This rationale is the denial of access to relevant objects that may be destroyed or weapons or items that could endanger human safety or facilitate escape. This would suggest that the scope of the power should be restricted to spaces accessible to the accused at the time that the search is performed.

130. This position may appear to raise problems of uncertainty in the definition of police powers. These problems are illustrated somewhat by the American experience of fluctuating decisions on a scope of search, particularly with respect to vehicles.[159] Are all parts of the passenger compartment under the driver's control? What about the trunk? We recognize that these issues pose problems. Insofar as vehicle searches are concerned, however, this concern for clarity is met by the proposals for expanded powers outlined later in this Chapter. These proposals would give the police clear powers to search the entirety of vehicles occupied by arrested persons once requisite grounds exist,[160] and would leave as the main focus of dispute the situations in which the person is found inside private premises, such as a residence or place of work.

131. The question of the scope of search in such circumstances has been a matter of dispute in both the United States and Britain. In the definitive pronouncement of the United States Supreme Court in the *Chimel* case, it was stated:

> A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[161]

On the other hand, the Royal Commission on Criminal Procedure in England has proposed that statutory recognition be given to

warrantless searches of premises occupied by, or under the control of, a person, even if he is arrested elsewhere, with the limitation that such searches could only be performed "on the basis of suspicion on reasonable grounds" that the premises contained articles material to the offence charged or a similar offence.[162]

132. The British approach may be criticized for its failure to respect the special privacy interest in the premises which an individual occupies. The circumstances that justify the deprivation of liberty entailed by an arrest do not require that the individual automatically lose his protection against violation of his private spatial domain. The relationship between arrest powers and the violation of private domains has arisen in recent Canadian cases, which have evinced a continuing judicial resistance to allow warrantless intrusions into the private domain of alleged offenders.[163] A sympathetic concern was expressed to Commission researchers by peace officers in a number of Canadian cities who indicated that even after performing an arrest they preferred to have a warrant in their possession before searching the accused's premises.

133. We believe that the *Chimel* rule is a sound one. Although at first glance it may seem rigid and unnecessarily limited, the reach test does provide a workable definition of the area within the accused's control; indeed, extending the scope of search and seizure beyond the reach of the arrested person may create problems of definition far greater than those it solves.[164] Moreover, the adoption of this rule in Canada would leave a number of viable options open to peace officers wishing to search the premises of a party they intend to arrest: a search warrant could be obtained either before entry or after the arrest. In either case, use of the telephonic warrant procedure we recommend later might well be appropriate.[165] We conclude that the inconvenience entailed in obtaining a warrant is generally outweighed by the interests served by the *Chimel* rule.

134. One situation in which requiring a warrant might seem unduly rigid, however, is that in which "objects of seizure" are within the plain view of the officer at the time of the arrest, yet beyond the reach of the arrested person. The "plain view" doctrine, which has long been recognized in the United States, would permit seizure of items in such a situation.[166] This doctrine is discussed later in this paper.[167] Also relevant to the issue of the scope of search incidental to arrest is the matter of intimate contacts with the person. Insofar as these fall within the definition of "medical examinations", the recommendations discussed later would require resort to special procedures.[168]

C. What May Be Seized?

135. As indicated earlier, the justifications for search incidental to arrest have focused on a number of classifications of items — the fruits of a theft, evidence of the offence alleged to have been committed, and dangerous weapons.[169] At the same time, the case-law has denied the validity of seizing items unconnected to legitimate state interests attending an arrest, such as money lawfully possessed by the accused.[170] It was observed earlier that the objects of seizure associated with search incidental to arrest actually have fallen within similar categories to those objects associated with warrants to search places; the proposed definition of "objects of seizure" was intended to cover all intrusive searches, including those incidental to arrest.[171] This approach conforms to that adopted in the *ALI Code*, under which the definition of "things subject to seizure" upon arrest incorporates classifications of things seizable under warrants.[172]

136. The need to preserve safety in the context of an arrest, however, may justify expanding the scope of seizure. Although certain instruments may not fit strictly within the *Criminal Code* provisions covering illegal use or possession of a weapon, it may be a reasonable precaution to remove them from the accused at the time of his arrest. The intention in seizing such instruments is neither confiscatory nor evidentiary; rather it is solely to facilitate the exercise of the arrest power. Accordingly, we propose that, in addition to "objects of seizure", a peace officer arresting an individual should be empowered to seize any weapon or other thing that could either assist the accused to escape, or endanger the life or safety of the accused, the peace officer or a member of the public.

137. Finally, the occurrence of an arrest justifies seizure of items that will enable the police to identify the accused. Subparagraphs 450(2)(*d*)(i), 452(1)(*f*)(i) and 453(1)(*i*)(i) of the *Criminal Code* all recognize that the need "to establish the identity of the person" may justify a decision by a peace officer or officer in charge to arrest and detain an accused person instead of releasing him with a form of written process. The power to actually search the person for identification once he has been arrested has been recognized at common law.[173] We propose that it be entrenched in the regime we are developing.

III. Where Delay Is Dangerous to the Life or Safety of Persons

RECOMMENDATION

9. Where a peace officer believes on reasonable grounds that:

(a) an "object of seizure" is to be found on a person or in a place or vehicle; and

(b) the delay necessary to obtain a warrant would result in danger to human life or safety,

he should be empowered to search for and seize the "object of seizure" without a warrant.

138. Outside of arrest, the need to preserve life and safety is recognized in a number of warrantless powers. The rationale is most evident in the context of the weapons searches authorized by sections 99 and 101 of the *Criminal Code*; it has also been a factor in the common law power of entry to stop, investigate and prevent breaches of the peace. We find that this rationale is persuasive. Whenever human life or safety is endangered by the delay necessary to obtain a warrant, the sacrifice of warrant protections is clearly justifiable in order to preserve what is an overriding value. Although detaching such searches from the prerequisite of arrest entails certain risks (which we address in the discussion of Recommendation 10 below), we believe these risks are also outweighed by the value of life and safety.

139. This position assumes that the justification for intrusion accepted in this paper is established — *viz.* that the peace officer has reasonable grounds to believe that an "object of seizure" is to be found. Any weapon possessed in circumstances constituting an offence would fall within the scope of this seizure power. But while the proposed provision would accordingly subsume the warrantless powers accorded by sections 99 and 100 of the *Criminal Code*, it is more limited in certain respects than both the common law power to preserve the peace and the recently enacted provisions of section 101. The need for the additional powers afforded by these two sources is discussed later.[174]

IV. Searches of Vehicles where Delay Risks the Loss or Destruction of Objects of Seizure

RECOMMENDATION

10. Where a peace officer has arrested a person who is in control of, or an occupant of, a movable vehicle, and believes on reasonable grounds that:

(a) an "object of seizure" is to be found in the vehicle; and

(b) the delay necessary to obtain a warrant would result in the loss or destruction of the "object of seizure",

he should be empowered to search for and seize the "object of seizure" without a warrant.

140. This proposal basically extends the power to search a motor vehicle beyond the limits which would otherwise be imposed by the rule for search incidental to arrest set out in Recommendation 7. Our position here is a cautious one. On the one hand, it signifies a recognition of the exigencies of situations in which a suspect is occupying, or in control of, a movable vehicle. In such situations, as the United States Supreme Court recently concluded in the *Ross* case,[175] there is a compelling need for the peace officer's authority to be clear-cut and free of unrealistic and confusing divisions of the vehicle into zones of permitted and forbidden investigation. Accordingly, we follow the principle enunciated in *Ross* that the scope of the warrantless search of the vehicle should be as wide as that which a judicial officer could authorize by warrant. On the other hand, the proposal is significant for the powers which it does *not* confer. Specifically, it expresses our reluctance to confer warrantless search and seizure powers outside the context of arrest, even where there is a danger that incriminating objects will elude police control if an immediate search or seizure is not made. This reluctance pertains not merely to the search of vehicles but also to searches of persons and places. In this sense we have differentiated between the paramount interests of preserving human life and safety, which justified the relatively broad provisions of Recommendation 9, and the significant but nonetheless subordinate interests of preserving the "objects of seizure" themselves. For the reasons outlined below, we are not prepared to recommend the same kind of provision to meet the latter interests as we are to meet the former.

A. The Present Law

141. At present, Canadian law admits no general exceptions to the warrant requirement based on the desirability of preventing the potential loss or destruction of objects of seizure. This factor has received some attention in case-law in other contexts. For example, it was recognized in *Eccles* v. *Bourque*,[176] that in order to prevent the destruction of evidence, a peace officer may be excepted from the requirement of making an announcement before entering premises to perform an arrest. If he wishes to perform a search without a warrant in order to prevent such destruction, however, the peace officer is somewhat limited in his options. If no consent to perform the search can be obtained, and if no danger to life or safety exists, there are basically two alternatives left: invoking a special statutory power, or making an arrest and then conducting a search incidental to it.

142. Many relevant statutory powers of warrantless search and seizure are found in federal regulatory and provincial statutes that are beyond the scope of this Working Paper. Insofar as crime-related legislation is concerned, the primary example is that of the narcotics and drugs powers.[177] Due to their portability and susceptibility to disposal, narcotics and drugs are often perceived to pose particular dangers of destruction or loss. These dangers are invoked by police officers to explain why, for example, when searching dwelling houses, they prefer to resort to a writ of assistance than a search warrant. In the Law Reform Commission's survey of a writ use in Canada, 40% of officers using writs explained that they had not used a warrant due to the need to prevent destruction or removal of evidence.[178] Another instance in which the rationale of preventing destruction of evidence appears to be applied is that of warrantless seizures of evidence of gaming offences under subsection 181(2) of the *Criminal Code*. Peace officers interviewed by Commission researchers referred to cases in which peace officers "stumbled" onto a game in progress and were accordingly required to make an immediate seizure.

143. The sole alternative in instances in which no statutory search power is applicable is that of arrest. This alternative is not always an unrealistic one. At least insofar as "takings of an offence" or "things ... possessed in circumstances constituting an offence" are concerned, any belief that an individual is in possession of the relevant object of seizure may amount to a belief that the individual is committing an offence: possession of property obtained by crime, for example, or possession of narcotics or drugs.[179] However, the restriction of

peace officers to this legal alternative raises certain difficulties. Insofar as the search power incidental to arrest is limited to the area within the arrested person's control (or, as we have recommended, his reach), it does not cover other areas, such as the space within a vehicle he is driving, in which objects of seizure may be located and susceptible to loss or destruction if an immediate search is not made. Perhaps more fundamentally, the logic of recognizing arrest as a prerequisite to searches for certain objects of seizure but not others demands examination.

144. In addressing these difficulties, we look to the positions regarding the prevention of loss or destruction of objects of seizure taken in the case-law of other jurisdictions and in recent proposals from both law reform commissions and scholars. Many of these sources have expanded powers to make searches and seizures for such purposes beyond arrest situations. The additional exceptions to the warrant requirement that have been recognized, however, are generally limited according to one or more variables. Although the exact nature and mix of variables in each case differs somewhat, it is possible to identify one factor as most critical: the identity of the subject of search.

B. Different Subjects of Search

145. There are three subjects of search at issue in this Working Paper: persons, vehicles and privately occupied places, residential and non-residential. In some jurisdictions, it is recognized that the danger of loss or destruction of objects sought may justify warrantless search intruding upon some individual interests but not upon others. This differentiation may be a product of either or both of two factors: the different values placed upon different interests, and the particular risk of loss or destruction associated with each of them.

(1) *Vehicles*

146. There appears to be a consensus among other common law jurisdictions that searches of vehicles should be relatively free of the constraints of warrant procedure. This is partly because, although vehicles are private domains, they are less valued as such than places

in which the individual lives or works.[180] Attention has also been paid to the fact that vehicles, due to their inherent mobility, are likely to escape an officer's control in the time required to obtain a warrant to search them. These factors have not led to a proliferation of express powers to search vehicles without warrant in Canadian criminal law. Indeed, only section 99 of the *Criminal Code* explicitly mentions vehicles as a subject of warrantless search. In large part, this is due to the ready access peace officers gain to vehicles under provincial liquor control and motor vehicle legislation.[181]

147. The jurisdiction that has given the greatest attention to warrantless searches of vehicles is the United States. In *Chambers* v. *Maroney*, the American Supreme Court observed:

> [T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true ... if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[182]

The *ALI Code*, following in the tradition of American jurisprudence, contains this provision:

> An officer who has reasonable cause to believe that a moving or readily movable vehicle, on a public way or waters or other area open to the public or in a private area unlawfully entered by the vehicle, is or contains things subject to seizure ... may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search.[183]

A provision for warrantless searches of vehicles for objects of seizure has also been proposed by the Royal Commission on Criminal Procedure in England and Wales.[184]

148. Our Recommendation 10 does not advance an "automobile exception" to the warrant requirement as such. Rather, it responds to concerns similar to those recognized in the United States and Great Britain by expanding the scope of search incidental to arrest in cases involving a movable vehicle. In large part, our position here reflects concerns related to searches of persons. As a matter of policy, these concerns — a desire for clarity of status, and an aversion to unnecessary increments in police discretion — prompt us to tie warrantless search powers as much as possible to the prerequisite of arrest.[185] But there are two additional points, specific to the context of vehicle searches, that deserve mention now.

149. First, except for instances in which the vehicle is both unattended and unoccupied, it seems fair to observe that the search of a vehicle must frequently involve an arrest in fact: the detention of the person concerned against his will during the period of the search. We recognize that the Supreme Court of Canada decided in the *Chromiak* case[186] that in complying with a police initiative to stop the motor vehicle he was driving, an individual could be considered to be acting voluntarily and hence be unconstrained by a condition of legal arrest. But *Chromiak*, a case involving a demand for a breath sample, must be viewed on its own facts. It did not purport to establish that stops of vehicles for an investigative purpose would never involve an arrest. Given the unlikelihood that a person whose vehicle is stopped and searched would be permitted, or indeed would consider himself to be permitted, to leave the scene either with or without the vehicle, it is arguable that the ratio of *Chromiak* would rarely be applicable in cases of vehicle searches. And while it is possible to conceive of the element of detention in such cases as incidental to the exercise of the power of search, peace officers themselves often account for vehicle stops in terms of investigation of a person — an inquiry into the commission of an offence by the driver or occupant. In such cases, it seems realistic to view the primary power at issue as one of arrest (controlling the suspect), and the ancillary power as one of search (looking through the suspect's vehicle).

150. Second, there is the danger that drafting a parallel power of vehicle search outside the context of arrest will lead to inconsistent and confusing interpretation and development of the two sources of authority. In this regard, it is relevant to consider the American experience, culminating in the simultaneously released 1981 decisions in *Robbins*[187] and *Belton*.[188] In the former case, the Supreme Court invalidated the seizure of marijuana from an opaque bag in the luggage compartment of a suspect's car; in the latter case, the same Court upheld the seizure of cocaine from a jacket pocket in the passenger compartment of a car occupied by the suspect. While the significance of the source of authority for the search was not made precisely clear in either case, it is noteworthy that the former instance was analysed as a warrantless search of vehicle within the "automobile exception" and the latter was viewed as a search incidental to arrest. Given the similarity of the facts in the two cases, it is hardly surprising that the Supreme Court felt compelled within a year to attempt to resolve the resulting uncertainty by its expansion of the automobile exception in the *Ross* case.[189] While departing from the specific solution advanced in *Ross*, we agree that the American experience points out the need to clarify the powers to search

vehicles without warrant. We suggest that this objective is well served by the single power set out in Recommendation 10.

(2) *Privately Occupied Places*

151. Searches of privately occupied places, both residential and non-residential, present the least compelling arguments for exceptions to the warrant requirement in the interests of preserving objects of seizure. Unlike persons and vehicles, such premises are stationary; while evidence believed to be on the premises can be removed or destroyed in the time required to obtain a warrant, there is a negligible danger of the premises themselves disappearing. And as discussed earlier, the individual's interest in maintaining the inviolability of his private domain has long been given strong recognition in the law.[190]

152. As well as the considerations of principle applicable here, there is a pragmatic problem in establishing any generally defined power to search premises without warrant. That is the danger that such a power might be used so frequently as to render the warrant requirement meaningless in practice. Such a danger may be posed in fact by the Australian *Criminal Investigation Bill*, which permits warrantless searches of premises to prevent loss or destruction of relevant items in "circumstances of such seriousness and urgency as to require" departure from the warrant requirements.[191] The scope of the exception defined by the quoted words is imprecise, and could be construed quite widely. In this regard, it is relevant to look at the Canadian experience with section 101 of the *Criminal Code*. Although the warrantless search power accorded by this provision is limited to instances in which it would be "impracticable" to apply for a warrant, searches without warrant under the section have in fact become the rule.[192]

153. Some courts and scholars in the United States have attempted to circumvent such danger by framing warrantless powers to search premises in terms that limit their exercise to truly urgent circumstances. A list of relevant factors was set out in the Circuit Court level decision in *Rubin*, which dealt with narcotics:

> (1) [T]he degree of urgency involved and the amount of time necessary to obtain a warrant.
>
> (2) [T]he reasonable belief that the contraband is about to be removed.
>
> (3) [T]he possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought.

(4) [T]he information indicating the possessors of contraband are aware that the police are on their trail.

(5) [T]he ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic".[193]

While this set of factors is undeniably comprehensive, and may be valuable for a reviewing court, it is so detailed and complex as to be virtually meaningless for a police officer faced with an immediate decision as to whether or not to perform a warrantless search.

154. The Royal Commission on Criminal Procedure[194] and the American Law Institute[195] have uniformly rejected the permissibility of non-consensual searches of premises without warrant outside of those associated with powers of arrest and, in the former case, danger to life or safety. For the reasons outlined above, we agree with their position.

(3) *Persons*

155. The greatest conflict in the present context arises with respect to searches of persons. Persons, like vehicles, are generally mobile, and similar risks of loss or destruction may flow from a failure to conduct a personal search immediately upon encountering an individual reasonably believed to be carrying "objects of seizure". On the other hand, the particular value our legal tradition has placed on the inviolability of the body serves to distinguish the two cases from each other. While a stop and examination of a vehicle, in the absence of legal authority, could amount in itself to a trespass to chattels, this wrong cannot be equated with the assaults, batteries, false arrests and other violations that could arise from an improper stop and search of a person.

156. The importance of the individual interests affected is recognized in American law, in which a warrantless search of person outside of arrest is authorized only on the basis of protection from concealed weapons and not potential destruction of other items. This approach has been supported by the argument that the benefits of warrantless search in other cases are outweighed by the potential for abuse.[196] On the other hand, the Royal Commission on Criminal Procedure in England has recommended a statutory power to stop and search persons in public places who are suspected on reasonable grounds of conveying stolen goods or being in possession of items otherwise illegal to possess:

> We believe that people in the street who have committed property offences or have in their possession articles which it is a criminal offence to possess should not be entirely protected from the possibility of being searched.... But the grounds for stop and search must be firmly based upon reasonable suspicion and the exercise of the powers must be subject to strict safeguards.[197]

157. The issue of permitting personal searches for objects of seizure in danger of loss or destruction focuses in large part on the prerequisite of arrest. The association of non-consensual personal searches with a pre-existing state of arrest is traceable to the early days of the common law.[198] This association has often been believed to afford protection to the individual; since the justification for legal arrest is limited by the requirement of "reasonable and probable grounds", it is thought that the precondition of an arrest is an effective control device by which unjustified search may be prevented. The expansion of personal search powers under statute is seen as undermining this protection. This view, for example, was advanced by a minority on the British Advisory Committee on Drug Dependence:

> In the view of the minority the abolition of the statutory power of search would undoubtedly mean that considerably fewer persons would be stopped and searched, the power to arrest being narrower than the statutory power of search. On their reckoning the proposal would involve a considerable diminution in the vexatiousness of police interference with people who are pursuing their ordinary affairs.[199]

In a way, the precondition of arrest is viewed almost as a substitute for a warrant in curbing unjustified use of personal search powers. While our position reflects this view in large part, we acknowledge that the view is open to criticism.

158. The requirement that an officer make an arrest in order to gain the legal power to search may encourage the officer to arrest as much as it discourages him from searching. The empirical evidence available is ambiguous on this point. Participant observer studies have suggested that personal search incidental to arrest often follows a decision to take formal action against the suspect, but difficulties experienced by observers in discriminating between arrests and other police-citizen encounters make conclusions from such studies problematical.[200] Some data also are provided by the self-reporting questionnaires returned in our own warrant survey. Of those personal searches performed in the course of executing warrants, a significantly higher percentage (17.4% to 11.2%) was reported as being incidental to arrest in the execution of *Criminal Code* warrants

as in the execution of *Narcotic Control Act* and *Food and Drugs Act* warrants.[201] Data from the survey would suggest that this cannot be attributed to the occurrence of more intervening justifications for arrest in the case of the *Criminal Code* warrants. The possibility exists, rather, that the police officers may have reported an arrest as the basis for search more frequently in the latter case because the statutory authority to search under the warrant did not exist, as it did in the narcotic and drug cases.

159. It may be argued that the "arrest" reported in any of these cases was merely an *ex post facto* attempt to legitimize the search. The problem is that it is difficult, on the basis of phenomenological factors to distinguish an arrest followed by a search from a simple search.[202] This may be seen to support the view that the arrest requirement imposes little restraint upon an officer who intends to search an individual; it is difficult to challenge an officer's assertion that an arrest did indeed take place prior to a personal search. Under the test set out in the leading Canadian case of *Whitfield*, the officer would merely have to show that he touched the person with a view to his detention.[203]

160. Whether the search itself may be lawful if the arrest is not is less than clear under the present law. Leigh, discussing powers of search in England and Wales, cites the New Zealand rule that "[t]he right to personal search is clearly dependent not upon the *right* to arrest but upon the *fact* of arrest".[204] On the other hand, in the early English case of *Dillon* v. *O'Brien*, the power to search was clearly predicated upon a "lawful arrest".[205] This ambiguity could be resolved by statute in favour of the latter position, thus in effect making adherence to the rules governing the exercise of an arrest power the prerequisite to the performance of a search. One wonders, though, whether these rules really add very much to the individual's protection against unjustified searches, particularly where the relevant offence is indictable. Since possession of many of the items for which an officer might wish to perform a personal search constitutes an offence prosecutable by indictment,[206] it is evident that in many cases in which an officer had reasonable grounds to search a person for an object of seizure, he would also have reasonable and probable grounds to arrest him for a relevant offence and then search him as an incident of that arrest. The only circumstances in which this rough equivalence between grounds for arrest and grounds for search would not obtain would be those in which the relevant offence was merely punishable by summary conviction, in which case the person could only be arrested if "found committing" an offence.[207]

161. It is possible that the prerequisite of arrest makes little difference to the exercise of powers of search, at least in relation to indictable offences. In consulting police officers from various Canadian forces, our researchers were told that whether the object of the search was a narcotic or drug (for which a statutory power of personal search currently exists) or stolen property (for which personal search is authorized only in conjunction with arrest), the officer's rule of thumb is "reasonable and probable grounds", a test often satisfied in practice by gut feelings. On the other hand, the frequent reference of police officials to "reasonable and probable grounds", a standard specifically associated with arrest rather than search and seizure, would suggest the existence of an association between the two powers, an association that may have some limiting effect. Considering this possibility alongside the evidence from participant observer studies that searches generally follow decisions to take formal action against suspects,[208] we are not prepared to concede that the prerequisite of arrest is meaningless as a device to help ensure that the exercised powers of personal search are confined to justifiable instances.

162. If our position appears to reflect an abundance of caution, this is because we believe that caution in this area is well founded. While a theoretical basis for a discrete power of personal search unquestionably exists, and while the recent trend in Great Britain and Australia has been towards the recognition of such powers, it is important to weigh very carefully the risks entailed in establishing them. In England itself, the Scarman Report has recently documented the activities of peace officers involved in search operations to recover stolen goods. Notwithstanding the limitation of the relevant powers to instances in which reasonable suspicion pertained to the persons searched, it was found that the exercise of powers during the operation was sweeping.[209] While no such operations have been found to occur in Canada, incidents and programmes of random personal search for narcotics have been observed by both government Commissions[210] and legal commentators.[211] While the objectives of the police in carrying out these programmes may be laudable, granting peace officers wide powers to conduct them conflicts with the specific, responsive character of criminal law enforcement intrinsic to Canadian traditions.

163. Moreover, quite aside from the question of impact on police activities, there is a useful purpose served in conferring the status of arrest upon a person who has been detained for the duration

of a search and seizure. Two consequences seem relevant. First, informing the person that he is arrested forewarns him of the illegality of any attempt to resist or elude the peace officer; this objective seems particularly significant in the light of recent Canadian case-law which leaves open the possibility of a suspect, free from any legally recognized form of compulsory restraint, being subject to criminal prosecution for such attempts.[212] In addition, the existence of a state of arrest may bring into play certain provisions of the *Canadian Charter of Rights and Freedoms*, a contingency discussed later in this Working Paper.[213]

C. Conclusion

164. Recommendation 10 is a tentative one for a number of reasons. Insofar as the need for an alternative to the powers of search and seizure incidental to arrest is dependent upon the scope and design of arrest powers themselves, we are mindful of the possible ramifications which could flow from our forthcoming Working Paper on Arrest. Perhaps more fundamentally, we are aware that any proposal dealing with this subject touches upon sensitive and significant areas of police practice and individual privacy. During discussions within the Commission, we have weighed a number of alternatives, including a discrete power to make searches and seizures without warrant, analogous to that set out in Recommendation 9 but covering the risk of loss or destruction of objects of seizure. Such a power could be fashioned so as to be more limited than Recommendation 9. It could be restricted, for example, to coverage of searches of persons and vehicles, but not places, or it could be applicable only when the object sought related to the commission of an indictable offence. While we have refrained from proposing such a power at this time, we welcome criticisms and comments as to the merits of our present position.

CHAPTER SEVEN

Procedures

165. This Chapter develops a scheme of rules covering search and seizure procedures in the following way. It begins by tackling the various problems arising in connection with the issuance and execution of warrants. It then moves on to consider problems relating to the execution of searches and seizures in general. Finally, it deals with two specific sets of issues: those relating to searches of persons, and those relating to questions of access to information about searches and seizures.

I. Issuance of Warrants

A. The Nature of the Procedure

RECOMMENDATIONS

11. A justice of the peace should be empowered to issue a warrant to search a person, place or vehicle if there are reasonable grounds to believe that the person, place or vehicle is carrying, containing or concealing an "object of seizure".

12. Except as authorized in the telephonic warrant procedures set out in Recommendation 19, the application for all search warrants should be an information in writing sworn under oath. The issuer should be empowered to question the applicant to ascertain additional

facts underlying the application. However, if such facts are relied upon in the adjudication of the application, they should be attested to on the face of the information.

166. These recommendations express in general terms the procedure for issuing warrants. Many of the aspects of this procedure require special attention and are discussed in detail in subsequent recommendations. First, however, it is valuable to look briefly at the general nature of the search warrant procedure we propose.

167. At present, the issuance of a search warrant is almost exclusively a documentary procedure. If the application documents are complete and proper, there is no onus placed upon the issuer to perform such adjudicative tasks as asking questions of the deponent, or checking the credibility of his sources. Conversely, if the contents of the documents are not sufficient, the applicant cannot remedy this through an oral presentation. As Roach J.A. stated in *Re Worrall*,

> mere conversations between an informant and a Justice of the Peace can form no part of the basis on which a search warrant may issue. If there is something lacking in the sworn information that deficiency cannot be supplied by some conversation between them.[214]

168. The emphasis on documentary preparation serves several useful purposes. It encourages police officers to put their own case in order, rather than relying on sympathetic justices to extract the essential facts. Moreover, the documentary application, at least in those regimes that require reasonable grounds to be present on the face of a written information, provides a basic and easily accessible record of the proceedings before the issuer. An individual wishing to challenge the legality of issuance, rather than being forced to wait for a transcript of an application hearing to be prepared, need only obtain the already existing written information in order to ascertain the formal, substantive and probative sufficiency of the application.

169. On the other hand, the "rigidification" of documentary procedure can have a distinctly counter-productive effect if it encourages the issuer to assume a merely clerical role. In *Re Den Hoy Gin*, the Ontario Court of Appeal indicated its willingness to go behind the face of a false sworn information to quash a search warrant.[215] However, the present law in Canada has stopped short of urging the issuer himself to make inquiries as to the veracity of the claims made on the face of the information. This contrasts with the American position which, for example, precludes an issuer from relying solely on the applicant's assertion that his informant is trustworthy, truthful, prudent, reliable or credible. Indeed, American

Federal Rule 41(c) allows an issuer to "examine under oath the affiant and any witness he may produce".[216]

170. If a lack of inquisitiveness on the part of the issuer allows unsupported assertions to remain undetected, it may also result in subsequent problems for the police. By failing, for example, to demand an elaboration of terse or ill-defined "reasonable grounds" before issuing a search warrant, the issuer leaves open the possibility that a reviewing court may eventually quash the warrant for its insufficiency in this respect. It may well be that the officer has additional reasonable grounds but, out of reluctance to elaborate or because he believes that only a minimal disclosure is required, he has refrained from putting them in writing. For the issuer to make some inquiries here would be quite natural. In *Campbell* v. *Clough*, the applicant failed to detail his reasonable grounds for belief; however, the justice was able to ascertain the circumstances of the investigation through questioning, and noted these on the information. "In this respect", held McQuaid J., "I am of the opinion that she [the justice] not only acted prudently, but also judicially as she is required to do".[217] While some judges and justices indicated to Commission researchers that they follow this practice, the documents collected in our warrant survey show that this is the exception. For example, the existence of a 52.3% success rate in seizing an object sought would suggest that police in Montréal often do have a reasonable order of belief that the object sought is in fact in the premises named;[218] one would be hard pressed to ascertain this, however, by looking at the written informations captured in the Commission's survey.

171. It may be argued that such participation by the issuer undermines his neutrality. If the police present a deficient application, runs the argument, they should bear the consequences. The argument, however, confuses judicial inquisitiveness with partiality. Although there is clearly a point at which an issuer's questions become a crutch to a sluggish police officer, inquiries designed to test assertions and seek out latent details stop well short of that point. Such inquiries cut both ways: if the details are available, the issuance of the warrant may be supportable; if they are not, it may be precluded.

172. Inevitably, the discussion of appropriate authorization procedures must be linked to a discussion of enforcement or review mechanisms. Reviews of search and seizure have generally focused on the legality of the process, which has in turn been based on its documentation. The avenue of challenging the legality of a search or a

seizure is one this Working Paper accepts as essential. To facilitate the review of legality, the documentary emphasis of the warrant procedure must be retained.

173. This does not mean, however, that the issuer ought to be restrained from asking questions designed to elicit the true basis of the application. So long as any additional details elicited through interrogation and relied upon in issuing the warrant are included on the written application and properly attested to, an individual affected by the search is not truly prejudiced by the justice's inquiry. On the contrary, the warrant becomes a more judicial form of protection against unmerited intrusions against the individual.

B. Documentation

RECOMMENDATION

13. Standard statutory forms should be drafted so as to eliminate the problems of improvised drafting that currently exist. These forms, unlike the current Form 1, should truly guide the officer in setting out the details the law requires. "Legalese" should be rejected in favour of comprehensible language. Guidelines used by the police should stress the need for thoroughness on the information and warrant rather than on exclusively administrative documents.

174. Despite the present emphasis on documentary completeness, the statute books provide little in the way of valuable guidance as to the documents police officers ought to use. The only model forms provided are those in the *Criminal Code* pertaining to the section 443 information and warrant. The presentation of the model information in particular is problematical, in that it involves a certain degree of paradox. While section 443 makes resort to Form 1 mandatory, Form 1 itself falls short of fulfilling the substantive and probative standards of this same section. In *R.* v. *Colvin; Ex parte Merrick*, Osler J. observed:

> It is to be observed that the use of Form 1 appears to be mandatory, although the actual form when examined leaves much to be desired.... [T]he section ... requires that the Justice must be satisfied that there is in such place something "... that there is reasonable ground to believe will afford evidence with respect to the commission of an offence ..." and the Form provided does not give much assistance in this respect. In

consequence, the person filling out the Form is obliged to complete a sentence commencing "The informant says that", following which he should, presumably, state that there is reasonable ground to believe that certain articles will afford evidence of a certain crime.[219]

175. As was noted earlier, various attempts have been made to modify Form 1 to comply with section 443.[220] Moreover, due to the lack of statutory models for the other warrant procedures, local officials have had to improvise appropriate forms, often by making modifications to the section 443 forms. In both cases, the products of local initiative have varied considerably, leading to a number of consequences.

176. First, erratic documentary practice has had its impact on formal validity. In particular, there has been confusion of section 443 and *Narcotic Control Act* and *Food and Drugs Act* requirements. For example, in our warrant survey in 1978, Edmonton, Winnipeg and Montréal all yielded narcotics and drugs warrants that failed to name the executing officer; often a general direction to peace officers in the relevant district, permissible under section 443 but not under *Narcotic Control Act* and *Food and Drugs Act* provisions, was used instead. This error is not a grave one by any means, but, in that it violates recognized legal standards, it represents an apparent inattentiveness.[221]

177. Second, the form of the document tends to influence the presentation of the substantive and probative details on the application. Even if the statutory requirements are followed to the letter, the spacing and structuring of the various elements may discourage meaningful disclosure. In the case of Montréal, for example, 33 out of 35 sets of documents relating to section 443 were found to be formally sufficient, yet the forms used by the Peace and Crown Office help to explain why only 4 out of the 35 were adequate in other respects; the space allotted to the description of "reasonable grounds" was minuscule. Subsequent to the completion of the survey, however, some attempt was made to rectify this problem through the incorporation of sworn appendices to the information. In Vancouver, on the other hand, the form was structured openly so as to encourage expansiveness where necessary; it is not surprising, then, that 28 out of 35 section 443 warrants issued in Vancouver provided satisfactory "reasonable grounds" in the eyes of the judicial panel.

178. Two rather simple prescriptions for action emerge from the above comments. First, standard forms ought to be provided and indeed made mandatory with respect to every warrant procedure, so

as to avoid the problems of local improvisation evident in the practices related to special procedures. If different regimes must be maintained for certain situations (a contention this paper questions), then the incoherence they produce should be minimized through the provision of special documents designed with the individual regimes in mind. Second, these forms ought truly to guide the officer in setting out the details the law requires. Exactly what details should be required will be discussed in the following sections; however, even if no alteration in the existing statutory provisions were to be made, it would be desirable to restructure Form 1 of the *Criminal Code* to meet this objective.

179. To make the documents used legally precise, however, is not enough. Even where information and warrants are structured properly, they often contain language that may make them intimidating and incomprehensible to the individual concerned. The value of warrants lies in part in the use of the document to inform the party searched of the legal status of the search.[222] Yet, that status is obscured by the arcane jargon used in the *Criminal Code* forms: "whereas", "hereinafter", the adjectival "said". The use of "legalese" has been attributed to a perceived need to "handle exceedingly specific details and relations between them".[223] There is no question that search warrant documents must often portray specific and complex details; on the other hand, it is possible to draft forms that accommodate these details in a relatively comprehensible manner.

180. Finally, there is the question of the onerousness of documentary requirements. Do they impair police efficiency? Officers in a number of Canadian police forces expressed the opinion to Commission interviewers that their paperwork was becoming overwhelming. In Winnipeg, for example, officers estimated that one hour was needed to prepare each set of warrant documents under section 443. This estimate, of course, is subject to variation according to the circumstances of each application. An information for a complex commercial crime warrant might take literally days to prepare, while a terse set of documents relating to a stolen goods offence might take less than twenty minutes. Some of the police complaints related to the necessity of duplicating descriptions of offences, items and premises on the application form and the warrant. As the Montréal Crown and Peace Office practice shows, it is quite possible to eliminate this inefficiency through the use of carbons and appropriately designed forms. The design ought not to be such, however, as to render the probative basis of issuance less than "judicial", or the definitions of items, offences or premises less than "particular".

181. Montréal also serves as an illustration of how police administrative procedures, rather than legal requirements, can add to an officer's paperwork. In addition to the warrant documents, municipal peace officers have been required to fill out separate forms for administrative use in which the circumstances of proposed searches are repeated. Not only does such duplication seem unnecessary; it may also de-emphasize the importance of the warrant documents themselves. It is recommended that documentary procedures used by the police should stress the need for thoroughness on the warrant documents rather than on documents for internal use.

C. Judicial Discretion and Refusal to Issue a Warrant

RECOMMENDATION

14. A peace officer applying for a warrant should be required to disclose on the information form any previous applications made with respect to the same warrant (*viz.* a warrant to search the same person, place or vehicle for "objects of seizure" related to the same or a related transaction).

182. Under subsection 443(1) of the *Criminal Code*, the issuer "may" issue a warrant if the information affords the requisite "reasonable ground to believe". As Fontana observes, this implies a discretion to refuse to issue the warrant notwithstanding the sufficiency of the information:

> Implicit in the wording of the section through the use of the word "may" is the discretionary element of the definition. A justice presented with the information properly sworn as required, and even though being "satisfied" within the terms of the section, may still refuse to issue the search warrant. It then rests with the applicant to pursue his application by other means.[224]

This discretion is also given to the issuers of warrants under sections 101, 181, 182, 353, and the narcotic and drugs provisions. On the other hand, judges performing functions under sections 160 and 281.3 of the *Criminal Code* are given no apparent discretion. The sections provide that they "shall" issue a warrant when satisfied as to the existence of the relevant grounds for believing.

183. We propose that as a general rule the issuance of the warrant should continue to be discretionary. The existence of discretion conforms with the "judicial" role this paper deems appropriate for the issuer and provides a context within which a number of factors relevant to issuance may be considered. Some of these factors relate to the status of the party to be searched. The fact that a party to be searched is a newspaper not believed to be implicated in the relevant offence does not alter the existence of reasonable grounds to believe that objects of seizure may be found inside. As suggested in the *Pacific Press* case, however, it may be relevant to deciding whether a warrant ought to be issued to search the premises.[225] Discretion may also be relevant in cases of doubt as to the accuracy of sworn assertions. Such doubt does not affect the apparent "reasonableness" of the grounds on the face of the information. However, it should entitle an issuer to refuse to issue the requested warrant.

184. Retaining judicial discretion marks a certain faith in the capacity of issuers to conduct meaningful hearings into warrant applications. This faith is not entirely justified by the results of our search warrant survey and it might be wondered whether it is not naïve to rely on it. Participant observer studies of detective work not only indicate that justices who fail to co-operate with the police are subject to considerable pressures to do so, but advance the possibility that truly "judicial" issuers are the exception rather than the rule.[226] The fact is, though, that the judiciality of the proceedings is not an option that can be revoked at will. Rather, it is a basic objective of a warrant procedure, and if the attainment of that objective is regarded as hopeless, not merely the existence of judicial discretion, but the basic structure of the proceeding, is of dubious worth.

185. One aspect of warrant issuance that may be perceived to undercut the "judicial" nature of the proceedings is the practice of forum-shopping. At present, if a peace officer's application for a warrant is refused, he may reapply for the same warrant on a subsequent occasion before the same or another adjudicator.[227] It may be argued that the exercise of judicial discretion against an applicant is rendered sterile by legal tolerance of this situation. On the other hand, we do not accept that the same "double jeopardy" considerations underlying the application of *res judicata* doctrines at subsequent proceedings truly obtain at the investigative stage of search and seizure. Circumstances may change after an initial application for a warrant; evidence supporting the application may become firmer. Moreover, we recognize that if an initial refusal to

issue a warrant were to be binding in relation to an investigation as a whole, this could inhibit adjudicators from ruling against applications perceived to be insufficient.

186. Accordingly, we propose a balanced solution, one that gives appropriate recognition to a refusal to issue a warrant, yet does not make the consequences of such refusal inimical to judicial discretion. Such a balance is found in paragraph 178.12(1)(*e*.1) of the *Criminal Code*, which requires the following information to be included in an affidavit supporting an application for an authorization to intercept electronic communications:

> [T]he number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit ... and on which the application was withdrawn or no authorization was given, the date on which each such application was made and the name of the judge to whom each such application was made; ...

We recommend that a similar requirement be included in applications for search warrants.

D. The Test to Be Met

RECOMMENDATIONS

15. A peace officer applying for a warrant should not be required to reveal facts disclosing the identity of confidential sources. However, this policy should not permit warrants to be issued on the basis of applications that fail to meet the "reasonable ground" test.

16. Section 178.2 of the *Criminal Code* should be amended so as to make clear that peace officers are not precluded from disclosing facts obtained from an intercepted private communication in the course of search warrant applications.

(1) *Reasonable Grounds to Believe*

187. The traditional test for the issuance of a search warrant is the demonstration under oath of reasonable grounds to believe that a specific item, related in a designated way to a specific offence, may be found in a specific location. The test incorporates both the

"judiciality" and "particularity" features associated with the warrant, features that empirical evidence suggests are often absent from the procedure in daily practice. Although some degree of vagueness characterizes the articulation of the test, it seems that the real problem lies not in the test itself, but in its application.

188. The test is quite readily broken down into its particular and judicial components. The specifications of the items, offence and location comprise the former; the reasonable grounds, the latter. Although there has been some inconsistency in the application of the particularity tests, and indeed some disagreement over the exact standards of particularity required, the basic issues are fairly settled.[228] The descriptions must be sufficiently detailed to assist the issuer in making a judicial decision and, when carried over into the warrant, to both guide the executing officer, and inform the individual concerned as to the scope of intrusion permitted.[229] While it is possible to quarrel with certain inconsistencies in the case-law, the existing standards are relatively uncontroversial.[230] It is, rather, in connection with the "reasonable grounds" themselves that the major problems have arisen.

189. What are "reasonable grounds to believe"? A number of courts have taken stabs at the question, often comparing the test to other legal standards. It is clear, for example, after *Re Newfoundland & Labrador Corp. Ltd.*, that the standard imposes a lower burden than "proof beyond a reasonable doubt".[231] But such semantic ordering does not really answer the question. Perhaps the best way to regard the test is as a guide. To the degree that "reasonableness" incorporates the standards of objectivity and thoughtfulness inherent in judiciality, it conveys sufficiently the duties the issuer should have in mind.

190. There is no doubt that the "reasonable grounds" test has been inconsistently applied, not only by issuers of warrants, but also by reviewing courts. For example, in the recent Québec Superior Court decision in *Abou-Assale*, the words "investigation conducted by the Royal Canadian Mounted Police" were held to satisfy the standard.[232] Yet the same Court fifteen years earlier in *Regency Realties Inc.* v. *Loranger* had rejected "information from a trustworthy person" as insufficient in this respect, commenting that this provided "no serious enlightenment".[233] In light of such conflicts, it is perhaps not surprising that issuers of warrants in Montréal followed a relaxed standard.[234] It is difficult to distinguish such decisions on the basis of the "circumstances of the case"; the circumstances are often virtually identical. To some extent, such

conflicts are inevitable, reflecting different priorities of various judges and various courts. However, common identifiable problems do crop up in the course of establishing reasonable grounds, and it is useful to outline basic principles for dealing with them. Two of these problems are the reliance of warrant applicants upon facts provided by confidential informants and by intercepted communications.

(2) *Confidential Informants*

191. The current Canadian position on confidential informants was set out in the *Lubell* case, in which Zuber J. upheld a warrant issued on "information from a reliable source":

> It is trite law that the Crown enjoys a privilege with respect to the disclosure of the name of informants and obviously this is the reason for taking refuge in this type of language.[235]

It may be argued that this position sacrifices too much of the fact-finding duty inherent in judiciality to police interests in concealing the facts. On the other hand, the identity of the informant is a matter that even at trial is generally protected from disclosure on the grounds of public policy. This policy is founded on the basis that anonymity encourages informers to communicate information about criminal offences to the government.[236] And while the identity of the informant may reflect upon the credibility of the assertions by the applicant for the warrant, protection of that identity does not entail complete frustration of the issuer's judicial duty.

192. There is a distinction between protecting the name of the source from disclosure, and protecting the grounds of belief yielded by the source from scrutiny. This distinction was recognized in the Newfoundland Court of Appeal's decision in *Re Newfoundland & Labrador Corp. Ltd.* "Surely", held the Court, "information in Form 1 in which the informant deposes to specific facts, knowledge of which he obtained [from a confidential source] is information upon which the justice could be satisfied that reasonable grounds to so believe existed".[237] This position is sound. To fall short of it is to compromise the issuer's control of the search in favour of police discretion. We recommend, therefore, that while informant privilege should continue to be recognized at warrant hearings, it should be limited to its proper scope. While the identity of the confidential source should continue to be protected from disclosure (through the use of aliases and code names if necessary), the applicant must still provide the factual assertions necessary to satisfy the "reasonable grounds to believe" test.

(3) *Grounds Based on Intercepted Communications*

193. A somewhat related problem arises when police wish to perform a search on the basis of factual information received from a wire-tap. As a matter of principle, there is no reason why the "reasonable grounds" standard should not be applied to such information. However, the police are often reluctant to disclose both the information itself, and the fact that it was obtained by wire-tap, not only because of the possibility that the future success of the tap will be jeopardized, but also because of the statutory prohibition against disclosure of the existence of an intercepted private communication.

194. Subsection 178.2(1) of the *Criminal Code* reads:

> Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully
>
> (*a*) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
>
> (*b*) discloses the existence thereof,
>
> is guilty of an indictable offence and liable to imprisonment for two years.

Results of the Commission's warrant survey and subsequent consultations suggest that the interpretation of the prohibition under this provision varies somewhat from city to city, and even within some forces. Some officers prepared informations referring to an "interception of private communications of persons whose names cannot be presently revealed". A number of police officials took the view, however, that a police officer could not even tell a justice of the peace of the existence of the tap without contravening subsection 178.2(1). While subsection 178.2(2) makes the prohibition inapplicable to "criminal proceedings" and "other proceedings" in which "evidence on oath" is required, local officials were not confident that this exemption covered search warrant applications.

195. The interrelationship between section 178.2 and search warrant requirements deserves clarification. For one thing, the section is expressly an effort to protect the privacy of the originator of the intercepted communication against disclosure to third parties. It is *not* directed to withholding information about police activity

from the parties to the communication themselves. This latter purpose is recognized in section 178.23, which permits delays in written notification to affected persons. Given that there is some ambiguity, however, it may be advisable to amend subsection 178.2(2) to specify that subsection 178.2(1) does not apply to search warrant proceedings. A provision designed to protect the privacy of the individual ought not to stand in the way of another provision with like intent.

196. This begs the larger question: To what extent should the existence of a wire-tap affect the application of the "reasonable grounds" test? It is suggested that this circumstance, like reliance upon a confidential informant, does not justify departing from the requirement that the peace officer provide the justice with facts supporting the application for the warrant. Indeed, the present reluctance of police officers to divulge the existence of a tap has meant that reviewing courts treat informations prepared in the wake of electronic surveillance the same as other informations.[238] This consistency in application should be continued, not only by reviewing courts, but by issuers of search warrants as well. While it is true that Parliament has placed a premium upon guarding the clandestine nature of wire-tapping, most notably through the delayed notification provision of section 178.23, there is a danger in pyramiding secrecy requirements on top of each other. Taken to its extreme, the need to maintain the secrecy of a wire-tap could argue for secret inquiries and trials.

197. As in the case of confidential informants, the distinction should be made between disclosing facts pertaining to the identification of the wire-tap, and facts received from the wire-tap about the existence of criminal activity. It is the latter category of facts, not the former, that establishes the requisite "reasonable grounds to believe". Any prejudice to an ongoing tap caused by disclosure of the latter category in the written information is likely to occur in any event as a result of executing the warrant. It is difficult to believe that an individual whose premises have been searched by police officers would not be so alerted to the possibility of electronic surveillance.

E. The Issuer

RECOMMENDATION

17. The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. Steps should

be taken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the *Criminal Code*. New provincial initiatives should be undertaken to examine the office of justice of the peace and either abolish or reorganize it where necessary.

198. The issuers of search warrants, at least those under sections 443 and 181 of the *Criminal Code* and the *Narcotic Control Act* and *Food and Drugs Act* provisions, are failing to maintain the legal standards governing the performance of their duties. The question is thus raised as to whether the responsibilities for issuance ought to be shifted to officials other than those designated under present legislation.

199. Most crime-related warrant regimes name a justice as issuer of the warrants.[239] Under section 2 of the *Criminal Code*, "justice" includes a magistrate as well as a justice of the peace, and under some provincial enactments, superior court judges have been granted *ex officio* status as justices.[240] In practice, according to the Commission's warrant survey, issuance duties appear to be shared by justices, magistrates and judges of the various provincial courts. One province covered by the survey, New Brunswick, has abolished the office of justice, and the search warrants we captured in that province were issued exclusively by Provincial Court judges.[241]

200. A frequently voiced opinion is that justices of the peace do not have the impartiality or competence to issue search warrants. The Kirby Report on the *Administration of Justice in the Provincial Courts of Alberta* put the point bluntly:

> It is possible to lay an information for a search warrant before clerks or police officers who have been appointed justices of the peace. Since the granting of a search warrant is a judicial act requiring judicial competence, impartiality and independence, justices of the peace should not have the power to grant such warrants.[242]

The Report suggested that search warrants should only be issued by Provincial Court judges. While this suggestion has much apparent force behind it, there are two points that should be considered.

201. First, the empirical evidence available from the Commission's survey suggests that giving Provincial Court judges exclusive jurisdiction would not in itself have a decisive positive impact. In New Brunswick, the validity rating of the twelve warrants, which were issued exclusively by provincial judges, was *lower* than in the other provinces (27% to 39%).[243] Vancouver, the city with the best

validity record, utilized only justices of the peace in warrant applications. In Edmonton, the one city in which it was possible to compare the validity rates of warrants issued by justices and those issued by Provincial Court judges, the justices fared only slightly worse than judges (33% to 35%). Due to the small size of the samples, these statistics are of limited value, but they do suggest that it is misleading to put much faith in the label or status attached to the official. What must be considered, rather, is the qualification of the official for his assigned function, and the appropriateness of the administrative structure surrounding him.

202. Second, it is arbitrary and narrow to view adjudicative functions of justices in terms of search warrants alone. Although the consequences of the issuance of a warrant are undeniably severe, the justice has other functions that can result in even more drastic consequences for individuals affected. Under existing *Criminal Code* provisions, he may issue arrest warrants, order accused persons to be detained in custody, conduct preliminary inquiries, make committal orders, and try summary conviction offences.[244] To strip the justice of his search warrant powers while leaving the rest intact is to miss the real issue: Is the office as currently constituted a proper repository of significant judicial responsibilities?

203. It is notorious that many justices are closely associated with the police officials who make applications to them. Many indeed are former police officials with minimal legal training. The air of casualness that can develop in such circumstances was illustrated in an incident described in the Pringle Report, in which two police officers obtained two warrants from a justice who had formerly been a police officer. When requested to present the informations that had been sworn to obtain the warrants, the justice could not do so, explaining that there were no guidelines that required him to retain the documents after the warrants had been issued.[245] This lack of perception as to basic judicial standards has led many observers to question the fitness of many justices for their office.[246] On the other hand, at least one province has developed a system of justices of the peace that treats adjudicative responsibilities seriously. British Columbia demonstrated to Commission researchers an organization in which justices were brought up through the court administration system, selected by a judicial council, and given the benefit of continuing education programmes concerning their duties.

204. The problems that arise are not simply ones of individual competence. One must also question the validity of doing what the warrant process has purported to do since the days of Hale — give a

judicial function to an officer whose position is often less than independent. Statutes in some provinces make Crown lawyers "advisers" to the justices;[247] in this capacity, Crown counsel have influenced dispositions of privately sworn complaints. Does this right to "advise" extend to applications initiated by the police? The legislation would appear to countenance this situation, leaving the justice in a position of potential conflict: he might have to decide, "judicially", an application in relation to a case his adviser is likely to prosecute.

205. The issues of appointment, qualification, instruction and responsibilities of justices have been studied extensively in Great Britain;[248] and recent American jurisprudence has been scrupulous in attempting to ensure neutrality on the part of the issuer, going so far as to invalidate warrants issued by state Attorneys General acting as justices of the peace.[249] In Canada, the matter has received some attention at the provincial level, where constitutional jurisdiction over Provincial Court judges, magistrates and justices resides.[250] The problems of the offices of the issuers of search warrants differ from locale to locale, as do the traditions of the office, and it is not intended to present an ideal formula here. But whether the problems are resolved through abolition of the position of justice or improvement or reorganization of the office, it is important that the provinces undertake the initiatives necessary to implement effective changes. Search warrant issuance, like other adjudicative functions under the *Criminal Code*, is only as judicial as the persons responsible for it.

F. The Participation of Crown Counsel

RECOMMENDATION

18. More use of Crown or private police counsel would improve the quality of applications for warrants. However, the Crown's participation in the process should remain discretionary. While issuers of warrants should remain free to request the Crown's participation in appropriate cases, the Crown should be a submitter rather than an adviser to the issuer.

206. At present, there is no formal requirement that Crown counsel be involved in the application for a search warrant, and in

most cases the peace officer proceeds to obtain one without a lawyer's assistance. The notable exception occurs in instances of searches connected with allegations of commercial crime. Crown counsel or privately retained lawyers may in fact be aiding the police in their investigation before the search is undertaken, and their legal expertise is often considered valuable in the preparation of warrant documents. The documents prepared in such cases are comprehensive and detailed, a circumstance which suggests that the quality of the applications, and hence the warrant issuance system in general, would be improved if legal counsel played an increased role in the procedure. Recognizing this likelihood, the Kirby Report suggested that all applications for search warrants in Alberta be made by Crown prosecutors.[251]

207. Aside from the pragmatic reasons for participation by the Crown, there is a principled argument that can be made — namely, that since the day-to-day administration of the criminal law is under the control of the Attorney General's department, a representative of that department ought to be present when a decision is made to enforce the criminal law by invoking warrant procedures. Indeed, such a monitoring role is envisaged by section 281.3 of the *Criminal Code*, which requires the Attorney General's consent before proceedings are instituted to obtain a warrant to seize hate propaganda. Should such a requirement become a general rule?

208. In our Working Paper, *Control of the Process*, we placed an onus upon the Crown to participate in all "prosecutorial" functions. The Commission extended this responsibility to the stage of compelling an accused's appearance in court. It was irrational, it was argued, "to permit a case to proceed to the stage of court appearance before the prosecution has been approved by the party who will bear ultimate responsibility for prosecutorial decisions".[252] It may be argued that, by analogy, before any case reaches the court appearance stage, Crown counsel should also be required to make a positive assertion that items seized are being detained for legitimate purposes. Indeed, some assertion as to the state of the investigation is required by the present subsection 446(1) of the *Criminal Code* within three months of seizure.

209. This does not mean, however, that the Crown ought to monitor all applications for a warrant to search. For one thing, such a requirement would complicate the process, and could be expected to make applications for warrants impracticable in certain cases, thus encouraging the police to perform warrantless searches. It is worth noting that, following the Kirby Report recommendations, a

monitoring system involving the Crown was set up; in practice, the system was described by a Crown official as "closer to a dream than reality". But beyond the administrative and pragmatic difficulties involved, there is the circumstance that search with warrant is basically an investigative rather than a "prosecutorial" function: while the search may uncover information that makes a charge appropriate, it is in itself neither a prerequisite or a concomitant to a charge. The participation of the Crown in initiating the process, therefore, should not be regarded as mandatory in principle, under the Commission's articulated standards.

210. This is not to say that more administrative arrangements, under which Crown counsel would monitor difficult applications, might not be useful in practice. Moreover, it would be consistent with the Attorney General's broad role as administrator of criminal justice for his representative to appear at search warrant hearings, either to support or oppose an application for a warrant. The existing practice by which issuers of warrants in some jurisdictions alert Crown counsel to cases involving significant problems, such as constitutional conflicts, deserves to be formalized. To affirm the judiciality of the issuer, however, it must be made clear that any role Crown counsel plays in the application process is as a submitter, rather than an adviser, to the issuer. While more participation by the Crown or other legal counsel undoubtedly would improve the quality of applications, it must be emphasized again that the maintenance of a judicial standard can only be assured by the independence and diligence of the issuers themselves.

G. The Telephonic Warrant

RECOMMENDATION

19. A telephonic warrant procedure, similar to that set out in the American Federal Rules, should be instituted in Canada. It should be available only when grounds exist to obtain a warrant under Recommendation 11 but resort to conventional procedure is impracticable. Safeguards should be implemented to ensure that a record of the proceedings is subsequently made available to persons affected, and that the warrant used by the officer is identical to that authorized by the issuer.

211. The telephonic or oral search warrant has been adopted in a number of American procedural codes, including the Federal Rules. In addition, it was endorsed by the Australian Law Reform Commission, which called it the "natural application of a modern convenience" to situations of urgency or inaccessibility of a magistrate.[253] Such problems may arise in Canada, in urban as well as rural settings. An officer may be at a location where he discovers things or information relevant to an offence. To leave the location in order to present a warrant application to an issuer would involve the risk of losing these objects of seizure. Yet, as a general rule, the officer has no other legal way of seizing them, short of arresting an occupant and making the seizure incidental to arrest. In cases where grounds do not exist for the arrest, the sole legal alternative left to the officer is to obtain the assistance of other officers in guarding the premises while the warrant is obtained.

212. Such predicaments would often be avoided if a telephonic warrant system were instituted. As outlined in Federal Rule 41(c)(2), such a system works as follows:

> (A) General Rule — if the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.
>
> (B) Application — the person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.
>
> (C) Issuance — if the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

213. The telephone warrant procedure offers two advantages. First, because it eliminates such factors as travel time and the preparation of a written application before execution, it abbreviates

the application procedure. American cases indicate that an oral warrant may be obtained in as little as ten minutes.[254] Second, because it may be obtained from any location, it allows the officer to stay near the place where he has discovered relevant objects. Both of these factors contribute to the practicability of the warrant in cases in which the use of conventional techniques would risk the loss of the objects, and accordingly they encourage resort to warrant procedures. To what extent, though, do the innovations inherent in the new procedure sacrifice the protective character of the warrant?

214. As far as the "particularity" of the warrant is concerned, there is no real difference in standards at all. Rule 41(c)(2)(E) requires that the contents of a warrant upon oral testimony be the same as a conventional warrant. Although the issuer is not presented with a written application containing specifics as to offence, items and location, this does not mean that specifics need not be given. On the contrary, the officer must recite them to the issuer for the purpose of their inclusion on the issuer's copy of the warrant. Since Canadian law has interchanged the standards of particularity applicable to informations and warrants, the dictation of one set of specifics rather than the written presentation of two does not effect a lowering of standards. The provision that ensures the uniformity of the recited description with that appearing on the actual warrant is the issuer's retention of the original warrant document.

215. Some problems are posed, however, with respect to "judiciality". Although the "reasonable grounds" test remains the same, the circumstances of its application change somewhat. First, there is the fact that no written application is presented to the issuer to assist him in making his decision. There are, no doubt, cases of such complexity that the absence of organized, written grounds of belief would hinder the evaluation process. However, the applicant would be likely to experience confusion in his oral presentation of such cases, and since it is the applicant who must demonstrate the grounds of his belief to the issuer, the basic rules of issuance would dictate that the application be refused. Moreover, since complex cases of this type would likely have been pieced together after a long and careful investigation, it seems doubtful that the "urgency" factor necessary to justify dispensing with the written application would obtain in such instances.

216. In the majority of cases, on the other hand, the main advantage of the written application lies not in the assistance the issuer gains from the document, but rather in its availability as a record of the proceedings. Thus, if an alternative record is available,

the prejudice stemming from the lack of a written application is diminished. The most obvious alternative is a transcript of the proceedings. Given that a telephonic warrant application is both exceptional and generally brief, it would not seem unreasonable to require the issuer's office to prepare a transcript without delay. Once it was prepared, it would be filed, like a written application, with the warrant. The availability of a stenographer and recording device can be ensured through organization and centralization of procedures, such as the establishment of an on-duty issuer with the necessary equipment and personnel.[255]

217. Second, the point may be made that the long-distance presentation of the application precludes the observation of the applicant's demeanour by the issuer. This point is undoubtedly true, but one wonders whether it is very significant. So long as the procedure is primarily documentary, demeanour is only relevant when the applicant is swearing the oath, and in the course of answering any questions the issuer may put to him. And, as an American commentator has pointed out,[256] the police officer's familiarity with legal proceedings makes demeanour a less-than-reliable indicator of credibility in any warrant application. Any cases in which demeanour might arouse suspicion might well be discernible through either the quality of vocal presentation or the consistency of the applicant's allegations. Ultimately, the significance of this factor appears to be minimal.

218. A properly safeguarded telephonic warrant procedure can be virtually as judicial as the normal documentary one. Indeed, models for conducting oral applications, such as that used in San Diego, California[257] not only compensate for the procedure's lack of documentation, but stand as examples of informative, meaningful inquiries into the basis for warrant issuance. Various Canadian jurisdictions, particularly in northern areas, have begun to use the telephone for proceedings such as bail applications and *ex parte* civil motions. We therefore recommend that the telephonic search warrant be incorporated into Canadian law. Since it is the impracticability of resort to conventional warrants that justifies its use, however, the telephonic warrant should be available only where the applicant can demonstrate this impracticability to the issuer.

219. Finally, it is important to recognize that just as the invention of the telephone expanded the possible ways of communicating authority, so too, the emergence of new technology may make the proposed telephonic procedure obsolete. For example, the widespread development of facilities for transmission of a copy of

a warrant signed by an issuer to a terminal in an officer's patrol car could eliminate the necessity of the officer hand-copying the issuer's instructions. As new technology becomes widely available, the law must be flexible enough to address it.

II. Execution of Warrants

A. Peace Officers and Private Individuals

RECOMMENDATION

20. Private individuals should continue to be entitled to apply for search warrants. Once the issuer has decided to authorize a search, however, the responsibilities of execution should lie entirely with peace officers. Peace officers should be empowered to bring into the place or vehicle to be searched any private individual whose presence is reasonably believed to be necessary to the successful execution of the warrant.

220. Except for warrants issued under the precious metals provision and section 443, all current search warrants must be executed by peace officers. In fact, the existing powers to execute a warrant privately are largely theoretical. The former provision appears to be rarely used, and the cross-country survey revealed no instances of private execution in the case of the latter. The question arises, then, as to whether or not the possibility of private execution ought to be left open by legislation.

221. The provision for private execution, at least in section 443, appears to be a product of historical distortion of Hale's common law warrant. Hale himself recognized the desirability of reducing the aggrieved party to the status of an adviser to the executing constable.[258] Later commentators, however, observed that warrants were in fact issued to private persons as well as constables.[259] Today, when the interest justifying the search is less the vindication of private rights than the enforcement of the criminal law, the provision for private execution is simply anachronistic. While certain intrusive powers are still accorded to individuals in the case of arrest, these

essentially arise in situations of urgency or sudden discovery of an offence, and are qualified by the stipulation that the individual deliver the accused to a peace officer.[260] There is no power under the *Criminal Code* to issue an arrest warrant to a private person, and it is difficult to maintain that such a power ought to exist in the case of search and seizure.

222. This is not to say, however, that a private individual ought to be precluded from swearing an information to initiate a search with warrant. The private individual's right to initiate proceedings is built into the spectrum of criminal procedures. In the early case of *Hetu* v. *Dixville Butter and Cheese Association*, Fitzpatrick C.J., speaking for the Supreme Court of Canada, affirmed the right of an individual to commence a prosecution: "To lay an information when in possession of facts sufficient to establish a *bona fide* belief of guilt, is not a fault, but the exercise of an undoubted right".[261] Recognizing the importance of this right, this Commission in its Working Paper on *Control of the Process* recommended that private individuals retain the right to lay charges.[262]

223. However, once the justification for the exercise of a coercive power has been ascertained, the responsibility for its exercise must belong, as much as possible, to the agents of the State. In a sense, this position derives from the basic exchange at the heart of the ideology of the liberal democratic State — the individual's concession to the Sovereign of his coercive powers in exchange for the security the Sovereign can offer.[263] The position is also supported by the common law concern that the party executing the warrant be free from any material interest in the outcome of the search.[264]

224. That a private individual should not be given the responsibility for executing a search warrant does not mean that he also be excluded from assisting in the search if the peace officer deems it necessary. It is evident that in some cases the presence of a private complainant or other individual might both facilitate the search and minimize the intrusion suffered as a result. For example, in searches and seizures involving business documents, the presence of an accountant may assist in isolating documents relevant to alleged transactions. Some police forces purport to authorize his participation by obtaining warrants directed to the accountant as well as to the peace officers. However, the alternative nature of the wording in subsection 443(1), which allows for a warrant to be given to a "person named therein *or* a peace officer", may not strictly permit this. Since an insufficient authorization could result in an individual being lawfully excluded from private premises or even found liable as a

trespasser, it is apparent that this situation should be clarified. Our recommendation would both provide for express authorization of a private individual accompanying the police and make that authorization clear to the individual affected by including it on the warrant.

B. Which Peace Officer May Execute the Warrant?

RECOMMENDATION

21. It should be legally permissible for any peace officer within the territorial jurisdiction of the issuer to execute a search warrant.

225. Assuming that peace officers are authorized to execute a search warrant, the issue remains: Which peace officers? This question reflects a discrepancy among the various warrant provisions. Section 443, which allows the justice to authorize "a peace officer" to conduct the search, has been interpreted as allowing a warrant to be issued to all peace officers in any given province.[265] The case-law has also suggested that a section 181 warrant could validly include such a wide direction.[266] On the other hand, warrants under the *Narcotic Control Act* and *Food and Drugs Act* provisions must be executed by "a peace officer named therein"; accordingly, in the *Goodbaum* case, it was held that the general direction permitted under section 443 invalidated a narcotics warrant.[267]

226. This problem was at the root of the finding of defects in narcotics and drugs warrants among the 98 evaluated by the judicial panel. Although the naming of a peace officer as executor of the warrant might seem a relatively minor inconvenience, it is worth asking what legitimate interest is served by restricting execution in this way. Certainly the naming of the executor does not lessen the intrusion as far as the individual is concerned. It does not purport to represent any evaluation of the fitness of the named party to execute the warrant. Rather, the warrant is issued on at least the tacit understanding that the recipient, whoever he is, will obey the rules attending execution.

227. On the other hand, there are strong arguments for abolishing legal restrictions as to which peace officers may execute a warrant. The authorization of particular officers is basically a throwback to an archaic notion of a one-to-one communication of

authority which derived from the subordinate relationship of the constable to the justice. Today, with a sophisticated police organization in place, this relationship no longer exists in any meaningful sense. Rather, lines of command and delegation are established within the police forces themselves. The issuer should direct his attention to the applicant, ensuring that he is in sufficient command of the basis of the investigation to present the requisite grounds to justify issuing the warrant. In the absence of a lingering police administrative role for the issuer, however, he has no business participating in decisions as to who should execute the warrant he has issued.

228. The one practical limitation upon the designation of executors of the warrant is the jurisdiction of the issuer. This is recognized in virtually all of the crime-related warrant provisions. Subsection 443(1), for example, speaks of premises within the justice's "territorial division", while subsections 101(9), 181(1) and 182(1) refer to the issuer's "jurisdiction". The question of jurisdiction is beyond the scope of this paper, and the existing structure of territorial divisions is therefore accepted for the present purposes. The scope of the paper also entails acceptance of the "backing" procedure currently available under subsection 443(2) of the *Criminal Code* for the execution of the warrant in another territorial division.

C. Daytime or Night-time Execution

RECOMMENDATION

22. Warrants should authorize execution by day only, unless the applicant shows reasonable cause for allowing execution by night.

229. In the common law of the seventeenth century, searches of premises with warrant could only be performed in the daytime; nocturnal intrusions were prohibited both for their "great disturbance" and the fear of robberies being committed under the guise of authority.[268] Modern techniques of lighting have obviously diminished the latter concern, but the former is still vital. Most individuals sleep at night, and intrusions during sleeping hours, practically speaking, represent particularly acute disruptions of normal life. Still, the only crime-related warrant to retain even vestiges of the

common law position is that under section 443, which is governed by section 444:

> A warrant issued under section 443 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night.

Sections 181 and 182 of the *Criminal Code* allow execution "by day or night", whereas entry under the *Narcotic Control Act* and *Food and Drugs Act* warrants may be effected "at any time". Sections 100, 160, 281.3 and 353 do not mention the time factor at all.

230. Our empirical evidence indicates that most warrants issued permit execution at the officer's discretion. However, in some cities covered by our survey — Edmonton and Winnipeg in particular — a practice of imposing time constraints had developed among local justices and Provincial Court judges. Indeed the actual imposition of time constraints appears to be a function more of local practice than of the particular statutory regime invoked. Our results also indicate that time constraints, when imposed, are almost invariably obeyed. Out of the cases reported in which time constraints were imposed and compliance could be ascertained, the vast majority were executed during the prescribed hours.[269]

231. What ought to be the general rule? None of the common law jurisdictions surveyed retains the hard and fast prohibition against nocturnal search. Indeed, the nearest approximation to Hale's position is that of the *French Code of Criminal Procedure*, which generally prohibits searches between nine o'clock at night and six in the morning unless a demand is made from within the premises.[270] On the other extreme, the Australian position has been quite permissive. Under the existing *Crimes Act*, the warrant may authorize a constable to enter premises at any time.[271] Recently proposed reforms give the magistrate discretion to restrict the time of execution without establishing any onus or presumption as to the appropriate hours.[272] In between these two positions is that of American Federal Rule 41(c)(1):

> The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall delegate a federal magistrate to whom it shall be returned.

232. We find that the American position is the soundest of the three approaches. It recognizes that an unyielding restriction of searches to the daytime hours might render the search ineffectual in particular cases; at the same time it requires the applicant to

demonstrate the need for nocturnal execution before it permits him to exercise this more intrusive power. In essence "probable cause" amounts to proof that "the warrant cannot be executed in the daytime or that the property sought to be seized will be removed or destroyed".[273] A test similar to the American position should be articulated in Canadian legislation.

D. Deadline for Execution

RECOMMENDATION

23. A warrant should expire after eight days, but an applicant should be entitled to apply for a new warrant if grounds for search still exist after this period.

233. There is at present no statutory requirement that searches with warrant be performed within a specified period of time. In the *Execu-Clean Ltd.* case, the Ontario High Court of Justice was sympathetic to the view that if an issuer includes a specified date on the face of a warrant, the officer is bound by it,[274] although the actual authority under which an issuer is empowered to impose such a limitation remains unclear. Despite this lack of direction, however, there is a tendency among some issuers of search warrants to specify deadlines; altogether, 18.2% of the warrants executed were limited by an expiry date.[275] Once again, local practice seems primarily relevant. Issuers in Edmonton and Toronto imposed expiry dates relatively frequently compared to their counterparts in Winnipeg, Vancouver and Montréal. Moreover, the data indicated that those warrants with expiry dates were executed more quickly than those without such deadlines.

234. The existence of an expiry date is a healthy element in a search warrant regime, for reasons that relate to both the "judiciality" and "particularity" of the warrant. In the *Adams* case, the English Court of Appeal held that a search warrant for obscene publications authorized only one search, entry and seizure: a conclusion necessary to a truly "particular" warrant procedure.[276] If police maintain the discretion to make the single intrusion after a lengthy period of time, however, the possibility remains that the police will undertake their intrusion in circumstances different from those that prompted the issuer to grant the warrant. Yet it is the intrusion itself

that must be justified by the circumstances, not simply the conferment of authority to intrude. This entails a proximity in time between the issuance and execution of the warrant. It is thus unsatisfactory to allow execution of the warrant 103 days after its issuance, as occurred in one case surveyed by the Commission.[277]

235. Deadlines upon search have been imposed in a number of different jurisdictions. While no deadlines exist in Canadian federal search warrant provisions, a number of provincial statutes, notably those dealing with liquor control, do specify time limits on execution.[278] The specific length of time picked, however, has varied considerably. Both the British Royal Commission on Criminal Procedure and the Australian Law Reform Commission's proposed legislation allow seven days,[279] and we accept that this period is a sensible one.[280] In order to accommodate the increasing number of police forces using a "four on — three off" shift system, however, we would fix the time limit at eight days. In consultations with Commission researchers, police authorities indicated that they could operate within such a deadline. If, after the expiry of the period, the police believe that circumstances still justify the authorization of a search, it is not unreasonable to ask them to submit those circumstances to an adjudicator for a new determination and obtain a new warrant.

E. Scope of Search and Seizure with Warrant

RECOMMENDATION

24. A peace officer executing a search warrant should be empowered to search only those areas, within the places and vehicles or upon the persons mentioned in the warrant, in which it is reasonable to believe that the objects specified in the warrant may be found. A peace officer performing such a search should be empowered to seize, in addition to "objects of seizure" specified in the warrant, other "objects of seizure" he finds in plain view.

236. We have specified that the following are legitimate "objects of seizure": takings of an offence; evidence of an offence; and things,

funds and information possessed in circumstances constituting an offence. The warrant issued in a particular case should thus contain descriptions of items within one or more of these categories. The officer, however, in the course of making the authorized search, may discover other things, funds or information falling within the definition of seizable objects, yet not mentioned on the warrant. Should he be allowed to seize them?

237. The answer with respect to the section 443 warrant in present legislation is a qualified yes. Section 445 of the *Criminal Code* clearly allows for seizure of things, not included in the warrant, believed on reasonable grounds to have been "obtained by or used in the commission of an offence". Although this provision may not actually authorize the seizure of items of a purely evidentiary nature, it does give the peace officer considerable scope. Accordingly, officers are instructed in police training materials not to confine their attention to articles specified on the warrant. "Be alert", reads the Metropolitan Toronto Training Précis, "for anything unlawful".[281]

238. According to the Commission's survey results, the power to seize unspecified objects is used often but not in the majority of cases. If one breaks down the figures according to things seized, 66.3% of the seizures reported were of the things or types of things described on the warrant.[282] The remaining 33.7% of seizures represented objects that the issuer of the warrant did not, on the evidence before him, order seized. What policy, then, justifies such departures from the authority of the warrant?

239. It is plain that if the officer's grounds for seizing the additional goods are indeed reasonable, he could obtain a warrant for them. What he is being allowed to do in skipping this procedure is essentially to perform a warrantless seizure. In fact, case-law on point has supported such seizures on a ground recognized in this Working Paper as justifying an exception to the warrant requirement: that obtaining a warrant would be impracticable. As put somewhat bluntly by Lord Denning in *Chic Fashions (West Wales) Ltd.* v. *Jones*:

> Suppose the constable does not find the goods mentioned in the warrant but finds other goods which he reasonably believes to be stolen. Is he to quit the premises and go back to the magistrate and ask for another search warrant to cover these other goods? If he went away, I should imagine that in nine cases out of ten, by the time he came back with a warrant, these other goods would have disappeared. The true owner would not recover them. The evidence of the crime would have been lost. That would be to favour thieves and to discourage honest men.[283]

240. This puts the case somewhat extremely. Even under a conventional warrant system, the peace officer could, for example, have a fellow policeman remain on the premises while he obtained authorization from a justice. Under a telephonic warrant system, the peace officer often could obtain the warrant while remaining on the premises. On the other hand, there are undoubtedly cases in which obtaining a telephonic warrant is not a real alternative — there might not be a telephone on the premises, there might be a risk of injury to the officer or destruction of the objects sought even with the officer's continuing presence on the premises. Ultimately, the question becomes one of whether the costs entailed by compelling a second application for a warrant are outweighed by the dangers created by permitting the seizure of unspecified items.

241. The prospect of allowing seizure of unspecified items creates two significant dangers. The first is the possibility that objects will be seized on the basis of mere speculation or arbitrary exercises of discretion, rather than on reasonable grounds for believing that they are legally seizable. Arbitrariness is, of course, the spectre that the notion of prior control inherent in the warrant is supposed to curtail. The existence of a warrant to search the premises, however, means that insofar as the entry and search are concerned, that control has been exercised. We believe that control of the unspecified seizure would be adequately served by requiring the officer to file a report after the seizure, setting out its particulars and the reasons why it was made. Such a procedure is set out in Recommendation 37 and detailed later in this Chapter.[284] Although it cannot prevent unjustified seizures, the report can both discourage them by letting the peace officer know that he will be accountable for his actions, and give an individual an informed basis, analogous to the written warrant application, upon which he may challenge them. The inconvenience of such a report is hardly prohibitive; it merely adds one element to the return which the officer makes to the issuer.

242. The second danger is that the permission to seize unspecified objects will, in the words of Stewart J. of the United States Supreme Court, "invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home", and, once inside, to make "unconfined searches" for seizable objects.[285] Accordingly, American jurisprudence has developed the "plain view" doctrine which prevents an officer from fishing through the entirety of an individual's premises, looking for something to seize. We conclude that the "plain view" rule should limit seizures of objects not specified on a warrant. Since this rule is applicable to situations outside the

execution of warrants, it is also detailed later in this Chapter.[286] For the present, in Recommendation 24, we advance a modest proposal which aims to keep the execution of the search limited by its justification.

III. Execution of All Searches

243. The following rules cover problems arising in both warranted and warrantless searches. Although the specific instances of these problems may differ from typical cases of search with warrant to typical cases of search without warrant, we believe that the principles governing the resolution of these cases should be uniform.

A. The Use of Force

RECOMMENDATION

25. The use of force should continue to be governed generally by the standards presently set out in subsection 25(1) of the *Criminal Code*, which recognize that a peace officer, if he acts on reasonable and probable grounds, is justified in using as much force as is necessary.

244. The use of force is one of the considerations the warrant itself cannot address. It is both too circumstantial — what the officer should be authorized to do depends on factors that may vary from moment to moment, and too general — it is significant in the whole context of law enforcement, not just that of search and seizure. It may also be an area in which the application of legal rules, rather than the rules themselves, is primarily in issue.[287]

245. The present general rule regarding the use of force is set out in subsection 25(1) of the *Criminal Code*:

> Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> ...
>
> (*b*) as a peace officer or public officer,

...

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

This subsection applies to searches of persons as well as to searches of places and vehicles; the former topic is discussed later in this Chapter.[288] The application of force to persons may also arise in the context of a search of a place, however; for example, an occupant may attempt to prevent a peace officer from performing a search of his residence. Since the standard for resolving problems of force to persons is consistent whether the relevant search is directed against a person or a place, the whole area will be canvassed now.

246. In one particular type of search the use of force is not always resolved by reference to section 25. Special powers to break possessions are provided in subsection 10(4) of the *Narcotic Control Act* and subsection 37(4) of the *Food and Drugs Act*, which read:

> For the purpose of exercising his authority under this section, a peace officer may, with such assistance as he deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

No compelling case can be made for such sweeping discretion as a general rule. Whether special treatment under *Narcotic Control Act* and *Food and Drugs Act* provisions is justifiable will be discussed in Chapter Nine.[289]

247. The leading Canadian case on the use of force during a search is *Levitz* v. *Ryan*, which dealt specifically with search under a writ of assistance. However, Arnup J.A.'s discussion on this point was expansive, embracing American jurisprudence on search warrants. In conclusion he held that a "reasonable surveillance" of persons on the premises could be a necessary part of a search, depending on the circumstances of the case.[290] In *Levitz* itself, it was found that the officer grabbed the plaintiff as he was attempting to run from the premises, and swung him backwards, causing him to fall. The use of force was held to be reasonable by the Court.

248. The test in subsection 25(1) governs not only the degree of force used but the resort to force in the first place. In the Ontario Police College training materials, it is recognized that "police should only resort to physical force when persuasion, advice and warning fail to achieve the objectives".[291] Arguably, some degree of force is always present in searches of an individual's body, and perhaps particularly so in the case of narcotics and drugs searches. Among the

locations on the person mentioned in instructional materials dealing with such searches are artificial limbs, buttocks, foreskin of penis, nose, rectum, vagina, and under false teeth, bandaids and bandages.[292] The probing of such locations is likely to be somewhat painful as well as particularly intrusive. Accordingly, we propose that these activities be governed by special rules,[293] as set out in Recommendations 32 and 33.

249. For the most part, however, the best standards would appear to be those currently enunciated in section 25 of the *Criminal Code*. Even the *ALI Code*, as detailed as it is, provides only for application of the "reasonable" and "necessary" standards to searches, along with provisions similar to those currently set out in subsection 25(3) on deadly force. While it might be argued that more specific applications of these tests should be set out in legislation, any attempt to be exhaustive would be futile. The variations in circumstances that confront a police officer in his decision to use force defy codification. The better approach would appear to be to continue to set out the general standard in the legislation, and leave the guidelines to police instruction, administrative mechanisms and judicial resolution of specific, litigated cases.

B. Unannounced Entry

RECOMMENDATION

26. In the absence of circumstances justifying either unannounced or forceful entry into private premises, a peace officer should be required to make a demand to enter in all cases. If an occupant does not comply with the demand within a reasonable time, the officer should be empowered to use force to gain entry.

250. A special set of rules has developed with respect to unannounced and forcible entries into premises. This body of law dates back to the seventeenth century decision in *Semayne's Case*:

> In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make requests to open the doors.[294]

Notably, the rule focuses upon the home as opposed to other premises. This distinction was carried into Canadian case-law in *Wah Kie* v. *Cuddy (No. 2)*.[295] While maintaining the general rule that there must be a demand to open in searches of dwelling houses, the case denied that the rule applied when the premises were not residential. In the latter event, the officer was bound only by the "reasonable and necessary" test. This test is essentially incorporated into the special entry provision in subsection 182(2) which is applicable to warrants for evidence of gaming- and bawdy-house offences, and women in bawdy-houses.

251. This is one area in which the distinction between dwelling houses and other premises might be usefully de-emphasized in favour of circumstantial factors. Some such factors were described by Dickson J. in *Eccles* v. *Bourque, Simmonds and Wise*, a case which dealt with entry to effect arrest. The list included the need to save a person from death or injury, the need to preserve evidence from destruction, and hot pursuit of an offender.[296] Other enumerations are provided in American jurisprudence dealing with the "no knock" rule, and include the expectation of violence, escape or destruction of evidence, the existence of an open door, and the obviousness of illegal activities.[297] We conclude that, whatever the use of private premises, in the absence of circumstances justifying either unannounced or forceful entry, an officer ought to be required to make a demand to enter. If an occupant does not comply with the demand, the officer ought to be empowered to enter the premises, resorting to reasonable force if necessary. American case-law has established that after notice is given, an officer must wait a "reasonable time" before breaking in; a wait of thirty seconds has been held to satisfy this standard.[298] This reasonableness test should be recognized in Canadian law.

C. Duties toward Individuals Affected by the Search or Seizure

RECOMMENDATIONS

27. Where a peace officer makes a search or seizure with a warrant, he should be required, before commencing the search or as soon as practicable thereafter, to give a copy of the warrant to the person to be searched, or to a person present and ostensibly in control

of the place or vehicle to be searched. A copy of the warrant should be suitably affixed within any place or vehicle that is unoccupied at the time of the search or seizure.

28. Where practicable, a person present and ostensibly in control of a place or vehicle should be entitled to observe the search.

29. If objects are seized in the course of a search, the individual affected should be entitled to receive an inventory of these objects on request. If the owner of the objects seized is known to be a different person from the individual whose place, person or vehicle is searched, he should be provided with an inventory without the necessity of a request. The extent of detail on the inventory should be that which is reasonable in the circumstances.

(1) *Production of the Warrant*

252. At present, the peace officer executing a warrant is under a minimal duty to provide information to an occupant about the intrusion upon his premises. All he must do is show the person concerned the warrant when required by subsection 29(1) of the *Criminal Code*:

> It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

While subsection 29(1) goes some distance toward assuring persons against whom a warrant is executed that the search is authorized, it stops rather short in two respects. First, the requirement that the warrant be produced is conditional upon the feasibility of the executor having the process with him, and even then only upon request. Second, subsection 29(1) does not require that the warrant be produced at the commencement of the search, which is presumably when an assurance of legality would be most worthwhile. Nor, incidentally, has Canadian case-law developed any requirement that the warrant be produced at the outset of a search or as soon as practicable thereafter.[299]

253. In discussion with Commission researchers, a number of forces mentioned different practices of showing a search warrant to an occupant in the course of a search. Some peace officers stated that they would tell a person that they had a warrant as a matter of course, but would not show the warrant unless requested to do so. Some

commented that the decision to show the warrant might depend on the identity or characteristics of the occupant of the premises. Others claimed that as a matter of policy a person would always get a copy of a search warrant to examine, but not necessarily to keep.

254. In contrast, the *ALI Code* recognizes the principle that the warrant should be shown as soon as possible, regardless of whether a request has been made or not:

> In the course of any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or the person in apparent control of the premises to be searched, as the case may be. The copy shall be read and furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case it shall be read and furnished as soon as is practicable. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.[300]

Although inconveniencing the peace officer in a minor way, this rule ultimately benefits both the officer and the individual concerned, by making the officer's authority visible as soon as possible.

(2) *Giving Reasons for the Search*

255. The requirement that peace officers conducting searches with warrant be required to show the warrant document provides considerable information to the individual concerned. While most warrants will not disclose the grounds of belief presented in the application before the issuer,[301] they are required to specify the premises to be searched, objects to be seized and an offence to which the search relates. Since these protections are supplemented by certain rights of access to the information after execution of the search,[302] we find little need to augment them.

256. We were concerned, however, that no such information was available to persons subjected to a search without warrant. This concern was reinforced by reference to two sections of the *Canadian Charter of Rights and Freedoms*. The first of these is section 8 which affords security against "unreasonable search or seizure". To require that reasons be given when persons are searched without warrant would give some force and visibility to this constitutional rule. In a similar vein, the Royal Commission on Criminal Procedure

concluded that a notification of reasons for the exercise of stop and search powers would assist in enforcing the threshold criterion of "reasonable suspicion".[303] As well, the provision of reasons could assist in ensuring that peace officers could be held accountable if the search or seizure were subsequently challenged. Along with this enforcing effect, the requirement that reasons be provided could contribute to better relations between the police and the persons they search without warrant in the course of their duties. To paraphrase a somewhat worn expression, it could help to ensure that reasonable searches are not only done but seen to be done.

257. Second, requiring that reasons be provided to persons searched without warrant would be consistent with the spirit of subsection 10(1) of the *Charter*, which reads:

> Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefor;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; and
>
> (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Although this is a constitutional rule pertaining to arrest, it may be relevant to search and seizure insofar as the exercise of these powers may involve incidental detention of individuals. Such detentions could arise in the context of non-consensual stops of vehicles and persons authorized in Recommendation 9, and even the kind of "freezing" of the premises accepted in *Levitz* v. *Ryan*.[304] In other words, it is possible that an arrest or detention may be found to have occurred notwithstanding the fact that the peace officer involved in the incident was executing a power other than arrest (or even no recognized power at all). On the other hand, a differentiation between powers of search and seizure and those of arrest may be relevant for Canadian constitutional purposes, the former being assigned section 8 protections, the latter the coverage of section 10.[305]

258. Even if section 10 of the *Charter* is found to be inapplicable to situations occurring in the exercise of search powers, the requirement of providing reasons at the time of search would serve the useful purpose of eliminating a source of potential hairsplitting. It has been argued that from a phenomenological point of view, the similarities between personal search and arrest activities are strong. To split the protection accorded to the individual on the basis of the identity of the power employed is to risk subsequent wrangling over the question of that identity. In the *Scott* case, a

Canadian appellate court found itself unable to agree with the trial court as to whether a brief encounter between peace officers and a patron of a bar had involved an arrest or merely a search.[306] Such conflicts could be minimized if procedural protections between the two exercises were parallel.

259. Notwithstanding the force of these arguments, however, we have declined to follow the example of the Royal Commission on Criminal Procedure, which recommended that reasons be provided to persons who are searched without warrant and that those reasons be recorded in the officer's notebook.[307]

260. Our reasons for declining to make such a recommendation are several. First, though perhaps the least compelling, is the "paper burden" consideration. If we were to make such a recommendation, any given consent search could entail the police officer being obliged to complete three separate forms: a statement of his reasons for the search or seizure, which reasons would presumably be recorded in his notebook; a consent form, signed by the person searched; and an inventory of things seized. Of these three items, the written statement of reasons would seem to be the most expendable. This is perhaps more obviously so when it is appreciated that, even in the case of a search with warrant, the warrant document will not generally disclose the reasons for the search. Second, the British Royal Commission's recommendation was specifically referable to the exercise of "stop and frisk" powers. By contrast, our recommendations, as a whole, are designed to express a preference for search with warrant and to limit resort to powers of search without warrant to circumstances of recognized exigency and informed consent. The exigencies we recognize number only two: danger to human life or safety and arrest. In the case of a consent search, the officer will likely find himself obliged to provide reasons before consent is forthcoming. In the case of search incidental to arrest, section 10 of the *Charter* requires that persons be informed promptly of the reasons for their arrest or detention. Requiring additional reasons — in writing — for the search that follows the arrest seems manifestly superfluous. As for the "danger to human life or safety" exception to the warrant requirement, it does not seem unreasonable to expect that in those cases where the reasons are not already self-evident, they will, in the nature of things, likely be forthcoming at, or immediately after, the event.

(3) *Witnesses and Inventories*

261. Beyond the production of the warrant upon request, there is nothing the law currently requires the officer to do in the course of his search. He is bound only by the standard of reasonableness. While this may serve as an adequate restraining principle, it does not take account of positive steps that the interests of the individual affected arguably demand. Specifically, the individual himself should be entitled in most cases to observe the search and upon request to receive an inventory of items seized.

262. The thrust of these demands is to make the execution of the search as much of a visible, civil and respectful exercise as possible, and to bolster the professionalism of the police. While the roles of the searcher and occupant are naturally adverse, this does not mean that the search need always be conducted in an overtly hostile manner. Rather, the peace officer should recognize the intrusiveness of his actions and attempt to be as considerate of the occupant as is realistic. While requirements of police courtesy are evident in both police instructional materials in Canada and the *ALI Code* in the United States, a quite remarkable exposition of such policies may be found in the *French Code of Criminal Procedure*. This Code includes different sets of rules for searches of domiciles belonging to accused and unaccused parties. Both sets of rules require the search to be made in the presence of the occupant, or a surrogate; if the occupant is not an accused party, he "shall be invited to assist" in the search. At the conclusion of the search, an official report is prepared and the witnesses to the search requested to sign it.[308] While the differences between civil and common law jurisdictions must be taken into account, the tone of the French legislation commends itself.

263. The general rule that an occupant of a place or a vehicle searched be entitled to witness the police activity is not only an instance of civility but of common sense: the presence of a witness verifies the officer's account of the conduct of the search. This policy has already been implemented to some degree, by police guidelines which require the officer in charge to have the landlord or occupant of the premises accompany him while the search is in progress.[309] We are mindful of the privacy problems entailed in allowing persons such as neighbours or bystanders to witness searches in the individual's absence. However, with respect to the occupants themselves, the law ought to sanction existing guidelines by incorporating them into legislation, making provision for exigencies in which the individual's

presence would be counter-productive (e.g., where he is so hostile as to make his presence a danger to the successful conduct of the search). We attempt to compensate somewhat for the absence of a witness in searches of unoccupied places or vehicles by the requirement that the police executing the search leave a copy of the warrant suitably affixed within the premises.

264. The inventory requirement was recognized at common law as applicable to seizures of stolen goods,[310] but it is not present in any modern provision. Inventory procedures, however, have been adopted by a number of Canadian forces. Members of one force told Commission researchers that they send exhibit forms to the individual from whom items have been seized as well as to their own records departments. On the other hand, another force looked unfavourably on inventory procedures as an unnecessary source of paperwork, backing up their argument by reference to an absence of complaints from persons affected. In between these views stood a number of forces which maintained that they would provide an inventory upon request.

265. A statutory requirement that a person whose possessions are seized be provided with an inventory is part of the American Federal Rules[311] and has been recommended by the Royal Commission on Criminal Procedure.[312] We believe that the principle should be adopted in Canada as well, but with a proviso. There may be cases in which the individual does not require and perhaps does not want an inventory. Examples of the latter possibility would be cases in which the objects seized were illegal to possess. Accordingly, we propose that the requirement stem from the individual's request. Since the officer will usually make an inventory for administrative purposes anyway, and indeed should do so for the purpose of making a return upon a warrant before the justice, the requirement imposes little extra burden upon the police. The objective of informing the occupant as to the exact possessions being taken from him enhances the visibility of the search and seizure procedure, and is well worth any inconvenience involved. In cases in which the volume of material seized makes a meticulous list impracticable, the inventory should be as detailed as is reasonable under the circumstances.

266. One possible complication involved in an inventory requirement concerns the potential use of an individual's receipt of an inventory as evidence against him in court. Where possession of the objects seized becomes a fact in issue at trial, any express or implied acknowledgment by an individual that an inventory was accurate

could be considered relevant evidence. In order to protect himself against this contingency, the individual from whom things are seized may wish to decline to request or to receive any such inventory.

D. The "Plain View" Doctrine

RECOMMENDATION

30. If a peace officer, in the course of a lawful search or otherwise lawfully situated, discovers "objects of seizure" in plain view, he should be empowered to seize them without a warrant. In such cases, a post-search report should be filed, as specified in Recommendation 37.

267. There are a number of ways in which a peace officer executing a lawful search may discover objects of seizure not covered by the justification underlying his initial intrusion. For example, a peace officer searching premises with a warrant for stolen goods may find a supply of illegal drugs; a peace officer arresting an individual in his house may see an illegal weapon beyond the reach of the accused and hence outside the ambit of the "reach" test proposed in Recommendation 7.[313] This situation poses a certain dilemma. Notwithstanding the obvious criminal law enforcement interest in taking the opportunity to acquire such objects, there is a risk that permitting their seizure invites peace officers to expand specifically authorized searches into "fishing expeditions". Some special provisions, such as subsection 10(1) of the *Narcotic Control Act*, permit seizure of objects not mentioned on the warrant but still connected to the same or a related offence. But what if the incriminating items pertain to another kind of offence altogether? Aside from the provisions of section 445 of the *Criminal Code*, which deals exclusively with searches with warrants issued under section 443,[314] Canadian law has not addressed this problem. However, the dilemma has been resolved in American case-law by the "plain view" doctrine.

268. This doctrine basically holds that taking advantage of the observation of incriminating objects in "plain view" does not involve the peace officer in any distinct "search" activity outside of that covered by his initial justification; hence, by allowing seizure of such objects, the law does not sanction any "general or exploratory" intrusion into the privacy of the individual concerned.[315] Rather, the

only recognizable deprivation resulting from the discovery is the individual's loss of the incriminating objects found. Warrantless seizure of these objects is permitted because the deprivation suffered does not outweigh the inconvenience or possible danger entailed in requiring the police to obtain a warrant specifically covering these objects.[316]

269. The American position is informed by Supreme Court case-law, which has confined the doctrine according to its rationale:

> It has been emphasized that any evidence seized by a law enforcement officer will ordinarily be in "plain view" at least at the moment of seizure, and that the mere fact that evidence is in "plain view" at the moment of seizure thus does not indicate that the "plain view" doctrine applies. The Supreme Court has held that the "plain view" doctrine is subject to such qualifications and exceptions as the following: (1) the observer of objects in "plain view" must have the right to be in the position to have that view; (2) in order for the seizure of objects observed in "plain view" to be constitutional, the seizure must be based either on a valid warrant or on "exigent circumstances" justifying the failure to obtain a valid warrant.[317]

We believe that the doctrine is a valuable one and accordingly recommend its incorporation into Canadian law.

270. It has been suggested in American jurisprudence that the "plain view" doctrine will not justify seizure of the object where its incriminating nature is not apparent from the "plain view" itself.[318] In some cases, distinctions have been drawn between seizure of contraband, stolen goods and dangerous articles, and objects of simply evidentiary value, although seizure of the latter category still appears to be constitutional if the discovery is inadvertent.[319] It would be possible to simplify the American approach somewhat by excluding from seizure objects which were neither "takings of an offence" nor "possessed in circumstances constituting an offence" but serve merely evidentiary purposes. Indeed such a policy may already be implicit in Canadian law. At present, the additional items seizable under section 445 of the *Criminal Code* are restricted to things believed to be "obtained by" or "used in the commission of an offence", a provision which may not cover mere evidence. However, there are unquestionably some kinds of evidence, such as bloodstained clothing or lawfully possessed weapons, which are incriminating at first glance, and we are not persuaded that excluding such objects from our Recommendation would serve any truly beneficial purpose. For this reason, and in the interests of simplicity, we propose that the "plain view" doctrine be applicable to all objects of seizure.

IV. Searches of Persons

RECOMMENDATIONS

31. A peace officer may search a person:

(a) named in a search warrant;

(b) found in a place or vehicle specified in a search warrant if:

(i) there is reasonable ground to believe that the person is carrying an object of seizure specified on the warrant; and

(ii) the issuer of the warrant has authorized the search of persons found in the place or vehicle on the face of the warrant; or

(c) pursuant to the powers of search without warrant set out in Recommendations 5-10.

However, no "medical examination" or mouth search may be conducted except as provided in Recommendations 32 and 33.

32. No activity involving the puncturing of human skin should be authorized under search and seizure law. A "medical examination" (*viz.* a sexually intimate search, examination of the naked body or probing of body cavities not involving puncturing the skin) should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) pursuant to a specific warrant naming the person to be examined;

(c) if performed by a qualified medical practitioner; and

(d) if conducted in circumstances respectful of the privacy of the person to be examined.

33. A search of the mouth of a person should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) if performed in a manner not dangerous to human life or safety;

(c) on the condition that the peace officer performing the search complete a post-search report, as set out in Recommendation 37.

A. Reasonable Grounds to Believe

271. It seems trite to say that the law protects each individual. It is not, for example, a collective protection against assault that extends to the residents of a building, but rather a protection of each resident individually. Consequently, it might be expected that protection against search would be accorded on such a basis, *viz.* that a person could not be searched unless a particular ground for searching *him* was present. The present law, however, is not always so individualized. Perhaps the most significant departure is evident in *Narcotic Control Act* and *Food and Drugs Act* provisions, which permit search of "any person" found in places searched for narcotics or drugs.[320] In the wake of the *Jaagusta* case, it appears clear that even in warrantless searches, reasonable ground for belief must exist as to the presence of drugs, either on the individual or in the place in which he is found, before a personal search can be made.[321] However, the alternative nature of this rule leaves it open for the officer to search anybody found inside a place, once he has the warrant or other authority under the statute to enter it.

272. This state of affairs was criticized in the Pringle Report,[322] which dealt with an incident of indiscriminate internal searches of the occupants of a tavern. The report referred to a June 1974 policy directive of the R.C.M.P. advocating the "utmost discretion" in the exercise of powers of personal search, and prohibiting strip searches "unless the investigator possesses reasonable and probable grounds to believe that the person is in physical possession of prohibited goods or evidence" of an offence. It went on to recommend that persons found in non-residential premises not be subject to search unless reasonable cause existed to believe that they were in possession of incriminating things.[323] We affirm this position. To entrust any measure of personal search to officers using "utmost discretion" is simply not good enough. Aside from principle, empirical evidence would suggest that this discretion is used quite liberally. In 487 searches of premises under *Narcotic Control Act* and *Food and Drugs Act* warrants reported in our warrant survey, 959 personal searches were conducted.[324]

273. Our recommendations recognize that the justification for intrusion should be related to the individual whom the peace officer wishes to search; the things, funds or information sought must be associated with him in a way sufficient to make the intrusion defensible. We apply this rule not only to searches of persons found

in the course of searching a place but to all instances in which a personal search is authorized, save for arrest. This position is based in part on constitutional considerations. In the *Ybarra* case, the United States Supreme Court found that each individual in a tavern was clothed with an individualized constitutional protection against unreasonable search and seizure, including frisks.[325] This rule was based on wording in the American Fourth Amendment similar to that found in section 8 of the *Canadian Charter of Rights and Freedoms*. Even aside from constitutional issues, however, the policy articulated in *Ybarra* is a sound one, and one which ought to be recognized in Canadian statute law.

274. We are aware of the possibility that powers to conduct searches of persons upon "reasonable ground to believe" could be distorted in practice into programmes of random or sweep searches. An account of such a programme with the alarming consequences that followed from it is found in the recent Scarman Report on the Brixton riots in England.[326] The danger of such programmes may be particularly acute in the instance of warrantless search powers such as those set out in Recommendations 7 to 10. We do not accept, however, that such programmes are deterred by ignoring the legitimate criminal law enforcement interest in conducting personal searches in certain circumstances, when reasonable grounds truly exist. As we indicated earlier, the effect of ignoring these interests may simply be to influence police to account for such searches by reference to relatively discretionary powers such as those found under provincial liquor legislation, to inappropriate constructions of consent or to problematical situations of arrest. Our approach, rather, has been to accord the police a proper range of powers of personal search, attended by procedural safeguards designed to limit the possibilities of their unjustified use.

275. It might also be wondered whether "reasonable grounds to believe" is a sufficiently strict probative test for personal search. Some American case-law on searches for narcotics has used "probable cause" as the applicable standard of proof,[327] although a lesser "reasonableness" test seems the guiding standard in frisks for weapons.[328] On the other hand the Royal Commission on Criminal Procedure has sanctioned a somewhat vague criterion of "reasonable suspicion".[329] Like the drafters of the Australian *Criminal Investigation Bill*, we conclude that the "reasonable ground" standard is appropriate for our purposes.[330] This decision reflects in part the traditional association of this test with Canadian search and seizure law as well as its fidelity to the "reasonableness" test in

section 8 of the *Canadian Charter of Rights and Freedoms*. It also accords with our observation that fine semantic differences may be of limited impact to peace officers faced with an immediate decision as to whether to search a suspect. Finally, it evinces our belief that true protection against unjustified personal searches can only come from the attitudes of the peace officers, the warrant issuers and the judges who are called upon to apply the law. Properly and fairly applied, the "reasonable ground to believe" test strikes a sound balance between the interests at stake in the situations of personal search covered in our recommendations.

B. Warrants to Search Persons

276. The idea of specific warrant to search persons may seem foreign to the mainstream of Canadian criminal procedure, despite the possible availability of such a warrant under sections 101 and 353 of the *Criminal Code*. However, the association of warranted searches with places and warrantless searches with persons is a result of the long historical growth of these search powers in separate strands rather than any legitimate distinction in principle.[331] Indeed, if one accepts the premise that warrants should be available to authorize all justifiable searches and seizures, it is the omission of personal searches from the warrant provisions that appears contrary to principle. This premise has now been incorporated into a sufficient number of codes and provisions[332] in other jurisdictions that the exclusive association of personal search with warrantless powers may be on its way to becoming an anachronism.

277. While it might be observed that many personal searches, including those incidental to arrest, are undertaken in urgent circumstances, this does not argue against the availability of a warrant to perform personal searches. Rather, it argues for the availability of the additional option to perform warrantless searches where circumstances require. It seems trite to observe that the fact that many arrests are carried out in similarly exigent circumstances has not made the peace officer's arrest powers exclusively warrantless. Although the considerations justifying warrantless search cannot be equated with those justifying warrantless arrest, it is

fair to observe that with both search and arrest powers, the choice is between different modes of authorizing an intrusion upon the person. If the warrant, with its inherent features of judiciality and particularity, is an appropriate mode of authorizing an individual's arrest, it is not evident why it is not an appropriate mode of authorizing a search of his person.

278. It might be argued that establishing a warrant to search persons is something of an academic exercise, in that police will invariably perceive that obtaining a warrant is impracticable, and proceed to perform a warrantless search.[333] But while the extent to which warrantless searches are indeed confined to "impracticable" cases is an important problem,[334] it is not resolved by the exclusion of personal searches from warrant provisions. What such exclusion means is that the peace officer cannot go to a judicial official for authorization even when he appreciates that it is practicable, and indeed desirable, for him to do so.

279. Moreover, there is one type of personal search in which a warrant is not only practicable but essential: the performance of "medical examinations". This topic is discussed in detail later; for the time being it is sufficient to state that the number of strip and internal searches currently performed indicates that a warrant requirement in this respect could be expected to produce a significant number of warrant applications.[335]

280. What tests, then, ought to be applied in authorizing personal searches under warrant? There are actually two specific issues relevant here. As to the probative test that ought to be applied by the issuer in authorizing the search of a person, there would appear to be no basis for departing from the "reasonable grounds" test. The critical requirement is that each individual to be searched be someone in relation to whom the requisite reasonable grounds for belief exist.[336] As to the particularity with which the person must be described, this would vary with the circumstances of each case, but there is obviously a need for a name, or at least a physical description accompanied by a precise location at which the person might be found.[337] Although American decisions are not entirely consistent on this point, it would seem that the elaboration of particularity tests is best left to the flexible context of case-law, rather than attempting to establish them in the legislation itself. Canadian cases, such as *Gibson*[338] and *Royal American Shows Inc.*,[339] have developed intelligent particularity rules with respect to the search of premises, and there is no reason to believe that similar tests could not be developed with respect to individuals to be searched.

C. Searches of Persons Incidental to Searches of Places and Vehicles

281. Personal searches currently carried out in the course of executing search warrants are rarely carried out in pursuit of warrants expressly authorizing personal search. Rather, they are usually undertaken in the course of executing searches of premises. As such, they are based on various sources of legal authority and, in some cases, no apparent source of legal authority at all.[340] In deciding upon how to deal with such searches in warrant provisions, one is presented with three basic alternatives: (1) to provide, as no Canadian provision currently does, that personal search may be authorized in a warrant to search places or vehicles; (2) to follow the basic approach of the narcotics and drugs provisions (although with possible modifications) by providing an independent statutory power to search persons as an incident of a warranted search of places or vehicles; or (3) to leave the executor of the warrant to rely upon independent sources of authority to search persons, as is currently the case with searches under section 443 of the *Criminal Code*. We have concluded that the first alternative is the best one.

282. The third course gives full expression to the view that each personal search represents a distinct intrusion. By according no significance to the fact that the individual is found in the place or vehicle searched, it puts the peace officer in the same position he would be in if he encountered the individual on the street. Its weakness lies in the artificiality of separating all personal searches from their context: the warranted search of places or vehicles. This is not simply a physical context but, more importantly, a context of purpose. It may happen that an officer wishes to search a person for reasons that are unrelated to the purpose of the warranted search, such as the apprehension that the person is carrying a dangerous weapon. But this need not always be the case; on the contrary, the officer may be searching the persons found on the premises for the same objects of seizure as those mentioned in the warrant. In such cases, it seems only sensible to view the personal search in the context of the search as a whole.

283. What is different about the undertaking of personal search, of course, is that personal security and not merely a spatial domain is being violated. And it remains critical that each individual in the place or vehicle be protected from a search of his person unless reasonable grounds exist to believe that he himself is in possession of

an object of seizure. The critical question is whether the decision as to the existence of these grounds should be confided to the original warrant issuer or to a peace officer.

284. To leave the matter solely to the determination of the peace officer raises certain objections. It gives the officer what is essentially a power to make warrantless searches, without offering a convincing reason for abdicating all warrant protections. There are a number of arguments to be made against requiring a *second* warrant application to be made from the scene of the search: the possibility of urgent circumstances, the inefficiency of requiring two separate applications, the marginality of benefits received from such an application compared to its inconvenience. But what factors argue against giving the issuer of the warrant responsibility in this respect on the *original* application?

285. The basic problem is that the issuer is in an inferior position to ascertain the likelihood of whether an individual encountered in a place or vehicle is carrying or concealing an object of seizure. Whereas the officer has the advantage of being aware of the circumstances encountered during the search of the place or vehicle, the original issuer can only be cognizant of factors known before the search is undertaken. There may be no basis upon which it may be predicted, at the stage of the application for the warrant, who may be in the place or vehicle, or which occupant might be in personal possession of the objects. And any hypothesis that might be developed before the search might easily be refuted once the search has begun.

286. To offer the issuer the power to authorize personal search entails some concession to the hypothetical and vague basis upon which his decision must rest. The problem of whether such a basis is a proper one upon which to issue a search warrant has plagued American case-law. The cases have focused upon the validity of authorizing searches of "occupants" of certain premises. It would appear that if there is reasonable ground to believe that all persons present at the anticipated scene are implicated in the offence, the warrant will be valid.[341] While the decisions evince a laudable concern that individuals on the premises not be searched without justification, they have viewed the issue of grounds to search at a collective level: if all occupants are sufficiently implicated to be searched, a search of each one of them may be authorized. Although it may well be that only a few individuals on the premises are so implicated, the issuer is faced with an all-or-nothing proposition.

287. We propose that the best solution to the problem is to divide the responsibility for determining the question of personal search between the issuer and the peace officer. To the issuer should go a kind of clearance function. If, when the issuer grants the initial warrant, it appears that the "objects of seizure" named in the warrant may be concealed upon persons in the place or vehicle to be searched, he should be empowered to include a clause on the warrant authorizing the officer to search persons. However, the officer should be permitted to search only those persons whom he reasonably believes to be in possession of these "objects of seizure". Not only does such a compromise balance the "judicial" protections of the issuer's decision with the informed basis of the officer's judgment, but by using the warrant to confer authority upon the officer, it communicates that authority to the occupants of the place or vehicle searched.

D. Medical Examinations and Searches of the Mouth

288. Probings of body orifices, intimate sexual searches, and strip searches are clearly very intrusive procedures. As well as being an aspect of search and seizure, these same procedures may also be performed for other investigative purposes, e.g., in order to obtain samples of bodily substances from a suspect in custody. Whether as an aspect of search and seizure, or as an aspect of what we refer to as "investigative tests", we believe that these procedures should be carefully prescribed by law. For present purposes, we make recommendations only as these procedures relate to powers of search and seizure; in a subsequent Working Paper, we will be considering the procedures appropriate to investigative tests. It should be understood, however, that it may subsequently prove necessary to reconcile certain of the present recommendations with those that we will shortly be making in our Working Paper on Investigative Tests. This task we expect to reserve for our respective Reports to Parliament on Search and Seizure and Investigative Tests.

289. The need for special rules governing visual examination and searches of body orifices and sexual organs was recognized by the Australian Law Reform Commission. The Australian Commission's position was summarized as follows:

> The intention of the Commission is to confine the power of search incident to arrest to light body search of the so-called "frisk" type. The more intrusive searches of the surface of the body, or various cavities

thereof, should be carried out only in accordance with provisions governing medical examinations. Obviously it will be difficult in many cases to draw the line between what is a personal search, which can be carried out by a police officer, and what is a medical examination, which in our recommendation can be carried out in the absence of consent only by a medical practitioner pursuant to a court order. The Commission is of the view that search of the body surface, even if only superficial scratches or bruises, should be construed as a medical examination to the extent that it involves any invasion of the modesty or dignity of the person concerned, as by the shedding of clothes and so on. It is difficult to draw this kind of distinction clearly in statutory terms. Much will clearly depend on the willingness of the courts to draw the appropriate distinctions when practical situations come before them, upon the discipline enforced by senior police officers and upon the response of all officers to the principle advanced here.[342]

290. The Australian proposal is basically oriented towards three objectives. First, it affirms personal dignity by expanding the definition of medical examination beyond intrusions into the body and encompassing strip searches generally. This position recognizes what was evident in the findings of the Pringle Report:[343] that it is the exposure, rather than the probing of the orifices of the body, that is the primary intrusion made in the course of an intimate search. The point was also made by the minority of the British Advisory Committee on Drug Dependence, which called for special protection against what it termed "embarrassing" inspections of underclothes and the naked body.[344] We give further recognition to this concern by requiring that the examination be conducted in circumstances respectful of the privacy of the person to be examined.

291. The argument may be put, of course, that no matter how serious the offence, the violation of human dignity implicit in a vaginal or rectal examination is intolerable in a free society. Proponents of this argument, however, often concede that there is a legitimate interest in obtaining some secreted items (*viz.* condoms containing heroin), and suggest alternatives open to the police, such as incarceration and supervision of the individual, and constant inspection of his or her body wastes. These alternatives themselves are hardly more respectful of human dignity than a rectal or vaginal probe conducted in appropriate surroundings by a medical professional; they may be even seen as less so. In the result, we suggest that the proposals contained in our Recommendation are the best available set of rules for an inevitably distasteful task.

292. Second, the Australian proposal requires that rectal and vaginal searches, when they are conducted, be performed by

qualified medical practitioners, and therefore involve a minimum of pain and risk of injury to the individual searched. In Canada, this concern has been manifested in the Pringle Report[345] and incorporated into a number of police instructional materials.[346] By restricting the permitted practices to medical "examinations", the proposed law clearly would exclude the more dangerous kind of operation attempted in the *Laporte* case,[347] as well as such brutal tactics as force-feeding of emetics which so incensed the United States Supreme Court in the *Rochin* case.[348]

293. Third, the proposals would preclude conducting a medical examination without the specific authority of a judicial order. We believe that these intrusions are sufficiently serious that they should not be permissible without prior judicial authorization. Moreover, it might be noted that the various orifices of the body generally do not lend themselves to the destruction of evidence so much as to its secretion. While it is physically possible to use internal surfaces to absorb, and hence prevent seizure of, various narcotics,[349] the internal search of an individual is usually predicated on the belief that the substance has been carefully concealed in the body for transportation purposes, a belief that assumes that the carrier is preserving the substance. Therefore, as a general rule, the "urgency" factor necessary to justify resort to warrantless search in the absence of consent is not present.

294. The major exception to the policies outlined above involves the mouth, searches of which are particularly relevant in narcotics cases. In the *Scott* case, Urie J. discussed a search of the plaintiff's mouth as follows:

> According to the evidence, it is well known to police officers engaged in drug law enforcement that suspects hide narcotics contained in a balloon or a condom in their mouths. The uncontradicted evidence was that the purpose of the application of the throathold by Sergeant Siddle was to ascertain whether or not the respondent had narcotics in his mouth. That is, he was conducting a search of the person as authorized by the statutes. Since the evidence also indicates that the only satisfactory methods for recovering narcotics hidden in a suspect's mouth and to prevent him from swallowing them to avoid their recovery is to apply such a hold, it would appear to be a lawful act, at least in the absence of evidence of undue force in its application. To find otherwise would, in my opinion, make a realistic search for narcotics a mockery and to a large extent negate the practical use of ss. 10(1) and 37(1).[350]

295. The existence of the practice of swallowing narcotics to prevent their seizure may be well known, but the *Scott* decision

raises some concern in its evident condonation of mouth searches as a general police exercise. It was in fact found that there were no reasonable grounds to believe that narcotics were concealed in the plaintiff's mouth; the search was conducted rather to "ascertain whether or not" narcotics might be found there. This exploratory rationale contradicts the positions taken in this paper that an individual should not be subjected to a search unless grounds pertaining to himself exist.[351] Assuming these preconditions to be satisfied, however, the question remains as to whether, given the painfulness and danger inherent in a search of the mouth, it ought to fall within the medical examinations provisions, or whether the demands of law enforcement justify making it, so to speak, an exception to the exception.

296. It would appear that, while undeniably a drastic measure, a mouth search by a peace officer may well be at times a necessary one to prevent the destruction of evidence. And while possessing the invasiveness of any assault upon the person, it does not involve the embarrassment and threats to dignity which strip searches and other internal searches entail. Accordingly, we propose that the requirements for a warrant and qualified medical practitioner applicable to special medical examination provisions should not obtain in searches of the mouth. We attempt to compensate for the removal of these protections with the requirements that an *ex post facto* report be prepared and that the search be performed in a manner not dangerous to human life or safety.

297. The one major weakness of the Australian proposal for medical examinations is that it allows the investigation of any offence to justify the intrusion. We recommend, however, that these searches be confined to cases in which the seriousness of the social interest demanding intrusion truly balances with the seriousness of the intrusion. Given that rectal, vaginal, and mouth searches are often undertaken in narcotics and drugs investigations, there is still a wide disparity between the search of an alleged possessor of marijuana and that of an alleged trafficker in heroin. Indeed, this distinction has been made in an R.C.M.P. operational manual:

> When conducting investigations involving small amounts of cannabis, members of the Force should not resort to the investigational techniques utilized in the investigation of offences involving heroin or other similar narcotics. Seizing a person by the throat or subjecting suspects to complete strip or internal searches will normally be considered excessive. If members do resort to these investigational techniques, they must be prepared to justify their actions.[352]

298. The classification of offences under the *Criminal Code* is itself currently under scrutiny by the Law Reform Commission of Canada, and it is difficult to discern in current criminal legislation any consistent standard by which an offence could be classified as deserving or not deserving of resort to medical examinations. Perhaps the best approach would be therefore the one taken in drafting existing wire-tap legislation: to limit the application of the regime to specific offences listed by Parliament in a special definition section.[353] This approach to medical examinations was taken by the Victoria Chief Justice's Law Reform Committee, and we recommend its adoption.

V. Release of Information about the Search and Seizure

299. By the time a search has been executed or a seizure has been made, the police are likely to be in possession of significant information about an individual whose interests have been infringed by the intrusion. At the least, they will know why and how the search was conducted, and whether or not a seizure was made. If a warrant has been issued, the office of the issuer should also be in possession of information which has been provided in the application for the warrant. The factual datum in the possession of the police and issuer is naturally of concern to any individual to whom it relates. It may also interest an institution, such as the press, which is not directly involved in the investigation. The institution's interest in turn affects the individual. The dissemination of police information may result in the exposure of previously private facts about his life and activities. The police, on the other hand, may wish to restrict the flow of information in their hands, in order to safeguard their sources and preserve their investigation.

300. The primary concern underlying rules governing the flow of information about a search or seizure is accountability. In this respect the differences between warranted and warrantless searches and seizures are acute. In the former case, accountability should begin with the application to the warrant issuer and his evaluation of the applicant's request. But even if the procedure for obtaining warrants in certain jurisdictions has been perfunctory and subject to

manipulation by the police, there is still some benefit in terms of accountability derived from the record which the information and warrant provide for subsequent examination, review and challenge. Where "returns" to the execution of the warrant are filed as required by section 443, these too provide a measure of accountability. Why should such benefits not accrue as well to an individual affected by a warrantless intrusion?

301. To some extent, this is attributable to certain distinctions between the source of the peace officer's authority in the two instances. Historically, the constable's warrant identified him as the delegatee of the justice of the peace for the purpose of carrying out the justice's law enforcement functions. This relationship is still notionally preserved in some aspects of warrant procedure such as the provision for "return" of the warrant and items seized to the justice under section 443 of the *Criminal Code*. By contrast, in the case of a warrantless provision, the peace officer is the direct holder of a statutory power. In the absence of specific legal or administrative provisions to the contrary by law, he is not accountable to any superior official for having exercised it. But primarily, the difference in accountability would seem to be based on the exclusive association of a "judicial" element with the warrant procedure. Many of the existing accountability mechanisms are traceable to this association, and its corresponding absence in the case of warrantless search powers has meant that parallel or similar mechanisms have not been conceived as appropriate in the latter case.

302. Do these factors still justify the existing discrepancies? In terms of present-day realities, the peace officer is no longer the subordinate constable being sent out to perform the functions delegated to him by the justice. Rather, it is the peace officer who almost invariably initiates the warrant procedure, ascertaining the basis of the underlying complaint and preparing the application and warrant for the justice's signature. More importantly, while the maintenance of a "judicial" character should continue to be an objective of warrant procedures, it may be misleading to isolate this objective as the major rationale for supervising powers of search and seizure with warrant. Rather, the "judicial" protections may themselves be instrumental; they themselves have been built into warrant procedures because of the perceived importance of protecting individuals from the unjustified exercise of intrusive powers.

303. In making recommendations concerning the maintenance and release of information about a search or seizure, we attempt to

balance the different considerations raised in instances of warranted and warrantless search. While not rejecting entirely the factors mentioned above, we have attempted to close the gap between the accountability mechanisms available in the two instances.

A. Search with Warrant

RECOMMENDATIONS

34. An issuer of a search warrant should be empowered to exclude persons from a search warrant hearing where it appears to him that the ends of justice will best be served by making such an order.

35. An individual affected by a search or seizure with warrant should be entitled to inspect the warrant and supporting information upon oath immediately after the execution of the warrant. Other persons should be granted access to these documents but should be subject to a prohibition against publishing or broadcasting their contents until:

(a) upon application by an individual affected, the prohibition is revoked by a superior court judge or judge as defined in section 482 of the *Criminal Code*;

(b) the individual affected is discharged at a preliminary inquiry; or

(c) the trial of the individual affected is ended.

36. If the release of either an information or warrant would be likely to reveal the existence of electronic surveillance activities, the issuer of the warrant, upon application by the Crown or a peace officer, should be empowered to obscure any telephone number mentioned on the document and replace it with a cypher. Similarly, if the identity of a confidential informant would be jeopardized, the peace officer or issuer should be empowered to obscure the name or characteristics of the informant and replace them with a cypher. In either case, upon so doing, the issuer should attest on the document that the only facts so obscured are the digits of a specific telephone number or name and characteristics of an informant, as the case may be.

304. These recommendations respond in part to the recent decision of the Supreme Court of Canada in the *MacIntyre* case,

which primarily involved the issue of whether the public ought to be entitled to access to records of search warrant proceedings. By a five to four majority, the Court adopted a modest position in favour of public access. Dickson J., writing for the majority,[354] held that after a search warrant had been executed and any objects seized as a result brought before a justice, a member of the public is generally entitled to inspect the warrant and supporting information. Martland J., dissenting,[355] took the view that access to these documents should be restricted to persons showing a direct and tangible interest in them, a class that in his view did not include the respondent MacIntyre, a reporter who claimed no interest above that of the general public. The Court's decision did not purport to lay down anything more than certain common law propositions; if Parliament deemed it appropriate, these propositions could be modified by statutory provision. We believe that the interests of clarity call for legislative treatment of three issues raised in the case. These issues are: Should access to the hearing of the application be curtailed? Under what circumstances, if at all, should an individual affected by a search be entitled to examine the warrant supporting information on oath? Under what circumstances, if at all, should members of the public and the press or media be so entitled?

305. The Nova Scotia Court of Appeal decision in *MacIntyre* held that the issuance of a search warrant is a judicial act performed in open court: "The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant".[356] Both the majority and minority in the Supreme Court of Canada rejected this view, however. As Dickson J. observed,

> [t]he effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless.[357]

We agree with this position and accordingly give the warrant-issuer the power to exclude persons from a warrant hearing.

306. The need to control information about the search warrant hearing is diminished after the warrant is executed, both because the individual affected knows about the police investigation by virtue of the search itself and because the police have had their opportunity to make the authorized seizures. The case for giving the affected

individual access to the warrant and information at this point was recognized by both the majority and minority in *MacIntyre*. It was perhaps most succinctly put in *Realty Renovations Ltd.*, a case that preceded *MacIntyre*:

> It is abundantly clear that an interested party has the right to apply to set aside or quash a search warrant based on a defective information. In order to make such an application the applicant must be able to inspect the information and also the warrant and must be able to do so immediately the warrant is executed.[358]

We incorporate this position into Recommendation 35.

307. The benefits of giving access both to the public at large and to institutions such as the press which serve it may harmonize with the individual's concern, but this is not necessarily so. As was the case in *MacIntyre*, a journalist may be interested in exposing the activities of the persons named in the warrant as much as checking on the propriety of the police activities against them. The interest that conflicts with public access in this instance is that of the individual's own privacy. Given the wide reach of the media, information about a search may cause the individual serious embarrassment. Privacy legislation at the federal level specifically protects "information relating to the ... criminal history ... of the individual" from disclosure to others,[359] and American law explicitly recognizes that release of information about criminal investigations may constitute an undue invasion of privacy.[360] On the other hand, damage to privacy is a danger acknowledged by law-makers in exempting courts from protection of privacy legislation. The public scrutiny necessary to ensure the fairness and quality of judicial proceedings entails exposure of embarrassing facts about individuals.[361]

308. In *MacIntyre* itself, the majority resolved this issue by reference to the policy of "protection of the innocent". It held that "where a search is made and nothing is found", arguments of public access gave way to concerns for the individual's privacy, but where objects were seized the interests in favour of access prevailed.[362] We hesitate, however, to make such a direct association between the results of a search and the question of an individual's guilt or innocence. A guilty individual may have removed wanted items from his premises; an innocent party may be in possession of relevant evidence seizable under a warrant. Our preference, rather, is to distinguish between access to the warrant and information and publication of their contents.

309. It is important to recognize that the public interest in publicizing procedures at the pre-trial stage is not as strong as at the trial stage. Indeed, the exposure of pre-trial proceedings may threaten the integrity of the trial system as well as enhancing it — by disclosing evidence that may not be introduced subsequently in court, or by tainting the person searched with culpability before he has been charged. The former concern has been enhanced by the introduction of a limited exclusionary rule against illegally obtained evidence in subsection 24(2) of the *Canadian Charter of Rights and Freedoms*.[363] It is also relevant to note that search warrant hearings, while ancillary to criminal procedure, do not involve the kind of final determination of culpability or liability that characterizes the trial and makes publicity "the hallmark of justice" in that context.

310. Perhaps the stronger case for unrestricted rights of publication resides in the violence that restrictions do to freedom of the press. The constitutional protection of freedom of the press as recognized in the *Canadian Bill of Rights*[364] was recently invoked by the Manitoba Court of Appeal in the *F.P. Publications* case. In quashing an order excluding a reporter from a trial, the Court recognized the reporter's freedom to report the names of witnesses at the trial, despite the embarrassment this might cause to the witnesses.[365] But, although the judgments of the majority in the case are spirited in their defence of the press, it would be misleading to take the ratio of the judgment outside the context of the trial proceeding itself. Indeed, two specific provisions in the *Criminal Code* make it clear that at the pre-trial stage, freedom of the press must bend to some extent to accommodate the individual's own wish to control information about the investigation against him.

311. Both at preliminary inquiries and show-cause hearings, a justice is required, upon application by the accused, to impose a non-publication order covering the evidence and representations made before the court.[366] The order lasts until either the accused is discharged at a preliminary inquiry or the trial of the accused is ended. Search with warrant generally precedes both the inquiry and the show-cause hearing, and unlike the accused in either case, the individual mentioned in a search warrant has not necessarily been charged with an offence. Neither the public interest nor the stake of the press in disclosing investigative facts against the individual's will would appear to be more compelling in the case of search warrant hearings than in the cases in which the benefit of a non-publication order is already recognized.

312. The major difference between the contexts is that the absence of the individual from the warrant hearings precludes him from making the application for protection available to an accused before a court. We recommend, therefore, that an order similar to that obtainable at preliminary inquiries and bail hearings be imposed automatically upon the issuance of a search warrant, but that this order be revocable upon the application of the person concerned. We do not accept, however, that this right of the individual concerned to obtain revocation of the order should be absolute. For one thing, the examination of a warrant or information upon oath may involve the disclosure of facts about a number of different individuals. While some of these persons may wish to publicize their case, others may wish to avoid exposure. The complex issues that could arise in such situations could be determined sensitively if presented to an adjudicator of a high-level court.

313. It is recognized that, allowing for what is in effect conditional public access to search warrant documents entails certain risks. The suggestion is made by police and Crown officials that such a step could lead to a reduction in the details disclosed in their applications. It is important to put this argument in perspective, however. It is true that some documents, notably those relating to commercial crime, are prepared with an almost artistic devotion to detail, and that officials preparing these documents might well be concerned about the exposure of names and sources included on these documents. However, the likelihood is that many of these details are superfluous in terms of the legal standards that actually govern applications and warrants. The more common warrant document, by contrast, is one that falls short of even the basic legal criteria — 58.9% of the warrants evaluated by the judicial panel were invalid, and of those found to be valid, many included terse but minimally sufficient descriptions of items, premises, offences and grounds to believe. It seems possible that the effect of public exposure could be to modify practices at both extremes: reducing detail on the meticulous warrants while bolstering standards on the manifestly inferior ones. If this is the case, it is suggested that the sacrifice incurred at the higher stratum is justified by the improvement at the lower end.

314. One area of particular concern is the possibility that public access to search warrants could frustrate electronic surveillance activities. As was suggested earlier, the relevant concern in the evaluation of a warrant application founded on a wire-tap is not the identification of the wire-tap itself but rather the facts it discloses.

However, there is one kind of search in which the tap is inevitably identified in both the information and the warrant: a search for records relating to the telephone number itself. Such searches are often conducted upon telephone company premises.[367] If the fact of the search for the records became publicly available, the individual concerned might well be alerted. In order to avert this situation, court officials, at the request of the police or Crown, could be empowered to delete the actual telephone number from the documents accessible to the public, and replace it with a cypher. So long as it was attested by the issuer of the warrant that the cypher represented a specific telephone number, no significant sacrifice would be made in terms of the capacity of the public to evaluate or monitor the standards of warrant procedures. Analogous policies are proposed with respect to the identities of confidential informants.

315. In advancing Recommendations 34, 35 and 36 we are aware of both the controversy surrounding the *MacIntyre* decision and the acute conflicts that emerge when police are required to disclose intricate and sensitive investigations in an open judicial forum. While the present set of proposals represents a defensible balance of the competing interests, we realize that they may seem too secretive to some and insufficiently confidential to others. In preparing the parts of our final reports on police powers and procedures concerning release of information about searches and seizures with warrant, we would be greatly assisted by comments on, or criticisms of, our present proposals.

B. Search without Warrant

RECOMMENDATION

37. A peace officer should be required to complete a post-search report in the following circumstances:

- **(a) where objects are seized without warrant;**
- **(b) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to Recommendation 24;**
- **(c) where a search of a person's mouth is conducted, pursuant to Recommendation 33.**

The report should include the time and place of the search and/or seizure, the reason why it was made and an inventory of any items

seized. It should be available on request to an individual affected by the search or seizure described in the report.

316. That a particular search or seizure activity is attended by such conditions as to justify an exception to the requirement of obtaining a warrant does not remove the need for accountability mechanisms. It might even be argued that the more defensible inclination would be to augment accountability mechanisms so as to make them effective as sources of *primary* rather than *secondary* protection against unjustified search. We do not accept, however, that it would be beneficial to require full-scale reporting of all warrantless searches and seizures, so as to provide a record as extensive as that available in cases of search and seizure with warrant. In part, this position is based on the recognition that the judicial character of warrant procedures is a matter of some weight. In part, it is based on the observation that some of the concern for accountability and access to information may be met by Recommendation 27, concerning the giving of reasons for the search. However, there are three other considerations that deserve attention: (1) the costs of requiring the scale of reporting characteristic of warrant procedures in all cases of warrantless searches and seizures, (2) the significance of the encroachment upon individual interests represented by different variations of search and seizure activity, and (3) corollary dangers arising from increasing reporting requirements.

317. It is a truism of police work that the reporting of occurrences involves a drain on resources. Traditionally, this drain has been viewed in terms of the "paperwork" that a peace officer is required to complete. Some of this expenditure has been transferred in recent times into computer systems in which information acquired by the police has been processed and stored. The exact nature of the expenditure entailed in requiring full-scale reporting for warrantless searches and seizures would be somewhat dependent on the division of functions between paperwork and computers. However, it seems inevitable that putting such requirements into practice would place an increased strain on the reporting capacities of police forces. This assertion is based on the likelihood that, despite the preference in principle for utilization of a warrant and the improvements in warrant procedure suggested earlier, warrantless searches, particularly of persons and vehicles, will continue to heavily outnumber warranted ones.

318. Can such an expenditure of resources be justified by the benefits received from it? It is accurate to say that any deprivation of

human liberty or violation of bodily integrity represents an interference with interests accorded significant importance in Canadian legal tradition and under the new *Canadian Charter of Rights and Freedoms*. However, it would seem that in many cases, the violation of individual interests is a limited one. Particularly in cases of non-resultant searches of vehicles and persons, the effect of the police action may have been a relatively fleeting deprivation of the individual's rights: a stop and a check or frisk for stolen property or weapons, following which the individual is allowed to go his way. While it remains essential to reduce even such fleeting episodes to truly justifiable cases, it is open to doubt whether striving for this objective justifies imposing draconian record-keeping burdens on the police for all search and seizure practices.

319. This position is fortified when one considers the implications for individual privacy that flow from detailed record-keeping. These implications would arise from the anticipated use of computers to process and store information about warrantless searches and seizures. Problems involving privacy and computers are, of course, larger than the context of criminal law enforcement, and the struggle to resolve them can hardly be said to be over.[368] In the specific case of search and seizure, the prospect of recording in a computer every incident in which an individual is stopped and searched by a peace officer is a dangerous one: it possesses dimensions of an Orwellian world that can hardly be reassuring to an individual whom search and seizure procedures strive to protect. These dangers would be compounded if the prospect of access to police information by outside parties were given serious attention.

320. Our recommendations attempt to strike an acceptable balance between the conflicting interests and arguments noted above. Generally, the performance of a search without warrant should not in itself lead to mandatory reporting procedures. However, such procedures could be triggered by one or more of a number of circumstances. First, making an arrest may invoke its own set of reporting requirements; the law of arrest is the subject of a separate Commission Working Paper. Second, as an administrative matter, in a case of search performed pursuant to consent, the written authorization to search proposed in Recommendation 6 should be kept by the police and filed. Third, when a search involves a particularly intrusive activity such as a probing of the mouth, an *ex post facto* report of the search should be mandatory.[369] Fourth, a similar report should be required in cases in which an actual seizure of things is made without a warrant.

321. Detailed *ex post facto* reporting requirements are currently set out in R.C.M.P. guidelines concerning writs of assistance. Another model for an *ex post facto* report is provided by the *ALI Code*:

> *Report of Seizure.* In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things seized [to a judge of a court having jurisdiction of the offence disclosed by the seizure].[370]

We recommend that a post-search report, containing the time, date and place of the search and/or seizure, the reasons why it was made and an inventory of items seized, be made a part of Canadian law as well.

CHAPTER EIGHT

Departures from the General Rules

322. The discussion in the previous three Chapters attempted to articulate a balanced regime of warranted search and seizure powers, both in terms of justifications for intrusion and procedural mechanisms. In the interests of simplification and coherence, this task was undertaken with a view to creating one generally applicable body of rules. Yet as much as the development of general rules has drawn upon the range of different laws and practices, there are still some cases in which the general rules cannot be applied effectively. Some situations involving searches and seizures admit peculiar factors and particularly acute interests which can only be taken into account in exceptional rules.

323. In this Chapter, the need for certain exceptional provisions is approached in two distinct stages. First, we address problems that have emerged from the preceding discussions as deserving of special attention. These problems include searches of unsuspected parties, the freezing of financial accounts, and seizures of items from solicitors and the press. The issue addressed in each case will be the appropriate adjustment that ought to be made to take account of the exceptional factor introduced into the situation. The second section in the Chapter deals with the critical issue of surreptitious intrusions.

I. Special Problems Related to the Individual Searched or Object of Seizure

A. The Unsuspected Party

RECOMMENDATION

38. Where a party in possession of "objects of seizure" is not suspected of being implicated in the offence to which the search relates, an officer executing the search should be required generally to request the party to produce the specified objects. The officer should be empowered to conduct the search himself if:

(a) the party refuses to comply with the request within a reasonable time; or

(b) there is reasonable ground to believe that a request will result in the destruction or loss of the specified objects.

324. Once search and seizure powers are recognized as distinct from arrest and charging functions, the possibility arises of the police exercising these powers against an individual in possession of seizable objects, yet not suspected of being implicated in the offence to which these objects relate. This possibility is not simply an academic one. Searches of unsuspected third parties are a frequent, if not predominant, occurrence in cases of search with warrant. In the judicial panel sample from the Commission's survey, 20% of the warrants were issued for such searches. In 63% of the cases, on the other hand, the face of the application (information or report in writing) indicated that the owner-occupant was implicated. In the remaining 17%, the implication of the occupant could not be ascertained from the available documents.[371]

325. The unsuspected parties subjected to such searches include banks, telephone companies, institutions of the press, courier services, solicitors, and simply acquaintances of suspected individuals. In a number of these cases, special considerations are present, which bear upon the necessity of special procedures tailored to the circumstances of the type of party affected. As a general matter, however, two questions arise. First, ought unsuspected parties to be subjected to exercises of search and seizure powers at all? Second, short of complete immunity, are there any special

protections that ought to be accorded to such parties by virtue of their lack of suspected involvement in the alleged criminal enterprise?

326. No Canadian authority has gone so far as to assert that unsuspected parties might be totally immune to the exercise of search powers. The most extreme position taken has been that other less coercive techniques of acquiring things or information should be preferred. Such techniques might include a request or subpoena *duces tecum*. In the *Pacific Press Ltd.* case, Nemetz C.J.B.C. held that before the justice issued a valid warrant to search the premises of the newspaper involved, material should have been required to show: whether a reasonable alternative source of obtaining the information was or was not available, and if available, that reasonable steps had been taken to obtain it from that alternative source.[372] We question the value of this approach for two reasons.

327. First, it gives scant recognition to what has come to be recognized as the function of search and seizure to provide not merely evidence for trial, but also information to the police. Since the warrant is often used before the perpetrators of an offence have been identified sufficiently to lay charges, it is difficult to ascertain exactly who should be offered the alternative of a subpoena or voluntary compliance. The decision to give an individual the benefit of the doubt and to refrain from exercising a search power involves a possible risk of losing the items sought.

328. Second, this restrictive approach seems to assume that search and seizure powers must embody particularly coercive features. The very assertion of state control over the objects sought under search and seizure powers may be considered coercive in itself. If so, however, the alternative of a subpoena *duces tecum* is also coercive, since it requires the thing to be produced as ordered. Unlike the subpoena, of course, the notion of search contemplates the active participation of the police in finding the object, and their entry into the private zones of the individual. It is possible, however, to exaggerate this apparent distinction. Indeed, since a subpoena is required to be served personally by a peace officer,[373] the visibility of the police is not peculiar to search and seizure. Nor need a distinction lie in what the officer may do once he reaches the door and confronts the individual in possession of the object. In fact, the exercise of the search power may not lead the officer past the front door at all. In the vast majority of non-residential searches captured by the Commission survey (comprising for the most part, telephone companies, financial institutions and other business premises), the object sought was reported as having been "turned over on request".[374] That the

physical presence of the officer encouraged compliance with this request is obvious. What is significant, though, is that in these cases, the intrusive features of execution were minimal.

329. We believe that the better course lies in according the unsuspected individual the added protections truly appropriate to his "unsuspected" status. One approach evident in Canadian authority has been to require definite indicators on the face of the information, before permitting issuance of a warrant, thus elevating the relevant standards above those applicable to regular warrant procedures.[375] We believe, however, that what truly differentiates the unsuspected from the suspected party is the likelihood that in the absence of forceful action by the police, the things or information in the hands of the suspected parties sought may be lost. Thus the logical place to give additional protection to the unsuspected party is at the point of execution, where the question of methods of searching is primarily relevant. And since it is at this stage that the police really confront the individual, protection here is more immediate than at the issuance stage.

330. Special respect for the privacy of an unsuspected third party has been recognized in recent American legislation.[376] The legislation calls upon the Attorney General of the United States to issue guidelines incorporating a requirement that the police use the least intrusive method of obtaining materials in the possession of such parties which does not jeopardize the availability or usefulness of the materials. While similar guidelines should be included in Canadian police materials, the basic rules deserve to be codified in legislation.

B. Financial Accounts

RECOMMENDATION

39. Where "objects of seizure" are reasonably believed to be in a financial account, the police should be empowered to obtain a warrant to transfer the amount of the seizable funds to an official police account under judicial control. A temporary freezing order on a financial account should be made available where police officers seize financial records that are reasonably believed to contain information that will enable them to apply for a warrant to seize funds in the account. The freezing order should be of fixed duration and limited by the amount of the seizable funds. It should be obtainable from a superior court judge

or a judge designated under section 482 of the *Criminal Code*, and subject to an immediate right on the part of the individual concerned to apply for its revocation.

331. We recognized earlier that in principle "objects of seizure" ought to be covered by search and seizure procedure even though they have been converted into a loan or debt and offer no evidentiary potential.[377] There remain a number of practical difficulties, however, in applying this principle. In particular, how exactly should a "seizure" of the funds be effected? And how is the law to deal with the peculiar accounting problems of identifying the seizable funds from a potential maze of financial transactions that might have been carried out by the individual concerned?

332. "Seizure" in this context was earlier defined as the acquisition of control over the funds sought. One way to exert control in this regard is by means of a freezing or restraining order, such as that set out in section 12 of the *Business Practices Act* in force in Ontario.[378] This provides that in conjunction with certain investigations, a designated official may, if advisable for the protection of an investigated party's consumers,

> direct any person having on deposit or under control or for safekeeping any assets or trust funds of the [investigated] person ... to hold such assets or trust funds or direct the [investigated] person ... to refrain from withdrawing any such assets or trust funds from any person having any of them on deposit or under control or for safekeeping or to hold such assets or any trust funds of clients, customers or others in his possession or control in trust for any interim receiver, custodian, trustee, receiver or liquidator ... or until the Director revokes or the Tribunal cancels such direction or consents to the release of any particular assets or trust funds from the direction ....

Adaptation of this provision to cover criminally acquired funds held in bank accounts was recommended by the Uniform Law Conference in 1979, with the proviso that the order be made by a superior court judge.[379]

333. Alternatively, the amount of the proceeds could be taken out of the individual's account and transferred to another account registered in the name of the police. The latter method has indeed been used on occasion by some Canadian forces, although the basis for doing so under present legislation has never been clear. According to Recommendations 2 and 11, however, once funds were determined to be "takings of an offence" or "funds possessed in circumstances constituting an offence", their seizure clearly could be authorized by

a warrant. This alternative possesses the advantages of respecting conventional protections associated with search and seizure with warrant, perhaps most significantly the "particularity" requirements governing the descriptions of the offence alleged and objects of seizure. These protections may be contrasted with the more general and tentative links between an offence and funds, which are characteristic of freezing order legislation. This is true not only of the Ontario model but of statutory regimes designed with specific reference to commercial crime. The Henderson Report in British Columbia, for example, proposed a statutory regime including interim freezing orders against property which "may be subject to forfeiture" as part of a criminal enterprise or profits of a criminal enterprise.[380]

334. The absence of such protections from a freezing order scheme may be balanced somewhat by the circumstance that such orders typically leave possession of the property covered by the order with the private individual affected by it. For example, a section in the American Racketeer Influenced and Corrupt Organizations legislation permits courts

> to enter such restraining orders or prohibitions, or to take such other actions, including ... the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture ... as they shall deem proper.[381]

What this suggests, however, is that such provisions may be less in the nature of search and seizure powers than court orders such as injunctions. This impression is enhanced by the legislation's reference to such alternatives as acceptance of performance bonds and the coverage of species of property such as land which have remained outside the traditional ambit of search and seizure powers. It is also enhanced by recent English case-law, which has recognized injunctions rather than search and seizure powers as the appropriate procedures for controlling criminally obtained funds in bank accounts.[382]

335. Accordingly, we restrict our consideration of freezing orders to those that might be required as ancillary to search warrants in this regard. Is there any aspect of the problems entailed in seizure of financial accounts that might require such a special feature? One such aspect is the complexity of the transactions the police may be investigating. This complexity often makes it difficult to isolate the funds representing the proceeds until financial records of the individual have been seized as well. Since the seizure of these records, if communicated to the individual, might result in the

transfer of funds out of his account, police attempting to identify the relevant money are liable to find themselves in a dilemma. In this sense, a freezing order procedure, fixing as it does upon the account and not upon any identified money inside it, is advantageous to the police.

336. However, this argument does not go so far as to prove the need for the kind of freezing order scheme outlined in the *Business Practices Act*. It does show the usefulness of a temporary freezing order pending identification of the funds. Upon obtaining a warrant to seize the financial records of an individual, peace officers could also obtain a temporary freezing order, directed to the financial account into which the relevant funds are reasonably believed to be traceable. Rather than lasting until a subsequent hearing, an order would expire after a specified and reasonable period of time. If the police were not prepared to obtain a regular warrant for the funds being sought by the time of expiry, the account would cease to be frozen.

337. It is recognized that the imposition of any such temporary order represents a departure from the standards inherent in conventional rules of warrant procedure. As such, it needs adequate safeguards. Primarily, the duration of such an order should be as short as the demands of investigation permit. Setting a statutory time limit, as in the case of deadlines for execution, is inevitably somewhat arbitrary. Discussions with police, however, indicated that a thirty-day period, with opportunity for renewal if necessary, could prove workable. Second, the amount of funds frozen should in no case exceed the funds identified with the offence. Third, given the degree of conjecture and complexity that could be expected to characterize police identification of the funds at this preliminary stage, and the correspondingly greater judicial scrutiny and discretion required, we recognize that resort to a superior court judge or judge as designated under section 482 of the *Criminal Code* is appropriate for the freezing order itself. And finally, as in the model Ontario legislation, the person affected by the order should have a right to apply immediately to the court to cancel it.

338. Our recommendation is a limited one in that it is specifically directed to funds in financial accounts. This limitation reflects our perception that, although temporary restraining orders could be instituted with respect to assets such as securities or negotiable instruments, they would be unlikely to be effective as an aid to a search and seizure power. Ultimate "seizure" of such property by the police, in the sense of acquiring control or possession, would be complicated by questions of administration and

disposition not evident in the case of funds. We view the critical issue with respect to these species of property, as indeed with realty, as being the need for long-term restraining orders such as those contemplated by the Henderson Report. This complex and significant issue is beyond the scope of the present Working Paper.

C. Solicitor-Client Privilege

RECOMMENDATION

40. The sealing and application procedures set out in Bill C-21, proposed in 1978, should be instituted with two new provisions — the protection should extend to materials in possession of the client as well as the solicitor, and counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application.

339. Under amendments introduced in the *Criminal Law Amendment Act, 1978*, a new section 444.1 would have been introduced into the *Criminal Code*.[383] It would have provided for a special procedure to deal with documents seized while in the possession of a lawyer, by requiring that, upon a lawyer's claim that documents to be seized were privileged, the officer making the seizure place the documents in a sealed package without examining or copying them. The package having been placed in the hands of a suitable custodian, the lawyer or his client would have fourteen days to make an application to a judge. At the hearing of the application, the judge would be required to inspect the sealed documents and then decide summarily the claim of privilege. In cases in which privilege was found to exist, the custodian would be ordered to return the document to the applicant and the document would be inadmissible as evidence unless privilege were subsequently waived. If no privilege was recognized, the document would be delivered to either the police or the Crown.

340. The implementation of this set of provisions would resolve a dispute that has plagued recent case-law as to when solicitor-client privilege may be asserted. As this Working Paper is being completed, the matter is before the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski*.[384] In the meantime, the restrictive position, represented in decisions such as *R.* v. *Colvin; Ex parte Merrick*,[385] has been that

the privilege is simply evidentiary and accordingly can only be raised at trial. The expansive position, on the other hand, would allow the privilege to be raised at the investigative stage. In *Re Director of Investigation and Research and Shell Canada Ltd.*, Jackett C.J., dealing with seizure powers under the *Combines Investigation Act*,[386] stated:

> It is sufficient to say, in so far as this matter is concerned, that it has been recognized from very early times that the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.[387]

We accept the policy articulated by Jackett C.J. and accordingly view the proposed section 444.1 as a progressive and sound step. However, we note two distinct weaknesses in the 1978 legislation.

341. First, it restricts the documents covered by the privilege to those in the possession of the solicitor. This was recognized by the Manitoba Law Reform Commission in its criticism of similar provisions already in effect under the *Income Tax Act*:[388]

> As is often the case, however, documents in the possession of the client, his accountant, or some other party may also be subject to solicitor-client privilege .... Presumably, then, while privileged documents in a lawyer's possession could be removed from his control, the same documents in the hands of the client could be withheld from department officials by virtue of the common-law doctrine of privilege. This interpretation of the law clearly points out that if a statutory mechanism for the invocation of solicitor-client privilege is to be employed, it must be comprehensive and apply to all documents, regardless of their location.[389]

We concur with this position.

342. Second, the procedure does not recognize the legitimate interest counsel have in examining the documents before presenting their cases before the judge. While the judge has the explicit duty to inspect the relevant documents, there is no statutory power given under the 1978 amendments to either counsel to do so. Although counsel for the solicitor might be presumed to know the nature of these documents, it would be expected that the Crown would be ignorant of them unless given a right of access. Indeed, counsel for the solicitor might well wish to examine the sealed package himself for the purpose of preparation. It would appear useful, therefore, to give counsel for both parties statutory rights of access to the

documents, with certain stipulations to ensure that Crown counsel would not benefit from this access were the judge to find the documents protected. Two stipulations seem appropriate. First, Crown counsel on the application should be precluded from further participation in the investigation or prosecution of the matter to which the application relates. Second, he should be under a duty not to disclose the contents of the sealed package.

D. Searches of the Press and Other Media

RECOMMENDATION

41. The press should have no special protections against unreasonable search and seizure, other than those conferred by the *Charter* and by these recommendations.

343. The *Canadian Charter of Rights and Freedoms* recognizes "freedom of the press and other media of communication" as a fundamental freedom existing in Canada.[390] Does this give the press any special protection against the exercise of search and seizure powers by the police? This question has been addressed in recent case-law both in Canada and in the United States. The case-law has been specifically focused. It does not suggest that an institution of the press deserves any measure of added protection when it is itself a suspected party in an offence. Rather, the debate has been concerned with the vulnerability of the institution when it is not a suspected party, but merely a holder of relevant things or information. For example, a reporter or photographer may have recorded events of an allegedly criminal nature. Should the police be entitled to obtain a warrant to search for and seize such a record in the normal way?

344. An exhaustive consideration of the question appears in the various judgments in *Zurcher* v. *Stanford Daily*, in which the United States Supreme Court held that a warrant issued to search the premises of a campus newspaper was constitutionally valid.[391] The dangers the minority identified with the use of search powers included the unconfined examination of files unrelated to the specific investigation and unnecessary disclosure of confidential sources. This prospect of random search was rejected by the majority, which relied instead on case-law which insisted "that the courts apply the warrant requirements with particular exactitude" when freedom of

the press was threatened. Since the warrant in the *Zurcher* case itself complied with these requirements, it was found to be valid. However, following the Supreme Court decision, legislation was enacted restricting powers to search and seize materials in the possession of journalists.[392]

345. A similar policy of imposing the general safeguards with greater strictness underlies the decision of the British Columbia Supreme Court in the *Pacific Press Ltd.* case. The result, however, was the opposite: the warrant to search newspaper offices was invalidated on the basis that sufficient grounds had not been presented to the issuing justice. Nemetz C.J.B.C., after canvassing British and American authorities, stated:

> Where, then, does the matter stand in Canada? Counsel for the petitioner submits that Parliament has accorded the free press a special place under the *Canadian Bill of Rights*. Accordingly, he argues, ss. 1(*f*) and 2, must be taken into consideration and weighed by the Justice of the Peace before he exercises his judicial discretion to grant the issuance of a search warrant against an organ of the free press of this country. *A fortiori*, he says, this fact is to be weighed in cases where the premises of the newspaper are not the premises of those persons accused of the crime. I agree with this submission.[393]

346. The situation, as indicated in the passage above, is really a sub-category of the general dilemma regarding searches of unsuspected third parties. It was argued earlier that protection of these parties is appropriate upon execution of a warrant rather than its issuance.[394] However, some jurisprudence has recognized that the journalist plays a role in society that differentiates him from other unsuspected parties.[395] For example, the British test for compelling the use of a journalist's film as evidence in court is higher than a simple "relevance" test. Rather, the film has to "have a direct and important place" in the determination of the issues before the court.[396]

347. Canadian law has been equivocal in its protection of journalists. The most relevant decisions on press privilege have concerned the power of a court to compel a reporter to disclose his sources while testifying in a civil discovery. In *Reid* v. *Telegram Publishing Co. Ltd. and Area*, the Ontario High Court held that the reporter could not be so compelled.[397] In *McConachy* v. *Times Publishers Ltd.*, the British Columbia Court of Appeal held that he could.[398] These cases are only tangentially relevant to the problem involving search and seizure, but it is significant that in *Pacific Press Ltd.*, the British Columbia Supreme Court did not cite the

McConachy case, preferring protective British and American authority on point.

348. It is fair to say that each time a court is presented with an attempt by the State to acquire information from an unco-operative institution of the press, it must balance competing interests of considerable importance. For our part, we would strike that balance by according the press the same protections we have accorded other unsuspected parties. Our Recommendation 38 would oblige the police, at the outset of their search, to request that the specified objects of seizure be produced; only if this request were met with a refusal, or if there were reasonable grounds to believe that the delay entailed in a request would result in the loss or destruction of the objects of seizure, would the police be authorized to execute their warrant in the usual manner. That protection, coupled with the "particular exactitude" which the issuing justices and reviewing courts can be expected to exercise, should provide adequate protection against unreasonable search and seizure for the press and other media of communication.

II. Surreptitious Intrusions

RECOMMENDATION

42. Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Absent compelling evidence of the need for such sacrifices, the modifications should not be made in the context of criminal or crime-related investigations.

349. The issue of police powers to perform intrusions surreptitiously has been brought into public attention in recent years by a number of disclosures concerning police activities in Canada. These activities have been scrutinized in both the Keable Report, which examined certain incidents involving federal, provincial and municipal police in Québec,[399] and the McDonald Report, which looked into matters concerning the R.C.M.P.[400] Both reports recommended that the Law Reform Commission of Canada address certain key issues respecting police powers.[401] We agree that the

issue of surreptitious searches and seizures in crime-related investigations is a critical one and have approached it in two stages. First, looking at statutory and common law, we perceive that, with one doubtful exception, these activities are not legally authorized at present. Second, after weighing the benefits and dangers of powers to conduct such activities, we conclude that the interests of criminal law enforcement do not justify enacting these powers.

A. The Present Law

350. By surreptitious intrusions we are referring mainly to what police officials frequently call "intelligence probes". The objective of such exercises is to recover information from the place entered without alerting the individual concerned to the investigation. Achieving this objective, as in the case of interception of communications under section 178.1 of the *Criminal Code*, depends in large part on the intrusion itself remaining invisible. However, we also must take into account activities in which the intrusion itself is visible but the police role in it is not. An example of a search and seizure activity of this kind was "Operation Bricole", which was discussed in the Keable Report. An expressed objective of this clandestine police operation was to be "disruptive", by planting suspicion in the organization searched that another organization was responsible for the evident intrusion upon its premises.[402]

351. Police views as to the lawfulness of these activities have themselves varied. The illegality of "Operation Bricole" was conceded in internal police documents.[403] Information presented to the McDonald Commission by the R.C.M.P., on the other hand, indicated that "intelligence probes" have been carried out by a number of divisions on the assumption that they were legally acceptable.[404] At the Commission's hearings, however, the force conceded that at present the law is less than clear.[405] The McDonald Commission's own view was that surreptitious entries were unlawful with the possible exception of searches conducted under narcotics and drugs legislation. Although this view has been challenged in a memorandum issued to the public by the Department of Justice,[406] we generally concur with the McDonald Commission in this regard.

352. The McDonald Commission's reasoning was that, given the trespasses entailed in such entries, the police require a specific

common law or statutory power to perform them lawfully. Our own research indicates that no common law power to enter and make surreptitious observations has been recognized in reported Canadian case-law. In fact, certain remarks of McRuer J. in the *Bell Telephone* case, in which a search warrant to enter premises and observe telephonic communications was invalidated, stand against the existence of such a power:

> As there is no common law authority for what is sought to be done in this case, the authority must be found in the relevant statute.[407]

Proponents of common law powers to perform intelligence probes essentially base their arguments on the possibility that the common law *could* develop in such a way as to accommodate such a power. But this position, while founded on references to expanded police powers in some landmark Canadian and English cases,[408] becomes tenuous in the face of recent Canadian judgments more relevant to the power at issue.

353. Perhaps the most relevant case on point is *Colet*,[409] in which the Supreme Court of Canada ruled that a statutory power to seize firearms did not carry with it a right of entry upon, or search of, private premises. The case does not afford an exact parallel; in *Colet*, the police activity occurring after entry (seizure of firearms) was authorized in the *Criminal Code*, whereas surreptitious observation is not recognized in any federal statute. However, the argument may be put on an *a fortiori* basis: if no implied entry power exists for an activity sanctioned in legislation, how can it exist for an activity *not* sanctioned in legislation?

354. Another analogous problem is that of making surreptitious entries in order to conduct electronic surveillance as permitted under section 178.1 of the *Code*. The absence of any power of entry for such objectives was noted in *Dass*:

> Crown counsel argues that the authority to install carries with it, by implication, the authority to enter premises by force or by stealth in order to implant the device....
> ... I see nothing in the *Criminal Code* which gives a Judge the power to authorize or condone illegal entry. Crown counsel points to s. 178.13(2)(*d*), which appears to enable the Judge to impose terms and conditions which he considers advisable in the public interest. In my view, that provision was not intended as a mechanism to have the Courts authorize illegal acts.[410]

A contrary view was expressed by the United States Supreme Court in the *Dalia* case, in which it was held that it was lawful to perform a

surreptitious entry to install a listening device. The majority of the Court reasoned that such a power of entry was necessary to carry out the purpose of the electronic surveillance legislation at issue.[411]

355. We conclude that no strong basis exists for a common law authority in Canada to make surreptitious entries in order to acquire information. This leaves open the possibility that such authority could be conferred by statute. The only possible sources of statutory authority relevant to the area of crime-related searches and seizures are paragraph 10(1)(*c*) of the *Narcotic Control Act* and paragraph 37(1)(*c*) of the *Food and Drugs Act*, which provide that a peace officer "may ... seize and take away" narcotics or drugs and other relevant objects found in places searched under the relevant regimes.

356. These powers of search (whether with writs, or warrants, or, in the case of non-residential premises, without documentary authority) are worded so as to give the officer apparent discretion to seize certain objects. They may not *require* him to seize them if he finds them. In this respect, these powers serve as an obvious contrast with warrants in Form 5 of the *Criminal Code*, under which an officer is "required" to enter specified premises, search for specified objects and bring them to a justice. The argument that these powers permit surreptitious intrusions essentially boils down to the contention that an officer can enter the place under investigation, attempt to locate evidence of illegal activity, record it or obtain samples and leave without disturbing the status quo. On the other hand, the statutory provisions for both writs of assistance and warrants provide that such instruments are to be issued to "search for narcotics". Accordingly, where the efforts of the peace officer are directed to searching for information about narcotics rather than the narcotics themselves, it could be argued that the practice falls outside the intent of the present provisions. Moreover, the exact relationship between secret searches and existing requirements for announcement prior to entry remains problematical.[412]

357. At any rate, it is apparent that if any power exists to perform a surreptitious entry in narcotics and drugs investigations, it is a relatively limited one. The power requested by the R.C.M.P. is much wider: rather than a search power triggered by "reasonable grounds to believe", discussion has focused on a power to intrude so as to know with certainty whether evidence or contraband is present in a particular premise.[413] Given the expansive nature of this demand and the dispute concerning the scope of activity permissible under existing law, it is important that the matter be clarified. If no power to make surreptitious intelligence probes is justifiable, the

practice should be precluded by legal rules. If it is decided to institute such a power, then it should be carefully and precisely set out in legislation.

B. Should Surreptitious Intrusions Be Authorized?

358. There are actually two questions at issue in the discussion of possible laws to deal with surreptitious intrusions. First, *how could* such intrusions be authorized for criminal investigations? Secondly, *should* such intrusions be authorized for these purposes? We believe that it is important to address the questions in this order, for knowing the nature of the potential authorization procedure helps to put the second question in context.

(1) *Alternative Modes of Authorization*

359. The McDonald Commission did not answer either of these questions directly. However, it did recommend a regime for authorizing surreptitious entries, along with other intrusive operations, in connection with security intelligence. This regime follows a mode of authorization quite similar to that set out in section 178.1 of the *Criminal Code*.[414] Certain remarks in the Report seem to imply that this mode is more suitable for surreptitious entries in criminal investigations than traditional search warrant provisions. Specifically, the Report found that justices of the peace, even those unconnected with the R.C.M.P., would not be qualified to issue the "warrants" that would authorize such entries for security purposes. Accordingly, it was proposed that security intelligence "warrants" be issued by Federal Court judges.[415] Although it is not entirely clear from the proposed regime whether a judge could authorize more than one entry per application, the existence of certain features, such as a 180-day maximum period during which the authorization would remain in force, suggests that the "warrant" could be used for more than one entry.[416] We find this an alarming prospect.

360. Each surreptitious entry entails a distinct intrusion. This differentiates the matter from, say, electronic surveillance, in which the intrusion — access to conversations — is by its nature continuous. Once this distinction is accepted, it becomes difficult to conceive of the need for a power to make a sequence of entries under one authorization document. Such discretion utterly contradicts the

"particularity" features of the conventional search warrant procedure.[417] Indeed, given the manifest character of the "intelligence probe" as a search, the threshold question is why proposals for its authorization must fix on special modes of authorization at all, be they given the "warrant" label or not. We suggest, rather, that the starting point for discussion must be the conventional search warrant procedure.

361. The McDonald Report's preference for a Federal Court judge really begs the question. There is no reason in principle why high-level judges could not be assigned responsibilities in certain cases if departures from conventional warrant procedures were determined to be necessary. But what departures *are* necessary? The McDonald Report includes a number of comments regarding the inappropriateness of search warrants for surreptitious intelligence probes. These comments focus on three limitations perceived to be characteristic of traditional warrant provisions: (1) no offence may be identifiable at the point in time at which the police wish to conduct the entry, (2) search warrants are not obtainable on mere "suspicion", and (3) the procedures are not secret enough.[418] These reasons demand analysis.

362. That no offence may be identifiable at the relevant point in time is a problem cited in the context of security operations and may be confined to that context. The cases cited in the Report in which surreptitious entry might be used in criminal investigation appear to focus on specific offences: drug or narcotics manufacturing and "white collar crimes". We attach considerable importance to the requirement that intrusive criminal investigations be directed to specific offences; this rule flows directly from the principle that makes criminal law enforcement "responsive".[419] No other criminal law power allows intrusion without identification of an offence. In fact, no recommendation in the McDonald Report itself would remove this requirement from any exceptional power granted for purposes of criminal investigation. We cannot accept a departure from search warrant requirements in this respect.

363. With respect to the grounds for authorization, it is indeed a fundamental rule that search warrants cannot be granted on the basis of mere "suspicion". Indeed, it was the fear that warrants would be issued on such a tenuous basis that prompted early common law advocates such as Coke to maintain their opposition to the recognition of warrants. When this opposition was overcome, it was with the assurance that warrants would issue only on "probable cause".[420] This standard has evolved over time into the "reasonable

grounds" test recognized in all Canadian crime-related warrant provisions. It seems fair to say that insofar as crime-related procedures would permit the authorization of searches on the basis of applications that fall below this standard, they would derogate from one of the essential elements in warrant procedure.

364. What is there about intelligence probes, though, that makes compliance with a "reasonable grounds to believe" test impossible? The McDonald Report contains the following observation:

> Surreptitious entry was considered to be justified when the purpose of the entry was to secure information or to confirm that an offence was in the planning stage, or was being or about to be committed, even though a search warrant could not be obtained because there were not reasonable and probable grounds of belief, as required by section 443 of the *Criminal Code*. In addition, on some occasions where a search warrant might well have been obtained, surreptitious entry without warrant was used because the police needed to ensure, before formal entry and seizure under a search warrant, that the activity under surveillance had reached a stage that the evidence found upon the search would be in such a form as to support a successful prosecution.[421]

Of the two types of situations contemplated here, it would seem that the second, in which a warrant "might well" be obtained, presents the distinct possibility of compliance with a "reasonable grounds" test. It is the first, in which confirmation of the occurrence of an offence is required, that represents the more serious departure from the traditional warrant protections.

365. It is to be noted, however, that the warrant envisaged here is that created by section 443 of the *Criminal Code*, which is restricted to the seizure of "things". If, as recommended earlier in this paper, search powers applied with respect to "information", then a warrant might be obtained in this first type of situation.[422] This would depend on whether or not there were indeed "reasonable grounds to believe" that a particular offence had been initiated and that particular information, which would provide evidence with respect to that offence, was present on the premises. Absent such grounds, we again hesitate to authorize any intrusive activity. To permit exploratory entries to ascertain whether such grounds exist is to render protection against unjustified intrusion extremely tenuous.

366. Assuming requirements for a valid search warrant to be met, however, the question arises as to the practicability of using a warrant, given the visibility features associated with it. For one thing,

the availability of application documents is a substantial issue, particularly in the light of the Supreme Court of Canada decision in *MacIntyre*.[423] Secrecy problems also extend to the execution of searches. In this Working Paper, we have made recommendations covering announcement of entry, provision of certain documents to the individual concerned, and allowing the occupant to witness a search of his premises.[424] It is obvious that these rules would have to be modified if surreptitious intrusions were to be effective under a search warrant regime. Although such modifications would severely compromise the degree of protection associated with warrant procedure, they would still leave this mode of procedure a preferable safeguard against undue intrusion to that represented by the surveillance model, if only because the scope of authorized intrusion would remain more limited. The question thus becomes whether such modifications should be introduced into crime-related legislation.

(2) *Conclusion*

367. The claim for exceptional provisions to facilitate surreptitious entries rests largely on police representations that such entries are necessary. The McDonald Report, while refraining from making a recommendation in this respect, observed:

> In a brief to us concerning surreptitious entries the R.C.M.P. has made a strong case that this is a desirable, and often an essential, investigative technique when the manufacture of illicit drugs and alcohol comes under the scrutiny of resourceful investigators. Eventually a time comes when members employed on lengthy, difficult investigations, many involving great personal danger, are faced with the problem of having to know with certainty whether an illicit drug laboratory or still is secreted in a place, if the laboratory or still is producing or is in the development stage, if a cache of drugs or alcohol is in a place, or if quantities of illicit drugs or spirits are being removed from a cache bit by bit for trafficking purposes. The Force considers that it is extremely difficult, without the power to search in circumstances when a search warrant cannot now be obtained, to detect the existence of clandestine drug laboratories. The R.C.M.P. also asserts that surreptitious entry is a valuable tool generally in the fight against "white collar" crime. This latter assertion, however, has not been substantiated before us.[425]

368. It is difficult to evaluate claims about the utility of "intelligence probes", given the present state of empirical data. For understandable reasons, the R.C.M.P. have been reluctant to release information that might endanger the success of some of their investigations. On the other hand, even from publicly presented

submissions, it is apparent that the use of the practice has varied widely from division to division. Indeed, in conjunction with the inquiry of the McDonald Commission, the Force itself had difficulty ascertaining and depicting the extent to which intelligence probes were used in practice.[426] The specific examples cited in the Report often give little indication of the seriousness of the offences involved or the availability of alternative techniques of investigation. In "K" Division in Alberta the technique was reported to have been used predominantly with respect to stolen property offences,[427] which fall outside the drug, alcohol and white collar crime investigations cited by the Force in its arguments for the necessity of the practice.

369. These observations call attention to a serious danger entailed in surreptitious entries: the problems of accountability that develop as the exercise of power loses its visibility. Such a problem has arisen in connection with electronic surveillance under section 178.1 of the *Criminal Code*, which includes reporting provisions expressly enacted to enable Parliamentary review of the interception of communications.[428] Particularly in terms of the figures for convictions obtained, an important set of facts for determining the success or usefulness of the interceptions, Commission research has indicated that the datum produced is essentially meaningless. This condition has been attributed in large part to the time required to process cases, and to ambiguities resulting from matching complex investigative facts to the reporting requirements.[429]

370. Beyond the problems with accountability in this general sense, surreptitious powers thwart accountability for particular actions. Once again, the confidentiality features of electronic surveillance legislation are illustrative. Notification to an individual affected that he has been subjected to electronic surveillance may be delayed for anywhere from ninety days to three years.[430] Even if evidence obtained from the interception is brought to trial, the materials used to obtain authorization are inaccessible except in manifest circumstances of fraud or wilful non-disclosure.[431] The effect of such restrictions is to restrict accountability almost exclusively to the judge authorizing the intrusion and the Crown and police officials supervising it. To permit a trend towards such a condition in search and seizure law would severely compromise a basic characteristic associated with these powers since their introduction three centuries ago: their visibility to the individuals affected.

371. Some of our recommendations in this paper account for modern technological developments such as the use of photographs

and computers that allow the acquisition and storage of information about individuals to become less visible.[432] These developments do not diminish the justifiability of visibility features in search and seizure law. On the contrary, they make it even more critical that the law itself ensure that police powers are exercised in a visible manner. Aside from the possibility of intrusions being undertaken on insufficient grounds, authorization to conduct intelligence probes in criminal investigations heightens the risk of particular intrusions being conducted for purposes outside those ostensibly covered by the enabling legislation. Of particular concern are instances such as Operations "Bricole" and "Ham", two projects carried out by the R.C.M.P. in Québec to obtain information about political activities.[433]

372. The policy considerations outlined above may be augmented by the constitutional issue raised by section 8 of the *Canadian Charter of Rights and Freedoms*, which affords security against "unreasonable search and seizure". Remarks in American case-law indicate surreptitiously conducted searches violate the similarly worded standard contained in the Fourth Amendment. In *Gouled* v. *United States*, a case involving a warrantless entry, the United States Supreme Court observed:

> Whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment....[434]

The apparent generality of these remarks, however, must now be considered to be confined by the *Dalia* case. Upholding the power to make covert entries to install an electronic bug, the Court held that such entries "are constitutional in some circumstances, at least if they are made pursuant to a warrant".[435]

373. Whether or not surreptitious searches with warrant might be found to be constitutional by a Canadian court, we conclude that no power to conduct surreptitious entries should be provided in our proposed regime. Recent years have seen the introduction of electronic surveillance legislation in Canada and proposals for mail-opening powers in the conduct of certain crime-related investigations.[436] Like these powers, powers to perform intelligence probes encroach on privacy interests in new ways that make it critical that they be introduced only when convincing proof of their necessity has been made. Absent such proof, we do not recommend the institution of powers to make surreptitious intrusions.

CHAPTER NINE

Special Provisions under Present Law

374. The discussion in Chapter Two outlined the historical background and distinguishing features of crime-related search and seizure provisions under present law. We have incorporated many of these provisions in whole or in part within our previous recommendations. Indeed, our proposed regime completely subsumes present powers of search and seizure following arrest, in cases of consent and under section 443 warrants. There remain, however, many of the special powers directed towards particular problems. In discussing the continuing viability of each special provision, both the individual hallmarks and historical origins become relevant. As far as the former are concerned, it is useful to consider whether the justifications or procedures peculiar to the special provision under present law have been accommodated by the scheme of general rules developed in the previous Chapters. To the extent that accommodation has been made, the special provision is simply redundant. Insofar as the provision would represent a departure from the proposed rules, however, the more substantial question of the justifiability for the departure must be addressed.

I. Writs of Assistance

RECOMMENDATION

43. The writs of assistance under the *Narcotic Control Act*, *Food and Drugs Act*, *Customs Act* and *Excise Act* should be abolished.

375. Our recommendation to abolish the writ of assistance is based on an examination of its history, its present use and its juridical character. Because contemporary discussions about retention of the writ often are based on misconceptions about these topics, we put them in their proper perspective in Part One of this paper.[437] We believe that when the issues are examined in the light of our other recommendations, abolition of the writ would reflect both sound analysis and balanced policy.

376. Throughout Part Two of this Working Paper, we have taken the position that non-consensual warrantless entry into privately occupied places to perform searches and seizures should only be authorized when human life or safety is in jeopardy. This position is based on both principled and pragmatic considerations — the individual's strong interest in maintaining the inviolability of his private domain against unjustified intrusions, and the danger that broader exceptions to the warrant requirement in this regard make the requirement itself meaningless. The writ of assistance represents a serious derogation from the procedural norms that characterize the warrant — it is neither granted "judicially" nor with respect to any "particular" intrusion. We believe that these departures cannot be justified by the claims made by defenders of the writ in support of its retention.

377. Our concern is enhanced by the security against unreasonable search and seizure effected by section 8 of the *Canadian Charter of Rights and Freedoms*. It is not irrelevant that the immediate concern prompting the American Fourth Amendment was precisely prohibition of discretionary writ searches to which Americans had been subject as British colonials.[438] Although the "warrant clause" of the Fourth Amendment is not reproduced in section 8 of the *Charter*, it is arguable that the writ may be impugned by the basic standard of "reasonableness" which the Canadian section has incorporated. Due to the impossibility of exercising judicial discretion in granting writs under existing legislation, it could be found that the provisions for their issuance violate the standard of "reasonableness" recognized in the *Charter*. While the power to perform an entry under authority of a writ is circumscribed by a "reasonable grounds" test under the *Narcotic Control Act* and *Food and Drugs Act*, we believe that meaningful compliance with this standard can best be ensured by a judicial officer, adjudicating before the event upon a sworn information. While this position, which

conforms to the American approach, may not be found by Canadian courts to be absolutely required by section 8, we believe that it would give valuable force to the constitutional rule. Moreover, we note that under section 139 of the *Customs Act*[439] and section 72 of the *Excise Act*,[440] reasonable grounds are not a prerequisite to entry.

378. Defenders of the writ of assistance point to the administrative safeguards the R.C.M.P. have built into their operational guidelines regarding use of the writ. In instances of narcotics and drugs these guidelines have required officers to use a writ only in important investigations in which a search warrant could be obtained, but where the immediate search of a dwelling-house was required for the successful conclusion of the case.[441] The *ex post facto* reporting requirements set out in the guidelines are thorough. Indeed we used them as a model for the reports proposed by Recommendation 37 for warrantless seizures.[442] The examples of these reports shown to our researchers in the course of our writ survey portrayed accounts of searches undertaken on grounds of belief that, if sworn before a justice before the intrusion were commenced, would generally have been sufficient to justify issuance of a search warrant.

379. These circumstances still leave a major gap, however, between the administrative guidelines informing writ use and the protections associated with the warrant. For one thing, since the reasons for the search with writ are recounted after the fact, they may be enhanced by information acquired during the search. This possibility derogates from the requirement of "proofs beforehand", which Hale built into the archetypal warrant for stolen goods and which have remained characteristic of warrant procedure ever since.[443] Perhaps more importantly, the guidelines currently used by the R.C.M.P. are merely internal procedures and hence have no legal force. While we do not discount the regulatory value of administrative controls, we believe that the individual is entitled to safeguards with legal status when significant intrusions such as entry upon privately occupied places are at stake. In this regard, it is relevant to note that the internal R.C.M.P. safeguards are at least in part a response to the controversy regarding retention of the writs. This response is a sensitive and commendable one, but it does not offer the fixed protection of the law.

380. In arguing for retention of the writ, officials have indicated a willingness to impose new safeguards on the writ,[444] including investing the issuance procedure with "judicial discretion". This concession may have been offered with the intention of meeting the

objections articulated by Federal Court judges required to issue the writ under existing law. The new features of "judicial discretion" that have been offered, however, have been limited. For example, a set of proposals advanced by the federal Minister of Justice in 1978 would have provided that a judge determine whether issuance of the writ would be "in the best interests of justice" in the area served by the R.C.M.P. officer named in the application, and whether the member had a statutorily prescribed amount of law enforcement experience.[445] Rather than giving a judge the task of case-by-case adjudication characteristic of judicial discretion, these proposals present him with a mandate only to tabulate the officer's years of service and assess local law enforcement needs. While limitations on the duration and area of operation of the writ would differentiate the consequences of issuance from the broader powers lamented in Jackett P.'s judgment in *Re Writs of Assistance*, we wonder whether judges would be persuaded that they had much more discretion to refuse an application under such proposed schemes than under the existing ones.[446]

381. In some part, the arguments in favour of retention fix on assertions as to the effectiveness and careful use of the writ as an enforcement tool. High "hit" ratios have been cited as proof that the writ is not used for "fishing expeditions".[447] Empirical evidence from our writ survey gives qualified support to these contentions.[448] The use of the writ was usually reported to result in seizures, frequently of the specified contraband identified as the original object of search. Such figures, however, tell only a partial story. They do not prove that searches performed with writs would not have been equally effective if another form of authority, such as a warrant or power incidental to arrest, had been used instead.

382. Defenders of the writ point to the peculiar difficulties experienced by narcotic and drug investigators, in particular the frequent need for speedy authorization.[449] Our empirical survey of writ use did reveal that "urgency" factors were the primary reason cited by officers for choosing a writ as the mode of authorization in narcotic and drug searches as opposed to a warrant. However, the patterns of writ use show us that other options such as the use of the power of search incidental to arrest would frequently have sufficed to authorize the intrusions at issue.[450] We perceive that this power, along with those flowing from our search warrant recommendations, afford wide latitude to narcotic and drug investigators.[451] Insofar as the perceived impracticability of warrants may be attributable to the delay inherent in documentary procedures, we believe that the

telephonic warrant procedure proposed in Recommendation 19 offers a sound and practicable alternative.[452]

383. Defenders of the writ also argue that the instrument is necessary to police serious drug offences. Particular reference is made to those involving "trafficking".[453] However, the narcotic and drug searches with writs reported in our survey do not entirely support this argument. In fact, searches appeared slightly more likely to be carried out with respect to simple possession than trafficking offences. While some of the drugs targeted in the possession cases may be viewed as "hard" (e.g., heroin), these figures suggest that the writ is more frequently used to capture the user than the trafficker.[454]

384. Even if powers of search under writs of assistance should ultimately be determined to be constitutionally valid in Canada, we believe that the retention of these instruments cannot be justified. We agree in this respect with the Australian Law Reform Commission, which, referring to writs as "general search warrants", concluded:

> The power to search and seize is undoubtedly a very necessary one for police to have. It has great destructive potential so far as the right to privacy and civil liberties generally are concerned. The power must therefore be capable of justification on every single occasion on which it is used. On this view, the continued existence of general search warrants cannot be countenanced. In the Commission's view such provisions should long ago have disappeared from the Commonwealth and Territorial statute books. We recommend that their demise be delayed no longer.[455]

Similarly, we would urge that the demise of Canadian writs of assistance be delayed no longer.

II. Other Special Powers

RECOMMENDATION

44. The following special provisions should be abolished:

(a) bawdy- and gaming-house powers — section 181 of the *Criminal Code*;

(b) warrants for women in bawdy-houses — section 182 of the *Criminal Code*;

(c) **special interrogation procedures for persons found in disorderly houses — section 183 of the *Criminal Code*;**

(d) **precious metals warrants — section 353 of the *Criminal Code*;**

(e) **powers to search for stolen timber — subsection 299(3) of the *Criminal Code*;**

(f) **powers to seize cocks in a cockpit — section 403 of the *Criminal Code*;**

(g) **powers to seize counterfeit money — section 420 of the *Criminal Code*;**

(h) **powers relating to narcotics and drugs — section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*.**

A. Gaming- and Bawdy-House Provisions

385. We offer our recommendations to abolish the powers conferred by sections 181, 182 and 183 of the *Criminal Code* at a time when Parliament is considering proposals to repeal the latter two sections.[456] While concurring with the Minister of Justice's proposals in this respect, we cannot anticipate the fate of the present legislation. Accordingly, our discussion addresses all aspects of the special search and seizure powers relating to gaming- and bawdy-houses.

(1) *Sections 181 and 183*

386. There are two essential features that have historically distinguished the search warrant under subsection 181(1) of the *Criminal Code*: the "report in writing" procedure, and the authority to seize and question persons found in the premises searched, pursuant to section 183. Both of these idiosyncrasies represent departures from our proposed recommendations. Together with these special features of the warrant, we examine the special power of warrantless seizure afforded by the present subsection 181(2).

387. The "report in writing" is unique in two respects. First, it is the one warrant procedure that does not require the applicant to present reasonable grounds in his application for the warrant.[457] Second, it is not concluded by swearing an oath. These features, as was outlined earlier, are traceable to the peculiar origins of section 181 as an essentially internal police order procedure.[458] The

identifiably "judicial" safeguard that the applicant satisfy a probative test by sworn evidence was simply not appropriate to the original administrative context of the provision. As has been noted, though, a measure of protection was originally offered in the ancillary requirement that a citizen's complaints under oath be appended to the report. Consequently, it is possible to see that the safeguards on the procedure have indeed been decreased since its origins, despite the recent inclusion of section 181 within the category of expressly labelled "warrant" provisions.

388. What justifies the retention of these exceptional features today? In the course of interviews with police officers from some Canadian forces, Commission researchers were told that speed was essential in obtaining a warrant to search gaming- and bawdy-houses and that reversion to an ordinary procedure of "information upon oath" would unduly impair police efficiency. On the other hand, representatives of other forces perceived that there was little practical difference in the preparation of applications for section 443 and section 181 warrants. In regard to the presentation of reasonable grounds, this latter view appears to respect the ruling in the *Foster* case,[459] which held that if reasonable grounds are not presented on the face of the report, the justice must inquire into them. Indeed, police in Saint John and Edmonton appear, from the samples of the warrants collected during the Commission's survey, to follow a practice of including reasonable grounds on the report form despite the absence of a statutory requirement to do so. The claim that section 443 procedures are too cumbersome for the gaming- and bawdy-house offences listed in section 181 was also contradicted by evidence in the warrant survey that officers in some cities surveyed were more likely to respond to the commission of a gaming- or bawdy-house offence by resorting to section 443 than to the special provision of section 181.[460]

389. Nor does any legitimate justification exist for the retention of the power to seize and question persons found on the premises searched. This power is not really a search or seizure power as such. Rather, it is basically a provision for detention outside arrest and for compulsory submission to interrogation outside traditional restraints upon police powers to enforce private co-operation. The implications of section 183 are obviously quite severe, a fact noted with concern by the Saskatchewan Court of Queen's Bench in *Re Sommerville*. According to this decision, section 183 can only be employed to gain information about two matters — the use of the relevant premises and the execution of the search.[461] Even staying within the bounds of

permissible questions, however, the interrogation gives the police an anomalous power to compel private co-operation. While insisting that resort to this power was rare, police representatives did allude to instances in which it had been used to compel disclosure of the identity of the "keeper" of suspected premises.

390. Nor can we find a persuasive reason to retain the warrantless power of seizure found in subsection 181(2). In fact, representatives from a number of forces interviewed by Commission researchers asserted that the provision is never used; in these forces, administrative policies dictate that a warrant always be obtained. Representatives from other forces, however, maintained that the warrantless power was occasionally useful. Examples of suggested use included instances of stumbling upon an illegal game in progress, finding a game being held in a public place, and situations of urgency. However, the decision of the Supreme Court of Canada in *Rockert* v. *The Queen*[462] seems to have diminished the provision's utility even to those forces which have resorted to it. It was decided in that case that a practice of employing premises is necessary for the place to constitute a "common gaming house" as defined in the *Criminal Code*. Accordingly, the use of subsection 181(2) to respond to initial or transient uses of premises for gaming might well be improper.

391. It might be possible to defend these departures, were the interests at stake in enforcing prohibitions against gaming- and bawdy-houses more critical. On the contrary, however, the validity of the underlying rationales are open to question. The nineteenth-century view of controlling the targeted activities in order to prevent more serious crime is open to question. This Commission has cited laws against unlawful gaming as examples of offences that should be reconsidered in the light of present social attitudes.[463] Even though such activities remain prohibited, it is difficult to maintain that a special search and seizure power should be accorded to enforce them.

392. One concern expressed by representatives of some Canadian police forces was that in the absence of a special warrant provision, the presumption stated in paragraph 180(1)(*a*) might become inoperative. This paragraph reads:

> (*a*) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is, in the absence of any evidence to the contrary, proof that the place is a disorderly house; ...

Without discussing the merits of this provision, a topic outside the scope of this paper, it might be commented that the presumption is

not triggered by the existence of a section 181 warrant; rather, it depends solely on the authority of the peace officer to enter the relevant premises. This authority could validly come from any warrant, be it one we have proposed in our recommendations or the present section 443 of the *Criminal Code*.

(2) *Women in Bawdy-Houses*

393. The warrant provision currently defined by section 182 appears to be rarely used. The Commission's survey did not disclose any examples of its issuance. Police officers interviewed in Winnipeg, Toronto, Ottawa, Calgary and Montréal regarded the provision as useless and could not recall an instance in which it had been employed.

394. Any lingering validity this warrant might possess would vanish under the scheme of general rules advanced in this paper. We have recommended that powers of search and rescue be provided for persons unlawfully obtained.[464] To the extent that the presence of an "enticed" or "concealed" woman in a bawdy-house may not be a product of illegal detention, there is simply no valid justification for intrusion under a search and rescue power, much less a search and seizure power. If the police wish to assert control over a woman in circumstances that are not legitimately those of rescue, their power to do so should be viewed in the normal context of such intrusions — that of an arrest. While the original enactment of the warrant for women in bawdy-houses may have been occasioned by a genuine concern for their exploitation, its retention in the present *Criminal Code* cannot be justified.

B. Precious Metals

395. As quaint as the section 353 warrant might appear to be, the basic fact remains that it does nothing more than clutter up the *Criminal Code*.[465] Not surprisingly, no evidence of its use showed up in our survey of warranted searches in cities. If anyone is using this warrant in rural areas, it is a fairly well kept secret. In an attempt to uncover some evidence of its use, our researchers contacted provincial court offices in the Yukon and Northwest Territories. Surveys conducted by these offices failed to turn up a single judge

who could recall issuing such a warrant. The provision was created to deal with frontier mining in the mid-nineteenth century, but both the epoch and the administrative scheme the original warrant enforced have faded away.

396. The provision still applies to the offence of fraud in relation to minerals, as set out in section 352. However, the remaining days of this offence may themselves be numbered. The Law Reform Commission of Canada has proposed a regime of theft and fraud offences that would remove particularized provisions such as the present section 352 from the *Criminal Code*.[466] Even if the substantive offence is retained, the warrant provision serves no useful purpose, even in theory; its subject-matter would be comprehended by our general recommendations as well as existing powers incidental to arrest, and under section 443.

C. Timber

397. Section 299 of the *Criminal Code* appears to be used infrequently at the present time. It is true that training materials for a number of police forces still contain references to this offence.[467] However, the virtually negligible rate of prosecutions under section 299 in recent years strongly suggests that very little resort is made to the search power under that section. Between British Columbia and Québec (two of the major timber producing provinces in Canada), only three charges were recorded in 1978.[468] Moreover, the registration of timber marks — the subject of the special search power — appears itself to be declining. We therefore recommend that this special provision be abolished.

D. Cocks in the Cockpit

398. It similarly appears that the cock-fighting sections of the *Criminal Code* are used very infrequently at the present time. In 1978, the most recent year for which even partial criminal statistics are available, only one prosecution was launched in the reporting provinces of British Columbia and Québec.[469] Whatever utility the provision ever had has probably been superseded by provincial

cruelty to animals legislation.[470] Although some peace officers recounted some interesting anecdotes to Commission researchers about cock-fighting prosecutions, none could recall using the power of seizure. We recommend that the provision found in subsection 403(2) of the *Criminal Code* be abolished.

E. Counterfeit Money

399. Unlike the statutory provisions related to timber and cocks in a cockpit, this power of seizure may be useful to peace officers under present law. There were 226 charges of counterfeiting and currency offences in 1978, a fraction of the percentage of criminal charges laid in Canada in that year, but nonetheless a significant number compared with the even more marginal figures pertaining to cock-fighting and timber offences.[471] We must ask, then, what the special seizure provision in section 420 adds to the proposed powers to seize items possessed in circumstances constituting an offence or comprising evidence of crime.

400. Peace officers have pointed to two situations in which the provision may be useful. First, it permits seizure of tainted money from individuals without a warrant in circumstances in which the individuals themselves are not suspected of involvement in an offence. Without section 420, peace officers could not make a warrantless seizure from a person without either arresting him or obtaining his consent. Second, it permits peace officers lawfully present on suspected business premises to make a quick seizure of counterfeit money found therein even where the money is beyond the control of a suspect and hence not seizable as an incident of arrest. Since the second situation is manifestly covered by the "plain view" rule in Recommendation 30, we turn our attention to the first.

401. It should be noted that in the case of possession of other classifications of contraband, such as house breaking instruments, no warrantless power of seizure is provided by the *Criminal Code*, notwithstanding the fact that existing indicators of the gravity of the offence, such as penalty maxima, are identical to those attending counterfeiting offences. It is possible that even innocent persons, reluctant to part with counterfeit money in their possession without compensation, might thwart efforts to seize it in the delay necessary to obtain a warrant after being confronted with police investigators. In such cases, a peace officer would have to determine whether

warrantless seizure could be justified as an incident of arrest or as within the scope of the "plain view" doctrine.

402. There is a manifestly regulatory aspect to section 420, an apparent tolerance of the special discretion it confers on peace officers in order to protect the integrity of Her Majesty's currency. We recommend that, at least insofar as crime-related legislation is concerned, the seizure of counterfeit money and counterfeiting instruments should be governed by the same principles that govern other items illegally possessed.

F. Narcotics and Drugs

403. Having discussed writs of assistance in conjunction with Recommendation 43, we turn to the other search and seizure powers under the *Narcotic Control Act* and the *Food and Drugs Act*. Although, in terms of the procedural norms we have outlined, these represent exceptional provisions, it is important to realize that they are actually exercised quite frequently. Narcotics and drugs were identified as the object of search in 488 of the 1,825 warrants reported as having been executed in our warrant survey.[472] In the case of personal searches without warrant, they also appear to be frequently sought.[473]

404. The major effect of our recommendation to abolish special search powers for narcotics and drugs would be to require a warrant for all non-consensual entries into privately occupied places, whether residential or not, unless human life or safety was at risk. Although the effect of such a modification in Canadian law may seem drastic, it is important to realize that the warrantless powers currently given to peace officers in this country with respect to narcotics and drugs exceed those available in most of the other countries with a common law tradition.

405. In England, for example, a warrant is required to enter premises to search for unlawfully possessed drugs,[474] a requirement endorsed by the Royal Commission on Criminal Procedure:

> 3.39. We have received little evidence arguing for coercive powers of entry and search before arrest to be available without warrant or other written authorisation. In our view such an intrusion upon the citizen's privacy should always require some form of prior and formal authorisation, whatever the purpose of the search. The existing powers

> are mainly confined to entry and search for items which it is an offence knowingly to possess (we refer to these as prohibited goods) for example stolen goods, drugs, firearms, and explosives.... Warrants for these items should be issued only if it is shown to the issuing authority that there is suspicion based on reasonable grounds that the object of the proposed search is on the premises specified.[475]

An even stronger position obtains in the United States, in which it has been held that, absent narrowly defined exigent circumstances, a warrantless entry into premises to search for contraband is presumptively "unreasonable" and unconstitutional.[476] While the *Criminal Investigation Bill, 1981* currently under consideration in Australia would permit warrantless searches of private premises for objects such as narcotics to prevent their loss or destruction, the Australian Law Reform Commission, in proposing this power, expressed its hope that such intrusions would be legislated judicially "very much along the lines of the American experience".[477] The country with the closest position to that of present Canadian law in this respect is New Zealand, in which police officers may search premises without a warrant for certain classifications of "controlled drugs" including cannabis, cocaine, opium and morphine.[478]

406. If a power to conduct warrantless searches of privately occupied places were considered to be justifiable in narcotics and drugs cases, it would have to be narrowly confined to particularly dangerous narcotics and drugs, and to particular emergencies in which loss or destruction of the objects was imminent. For reasons outlined earlier, we believe that "emergency" criteria are difficult both to define and enforce. While narcotics and drugs offences may be viewed as serious, we find it difficult to justify a departure from the policy against authorizing warrantless entries into private premises solely to avoid dangers of loss or destruction of "objects of seizure".[479] In situations in which obtaining a conventional search warrant is impracticable, our position leaves open the possibility of seizing narcotics incidental to the arrest of a person believed to be in the premises, or of obtaining a telephonic warrant.

407. Certain other provisions are affected by our recommendation. The narcotics and drugs provisions were cited earlier as examples of disharmony between grounds for entering a place and powers of execution once entry has been made.[480] This disharmony undermines the control represented by the warrant, since it leaves the peace officer with wide discretion as to the ambit of intrusion: in particular, as to whom to search and what to seize. The general proposals we have developed avoid such incongruity by allowing the

warrant itself to authorize and define most of the types of intrusion the officer might be called upon to make in the legitimate pursuit of a search or seizure power. For those contingencies that cannot be addressed by the warrant, such as discovery of unanticipated objects of seizure, we attempted to develop fair and balanced approaches. The extension of our recommendations to searches related to narcotics and drugs offences would make some of the incongruous and peculiar powers under existing legislation unnecessary.

408. Consider, for example, the seizure of evidence of an offence. At present, this may not be authorized in a *Narcotic Control Act* and *Food and Drugs Act* warrant, which can only be issued to search for the contraband itself, but it may be effected by the officer in the course of executing the search. It is difficult to discern a legitimate reason for this restriction upon *Narcotic Control Act* and *Food and Drugs Act* warrants. Indeed, its continued existence has made it necessary for officers to make strained allegations of conspiracy in order to invoke *Criminal Code* powers to seize documentary materials in premises, such as telephone company offices, where no contraband is believed to exist. Making the general rules applicable would make this practice unnecessary.

409. The existing *Narcotic Control Act* and *Food and Drugs Act* provision for search of "any person" found in a place searched may be rationalized on the basis of the historical absence of any general power to make such a search in the absence of arrest. Our recommendations, however, allow for personal search only where authorized by warrant or where authorized as an incident of arrest. No convincing reason exists for exempting narcotics or drugs searches from this rule. Indeed, the arguments in favour of the rule have been advanced quite often in discussions of searches for narcotics. The *Ybarra* case, the leading American constitutional decision on point, dealt with a drug raid in a tavern.[481] In Canada, the Pringle Commission, having investigated a similar raid in Fort Erie, Ontario, concluded with the following recommendation:

> Persons found in a place other than a dwelling-house, where there is no reasonable cause to believe that they are in possession of a narcotic or anything incidental to possession of a narcotic by themselves or others, should not be subject to search when the only basis for the search is their legitimate presence in such place.[482]

410. The existing discretion to conduct personal searches for narcotics or drugs raises an apprehension of employing the power against individuals not because of what they are believed to have done, but because of their personal characteristics, membership in

minority groups, or conformity with police profiles of drug users or couriers. These apprehensions arise in conjunction with street searches as well as searches of privately occupied places. We believe that, however important criminal law enforcement objectives may be in a particular case, intrusions should not be performed either on a wholesale basis at selected target groups or, for that matter, at random. The retention of an open power to search invites both the exercise of that power in inappropriate cases and the apprehension that such unjustified use of the power is being made.

411. The major concern on the part of police officials about losing the special power to search persons for narcotics and drugs is that they encounter many circumstances in which, through intuition, they believe a number of members of a group to be in possession of drugs, yet would be reluctant to risk incurring liability by subjecting these intuitions to a "reasonable grounds" test. An example of such circumstances cited by the police is a search of a house in the course of which a number of occupants are found. If the concern were to be persuasive, one would expect the existence of this intuition to be borne out by the fact of frequent seizures of drugs on such persons. Yet the empirical evidence from the Commission's survey indicates the contrary. For example, of 32 seizures of chemicals reported in the warrant survey, only 18.6% were made by virtue of frisks or strip searches of persons. While there were far more reported seizures of marijuana (41.2), a smaller proportion of these (5.8%) occurred by virtue of person searches. In most cases involving narcotics and drugs seizures, the extent of intrusion made to find them was either a sighting in "clear view" or a search of "drawers, cupboards, closets and files".[483] These figures prompt one to concede the utility of person searches in some cases involving illegal narcotics or drugs. They also suggest, however, that these items are not so frequently found to be concealed on occupants of premises as to justify the present existence of utter discretion to perform such searches. As in the case of all items mentioned in warrants, a person should only be searched for narcotics or drugs when there are reasonable grounds to believe that he is concealing them.

412. Finally, there is the problem of the special powers to use force to break open various compartments and things. These powers, as currently set out in subsection 10(4) of the *Narcotic Control Act* and subsection 37(4) of the *Food and Drugs Act*, were not introduced into narcotic and drug legislation until the 1960-61 amendments.[484] The new scheme introduced by these amendments was also significant for bringing the writ of assistance into the mainstream of search and

seizure provisions in the latter Act. Indeed, the extraordinary powers to use force may be identified quite readily with the writ and traced historically to the exercise of royal prerogative associated with early writ legislation. If this somewhat inappropriate transplant from writ of assistance provisions explains the anomalous power to use force in *Narcotic Control Act* and *Food and Drugs Act* searches, however, there is little basis for arguing for its retention. To make such an argument, in light of Recommendation 20, which incorporates existing standards of "reasonable and probable grounds" and "necessity", is to argue for giving the police the discretion to use force either when such grounds do not exist or at least unnecessarily. Any concern for the special factors presented by *Narcotic Control Act* and *Food and Drugs Act* searches may be met by the concession that section 25 of the *Criminal Code* is flexible enough to take these factors into account.[485]

413. To the degree that the departures from our recommendations respecting searches of places and persons and use of force cannot be justified, we recommend the abolition of the special search and seizure provisions under section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*. If illegal use of narcotics and drugs continues to be dealt with under legislation separate from the *Criminal Code*, then the crime-related search powers outlined in this paper should be incorporated into that legislation. It may be unnecessary to do so expressly, given subsection 27(2) of the *Interpretation Act* and the cases applying this provision to search and seizure law.[486]

G. Obscene Publications, Crime Comics and Hate Propaganda

RECOMMENDATION

45. Special warrant provisions for obscene publications, crime comics, and hate propaganda should be regarded as regulatory provisions rather than legitimate components of criminal procedure. Accordingly, if they are to be retained, they should be incorporated into regulatory legislation and removed from the *Criminal Code*.

414. That it is legitimate to seize items to prevent the continuation of an offence was recognized earlier in this paper [487] But the detention and disposition of the things seized are tied, according to the conventional model of criminal procedure, to an accusation and ad-

judication against their possessor. The *in rem* alternative offers a mechanism that allows for an initial intrusion, an adjudication, and a disposition outside the conventional route of the criminal prosecution. It is trite to say that this alternative falls outside the limitations articulated by Dicey in the first principle of the rule of law; it is obviously not a way by which "a distinct breach of the law" is "established in the ordinary legal manner".[488] The question is whether the availability of this alternative may be supported by arguments strong enough to justify its retention.

415. To begin with, the point may be made that since the individual distributor is not charged with an offence, the *in rem* procedure spares him the prospect of a criminal conviction if the publication is indeed found to violate the relevant test. The benefit of this dispensation is augmented by the apparent willingness of the courts to impose traditional criminal law burdens of proof and rules of evidence upon the Crown, despite the reference in subsection 160(2) (obscene publications and crime comics) and subsection 281.3(2) (hate propaganda) of the *Criminal Code* to the individual "showing cause" why the matter seized should not be forfeited.[489] In other words, goes the argument, the individual gains some of the protections of a criminal trial without suffering its major risk.

416. This argument must concede that, notwithstanding the absence of a conviction, considerable prejudice is caused to the publisher or distributor by the *in rem* procedure. In *R.* v. *Pipeline News*, for example, the Edmonton authorities seized and obtained a forfeiture order for 2,580 publications.[490] In fact, the possible prejudice does not merely stem from the forfeiture order; rather, considerable loss may be caused by the detention of the materials pending the final disposition. Although the show-cause hearing is required to proceed within seven days, one must take into account the possibility of delay in a final adjudication. The decision of first instance in *Pipeline News*, for example, was not rendered until a year after the hearing. When the additional possibilities of appeals and applications to quash the warrant are considered, the financial consequences of an unjustified seizure, particularly to periodicals, must be recognized as significant.[491]

417. Consequently, the defence of the *in rem* proceeding must fall back to the position that while the implications of the intrusion may be significant, they are not as potentially harmful as those attending criminal conviction. It might be commented that since the parties named in proceedings related to obscene publications and crime comics are almost invariably corporations, the critical elements of imprisonment and the stigma of a personal criminal record have rarely been a

real possibility in these cases. In any event, however, it is important to recognize that neither section 160 nor section 281.3 of the *Criminal Code* precludes the laying of a criminal charge following a forfeiture, although the former does require the Attorney General's consent to do so. The argument in favour of the *in rem* proceeding on this point is reduced to the proposition that, given a seizure and forfeiture hearing under one of the two sections, the Crown will be content with the disposition of the case and decline to prosecute.

418. Ultimately, the choice of initiating the *in rem* procedure as opposed to the conventional prosecution is a matter of Crown discretion, the difference between the two provisions being that while the launching of a section 281.3 proceeding requires the consent of the Attorney General, the section 160 warrant does not. Although these warrants were not covered by the Commission's warrant survey, some information as to their use is available from previous Commission studies[492] and interviews with police representatives. This evidence suggests that resort to a section 160 warrant is very much a matter of local preference. Most cities did not use it at all, preferring the conventional prosecution, and in those localities in which it was employed, such as Ottawa and Toronto, the authorities favoured conventional prosecutions in most cases. If the *in rem* proceeding offers the distributor or publisher any practical benefits, then, it would appear that these are granted on a discretionary and somewhat idiosyncratic basis.

419. It is difficult to discuss the issue of maintaining these *in rem* proceedings without reflecting upon the content of the two distinct prohibitions which the *in rem* provisions enforce. However, it is important to detach the provisions for the *in rem* proceeding from the subject-matter of the legislation. Indeed, the detachability of these provisions is supported by their histories: the section 160 warrant was introduced into Canadian legislation almost seventy years after the connected offences, and the Special Committee did not itself recommend a warrant for forfeiture before conviction. Whether the substantive offences dealing with the different categories of publications ought to be abolished is a question that obviously must deal with the provisions separately. The propriety of an *in rem* procedure, however, may be examined in a broad context. Assuming that it is desirable to assert control over the relevant types of material, is it legitimate to employ the *in rem* proceeding to do so? We conclude that once the sole purpose of the *in rem* proceeding is recognized as removal of the targeted publications from circulation, the provisions may clearly be identified as nothing more and nothing less than regulatory schemes for the protection of the public. And as such, they do not belong in a code of criminal procedure.

420. The distinction between the enforcement of criminal law and the regulatory control of publications through censorship and restraints upon distribution is often blurred, yet a distinction has been made for constitutional purposes. In *Nova Scotia Board of Censors* v. *McNeil*, the Supreme Court of Canada held that the Amusements Regulation Board established under Nova Scotia legislation could validly ban a film from public viewing. Ritchie J., writing for the majority, stated:

> Under the authority assigned to it by section 91(27), the Parliament of Canada has enacted the *Criminal Code*, a penal statute the end purpose of which is the definition and punishment of crime when it has been proved to have been committed.
>
> On the other hand, the *Theatres and Amusements Act* is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performances which do not comply with the standards of propriety established by the Board.
>
> The areas of operation of the two statutes are therefore fundamentally different on dual grounds. In the first place, one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is penal.[493]

421. The *McNeil* case did *not* decide that the federal government could not itself enact a valid regulatory censorship scheme, nor is it intended to impugn the constitutionality of either section 160 or section 281.3 in this paper. What is significant for present purposes about Ritchie J.'s judgment is its restriction of the *Criminal Code* to a "penalizing" function rather than a broader "preventive" one, and its perception of the enforcement of criminal prohibitions against the relevant subject-matter through the prosecution alone.[494] Arguably, therefore, if Parliament wishes to retain a mechanism for preventive searches and seizures of obscene materials, crime comics and hate propaganda, then it should do so in a context other than criminal law and procedure. A number of possible regulatory models from other jurisdictions are available. New Zealand's Indecent Publication Tribunal has been cited by analysts of the present Canadian legislation,[495] although subjected to criticism in New Zealand itself.[496] In the United States, obscene publications are covered by civil forfeiture provisions.[497] It is noteworthy, though, that preventive seizures of offending materials have long been countenanced in a regulatory context here in Canada, under the *Customs Tariff* Act.[498]

422. Whether the intrusion upon liberties represented by seizures of materials before distribution should be authorized by contemporary law, and whether the existing provisions in the *Customs Tariff* Act satisfactorily meet the demands and interests inherent in this task, are questions beyond the scope of this paper. It is suggested, however, that the task, if undertaken, should be recognized for what it is — a preventive, regulatory programme. It should not be confused with, nor dressed up as, a search and seizure power exercised in the enforcement of the criminal law. As currently conceived, sections 160 and 281.3 of the *Criminal Code* should be repealed.

H. Weapons

RECOMMENDATION

46. Powers to seize firearms currently authorized under sections 99 and 100 of the *Criminal Code* are subsumed in the Recommendations set out above. Section 101 of the *Criminal Code* is not a valid mechanism for the enforcement of criminal law. However, it may serve legitimate objectives as a regulatory instrument of gun control. The section should be redrafted in this light so as to:

(a) tie the search and seizure sections more firmly to *in rem* confiscation provisions; and

(b) permit a search to be performed only when there is a reasonable belief that the person concerned is in possession, custody or control of a weapon.

423. In Chapter Five, it was recognized that protective search of an individual ought to be allowed as an incident of arrest, as is presently allowed by common law.[499] Other justifications articulated in that Chapter would allow weapons to be seized when they are either evidence of an offence or possessed in circumstances constituting an offence. These justifications basically comprehend the particular rationales for warrantless seizure of weapons which exist under sections 99 and 100 of the present *Criminal Code*, as well as the wide-ranging section 443 warrant. While the section 443 warrant covers only searches of places, however, the proposed set of general rules, like section 99, would cover searches of persons and vehicles as well. Since we provide that such searches could be

performed without warrant whenever human life or safety was in danger, it is unlikely that any search which would be authorized at present under sections 99 or 100 would fail to be authorized under our proposed Recommendations.

424. The same cannot be said of powers under section 101. It was argued earlier that the broadly protective justification present in this section did not belong in an elaboration of general rules, and that by failing to conform to a sequence of crime and response to crime, the provision opens the door to dangers of uncertainty and arbitrariness. Can these dangers be justified where searches for weapons are concerned? In answering this question, we refer to the two concerns addressed in section 101: immediate criminal law enforcement, and long-term regulation of possession of weapons.[500] We conclude that the first concern does not justify additional grounds of intrusion to those recognized in the proposed general rules, and that the second concern, while supportable on principles associated with health and safety legislation outside of criminal law, does not justify the provisions of section 101 as currently worded.

425. The first concern is basically an application of the preventive policing approach to the problem of dangerous possession of weapons. The need for preventive powers in this regard has been articulated in contexts as diverse as legal publications[501] and police submissions to Parliamentary Committees.[502] Quite simply, proponents of such powers argue for the legitimacy of intervention where a firearm "is about to be used illegally". What this argument passes over, however, is the fact that the prospective use of a firearm for an illegal purpose is itself covered by offence provisions. The *Criminal Code* includes prohibitions against concealment, careless use, pointing a firearm, possession at public meetings, and possession for dangerous or illegal purposes.[503] Particularly in this last case, the law reflects a concern for the safety of members of society by curbing what is essentially inchoate criminal activity. And in addition to the restrictions on use, there are provisions against illegal possession of weapons that fall into restricted and prohibited categories.[504] A reasonable belief on the part of a peace officer that an individual possessed a weapon in contravention of these laws would provide a sound basis for invoking authority to search for and seize the weapon.

426. The issue, then, is a rather precise one. What "safety" factors, outside of the illegality of a weapon possessed, its subjection to careless use or handling, the unlawful or dangerous purpose of its possession, or the fact of arrest, might present valid grounds upon

which an officer should be authorized to conduct a search for, or seizure of, a weapon? This question is probably best answered by reference to the uses to which section 101 may be put.

427. The *First Progress Report* on the evaluation of gun control legislation prepared for the Solicitor General confirmed that it is mainly the warrantless power under subsection 101(2) rather than the warrant power under subsection 101(1) that is put to use. The Report continued:

> The predominant characteristics of the situations which have given rise to both s. 101(1) and s. 101(2) searches has been that the individuals involved, although not "criminals" *per se*, are exhibiting emotional instability or violence in circumstances or surroundings where firearms are easily accessible. So, search and seizure in the interests of safety most often arises in domestic or neighbourhood disputes. ... We have found one or two jurisdictions where s. 101(2) has been employed to facilitate searches of known or suspected "criminals". These searches may not be in technical contravention of the section. But, if the proposition that both ss. 101(1) and (2) were intended for use in "behavioural" rather than "criminal" situations is correct, then such searches can be viewed as an abuse of the intent of the section.[505]

428. The Report, then, distinguishes between the type of safety factors presented by an individual's behaviour and the type presented by his status in the eyes of the police, suggesting that it is upon the former that the legislation is properly focused. Leaving aside for the moment the question of the section's possible tolerance of searches based on status, it is worth inquiring whether in fact the former type of safety factors do present a valid justification for search. Why should behaviour that does not constitute a criminal offence leave the individual vulnerable to intrusion by the police? This paper has tendered a responsive view of the criminal law, and has rejected the proposition that the interests of criminal law enforcement require the conferment of powers to make intrusions of a purely preventive nature.[506] Is such a general view inappropriate in the context of firearms searches?

429. We suggest that to regard the issue as one of preventing crime or not preventing crime may be misleading, for the concern with the prospective use of firearms by emotionally unstable persons does not stop at the prevention of *crime*. Rather it extends to the prevention of *injury*, whether or not the commission of a *crime* is entailed. Once this is appreciated, it is apparent that the justification for special search and seizure powers for firearms resides not in criminal law enforcement, but rather in the second aspect of section

101: comprehensive regulation of the possession of weapons. This concern, in a sense the more sweeping of the two in scope, is founded on the comparatively modern principles of public health and safety legislation rather than the traditional objectives of criminal law. Indeed, the growth of gun control legislation over the past one hundred years has been characterized by the expansion of laws from prohibitions against criminal conduct to include regulatory features such as permits and registration, and recording procedures.[507] While the latter have been embraced in the *Criminal Code* itself, it is important to recognize that they are not in truth "criminal law"; they do not in themselves denounce or prohibit actions, condemn those who commit them, or penalize offenders. Rather, much as explosives are covered by the *Explosives Act*,[508] the acquisition, possession and use of weapons are subjected to regulation in the interests of public safety. And while these interests often coincide with the enforcement of criminal law, this is not necessarily the case.

430. Perhaps the best example of a weapons seizure conducted on a health and safety basis occurred in *Re Thomson*, a case that involved a large cache of explosives and weapons.[509] While some of the explosives and weapons were possessed illegally, many of them were not. In finding that grounds existed for the seizure, Phillips Prov. Ct. J. focused not on specific instances of illegality, but on general factors to do with the occurrence of a fire in the neighbourhood and the susceptibility of the weapons to theft as a result of media coverage of the existence of the cache.[510]

431. One's perception of the acceptability of the present section 101 as an instrument of gun control depends in some part upon one's perception of the acceptability of regulatory gun control legislation in general. That a "gun is a dangerous object", the assertion underlying the 1977 amendments, is not questioned here; nor is the basic regulatory scheme set up as a result of those amendments. Whether or not this scheme truly belongs in the *Criminal Code* is a fair question. For constitutional purposes, it has been determined by the Alberta Court of Appeal that section 101 is valid federal legislation under the Criminal Law power in subsection 91(27) of the *Constitution Act, 1867*.[511] It might be observed that the regulatory aspects of gun legislation, like those of explosives legislation, might easily be placed in another statute, but recommendations in this respect are beyond the scope of this paper; unlike obscene publications and hate propaganda, the relevant provisions cover far more than *in rem* procedures.

432. If one accepts the "regulatory" aims and provisions of gun control legislation, one must still question whether the present search and seizure provisions in section 101 are appropriate. Insofar as regulatory searches involve a different set of premises than those underlying search and seizure powers to enforce criminal law, the matter may deserve attention in another study. The following preliminary comments are directed specifically to ensuring that these regulatory powers are not distorted into a general mandate to conduct the discretionary searches of suspected criminals, noted and criticized in the *Progress Report* prepared for the Solicitor General.

433. It is important to note that some police materials instruct peace officers to use their power with circumspection. The Metropolitan Toronto Training Précis comments that "this legislation will be very helpful to police officers in emergency situations where members of the public are in danger and there is no time to obtain a warrant". It goes on to warn, "extreme care must be taken by all officers to ensure that this power is not abused".[512] It is also true that some police forces appear to be taking a cautious view of their powers under section 101, instructing officers that the section is applicable to searches of places rather than persons. On the other hand, other forces consulted by the Commission defended retention of the provision on the basis of the need to conduct personal search activities.[513] At the least, the situation with respect to searches of persons under section 101 ought to be clarified. The larger issue, however, remains: how the ambit of the section may be restricted so that it is confined to its legitimate purposes. In this regard, two suggestions are offered.

434. First, the power to search and seize should be linked more closely to the *in rem* application. As in the case of obscene publications and hate propaganda, it is the *in rem* hearing that represents the essential, long-term regulatory decision: whether the relevant items should be allowed to remain in the private individual's possession. Search and seizure powers, according to the *in rem* models established under sections 160 and 281.3, should be regarded as ancillary provisions designed to bring the item under state control pending the adjudication of the matter. Accordingly, it should be made clear that the prohibition against possession justified in the "interests of safety" is the long-term deprivation contemplated by an order under subsection 101(6) and not simply the brief interference that may result from an officer's actions. It is noteworthy that while the Attorney General must make a return to a magistrate, this in itself does not start the *in rem* procedure. To do so, another application to

the magistrate must be made under subsection 101(4); in the absence of such an application within thirty days, the articles seized must be returned. This disjunction permits the police to set up a parallel system of regulation: to make seizures, detain the items temporarily, and return them to the owner without invoking the essential regulatory mechanism of the *in rem* proceeding. The disjunction should be corrected and the search for, and seizure of, items linked directly to the *in rem* hearing, as is the case under sections 160 and 281.3.

435. Second, the grounds for search and seizure should incorporate a reasonable belief that the person concerned is actually in possession, custody or control of a weapon. This belief was implicit in the wording of the former section 105, which allowed seizure of weapons but not searches for them. While it would seem justifiable to enable a peace officer to search for a weapon possessed in dangerous circumstances, it would appear unnecessary to go so far as to sanction a "fishing expedition". To leave the person susceptible to search so long as it is perceived that he ought not to have a weapon, is to sanction a form of inspection inappropriate to an *in rem* procedure. While the *in rem* proceeding is inherently regulatory in nature, it possesses many features analogous to the "rule of law" protections built into criminal law. For example, it makes deprivation of the individual contingent upon an adjudication that the relevant possessions fall within the designated class. Under sections 160 and 281.3, the responsiveness of the procedure extends to the search and seizure stage. A peace officer is not entitled to perform inspections to ascertain whether an individual is in possession of the designated items, but to search only if there are reasonable grounds to believe that he in fact possesses them. It is not clear why any legitimate searches performed in the interests of gun regulation cannot be authorized within similar constrictions.

I. Entry to Prevent Danger to Life

436. Many of the recommendations in this Working Paper have related to aspects of search and seizure powers directed to the preservation of human life and safety.[514] As indicated earlier, however,[515] the responsibilities of a police officer as "keeper of the peace" expand beyond search and seizure activities. Insofar as we are concerned here exclusively with powers of search and seizure, we make no recommendation concerning the retention or modification of this historical role.

CHAPTER TEN

Enforcing the Rules

I. Introduction

RECOMMENDATIONS

47. A procedure should be instituted to implement the principle that illegally obtained evidence should not be admitted at trial, where its use as such would tend to bring the administration of justice into disrepute. The details of this procedure will be developed in the Working Paper on Post-Seizure Procedures.

48. Consideration should be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.

437. Enforcement of the legal rules governing search and seizure encompasses both "internal" and "external" enforcement mechanisms. "Internal" mechanisms enforce the rules by instilling awareness of, and obedience to, legal procedures through institutions and structures associated with the police and the issuers themselves. It is somewhat trite to observe that to the extent that an internal system can accomplish these objectives, it possesses advantages over resort to "external" mechanisms: bolstering morale and cohesiveness among the officials involved, and even more importantly, working to prevent procedural violations rather than addressing them after the fact.[516]

438. Examples of internal controls such as training courses for police and justices of the peace have been noted and lauded in the

course of this paper.[517] Even initiatives so basic as the updating of forms in the wake of relevant case-law represent a form of internal control, a step taken to ensure that future activities stay within the law as redefined. Indications that some of the forces and court offices are upgrading control of their practices are encouraging. The high incidence of illegality demonstrated by the Commission studies, however, shows more than a need to tighten up internal enforcement. It raises the question: What is and should be done when internal enforcement fails? It is this question, the question of external controls, to which the following discussion is directed.

439. Theoretically, an individual whose person, vehicle or premises have been searched by a peace officer has three alternative ways in which to challenge the legality of the search or seizure.[518] First, if objects have been seized, he can apply to a court to deny the police the right to retain them or use them for investigative or evidentiary purposes. Second, he can initiate criminal or disciplinary proceedings against the issuer or executor of the warrant. Finally, he can seek to recover damages for the intrusion through civil proceedings. Until recent constitutional developments, however, the legal and practical limitations on these alternative courses have been such that they have fallen short of providing significant vindication or protection of individual interests against intrusion by the police.

440. Certain aspects of this situation, may well be changed by virtue of section 24 of the *Canadian Charter of Rights and Freedoms*:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

While the exact scope and meaning of the provisions of this section must await judicial determination, there are a number of clear limitations in it that are relevant to our analysis.

441. It is apparent that the section does not purport to cover enforcement of all rules governing search and seizure powers. Rather it is triggered specifically by a violation of constitutionally guaranteed rights and freedoms. In the case of search and seizure powers, this

means the constitutional standard of "reasonableness" set out in section 8 of the *Charter*.[519] Nor does it comprehend all possible enforcement mechanisms. In that section 24 contemplates an application to a court of competent jurisdiction, it does not seem to cover internal disciplinary procedures or conventional criminal prosecutions against the violators of those rights. And insofar as it focuses on the violation of individual rights, the section does not relate at all to wider regulatory mechanisms of enforcement.

442. Accordingly, the following observations are not structured exclusively around section 24 of the *Charter*. Rather, we approach the subject in three parts: (1) traditional ways of challenging a search or seizure through civil, criminal and complaint procedures, (2) proceedings relevant to the exclusionary principle and restoration of things seized, and (3) regulatory monitoring.

II. Traditional Alternatives

443. The primary alternatives traditionally available to a person aggrieved by a search or seizure are criminal, civil and complaint proceedings. (Although prerogative writs are also traditional, we consider them in the next section in conjunction with the exclusionary and restoration issues to which they in some part relate.) The problems relating to criminal, civil and complaint proceedings against officers involved in criminal law enforcement are not peculiar to search and seizure. Allegations of violence, in the course of incidents of arrest and custodial interrogation in particular, have attracted recent attention.[520] We do not undertake in this paper to provide solutions to these problems, partly because they go beyond the scope of this Working Paper, but also because we doubt whether any solutions to those problems would be likely remedies for some of the more prevalent problems relating to search and seizure. Accordingly, we discuss the traditional remedies mainly to show why other enforcement mechanisms are desirable.

A. Criminal Prosecutions

444. These procedures are mainly relevant to allegations against the police. The only provision that might be used to prosecute

a justice issuing an illegal search warrant would appear to be section 115 of the *Criminal Code*:

> Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

This section was utilized in the case of *R.* v. *Coutellier, Cobb and Cormier* to prosecute police officers for an illegal search without warrant,[521] and it might be applicable to the wilful disobedience of a requirement pertaining to the issuance of a search warrant.

445. The range of offences with which a police officer might conceivably be charged in connection with an illegal search or seizure activity is less limited. In addition to assault and bodily harm sections which would apply to improper uses of force, there are a number of *Criminal Code* offences against the administration of law and justice which could be relevant to the conduct of a peace officer. These include section 120 (perjury in judicial proceedings), section 122 (false statements under oath), and section 117 (misconduct in the execution of process and making false returns). Since all of these offences are indictable, however, a practical limitation is placed upon the individual aggrieved: the Crown has an absolute right to intervene in the prosecution and conduct of all indictable offences.

446. It has been suggested that prosecutions of police officers are impeded by both the natural human tendency to close ranks with one's colleagues and by the possibility that illegal conduct may be consistent with normal departmental practice.[522] In fact, criminal proceedings are rarely resorted to against police officers in connection with searches with warrant. In 1973, Spiotto noted that criminal prosecution, while theoretically available, had not been invoked in Ontario in connection with illegal searches and seizures since the early 1940s.[523] This conforms with recent national information received by the Commission relating to the R.C.M.P. In 1978 and 1979, a total of five prosecutions were launched against R.C.M.P. members for assaults related to search incidents, but none of these involved a search warrant. In all five cases, the officer was acquitted. While this may be a reflection upon the merits of the charges laid, it may also indicate the difficulty in obtaining a conviction against a peace officer.[524] And even when a conviction is obtained in a search-related charge, the sentence is likely to be a light one. In the *Ella Paint* case, the appellate court recommended a "nominal" penalty.[525] In *Coutellier, Cobb and Cormier*, officers who

had conducted an illegal search without warrant were given absolute discharges.[526]

B. Complaint Procedures

447. Short of initiating a criminal charge against the peace officer, an individual may present his grievance to the police authorities themselves by lodging a complaint. This step may lead to remedial action being taken by supervisory personnel or to the initiation of disciplinary proceedings.[527] Yet as a response to intensive search and seizure, relatively few complaints appear to be made, at least in the case of the R.C.M.P. During the course of a six-month study conducted by the force in 1979, 26 complaints were received regarding search. Statistics for seizures were smaller: 18 complaints were made. In those cases in which it was deemed appropriate to take action, the consequences were the most informal possible — in seven search cases and one seizure case, the officer was "counselled".[528] Similar indications of the infrequency of complaints related to search and seizure were reported by Spiotto in 1973, with particular reference to Toronto.[529]

448. The Marin Report, issued in 1976, recognized that not all individuals who feel aggrieved by R.C.M.P. action take the step of making a complaint, and identified four particular reasons for such failures:

- the individual concerned did not know how to bring the complaint to the attention of the Force;
- he felt that to complain would "do no good" as the Force would simply "cover up";
- he feared that some form of retaliation by the Force would follow the lodging of a complaint;
- upon seeking the advice of others, he was discouraged from pursuing the complaint further.[530]

While it is dangerous to generalize from observations made about one particular police force, observers suggest that the concerns expressed in the Marin Report are applicable to other forces.[531]

C. Civil Proceedings

449. While the common law has regarded public officials as being liable to persons injured by their unlawful acts, it has taken

account of the difficulties facing judicial decision-makers. For example, in *Cave* v. *Mountain*, the Court distinguished between the absence of jurisdiction, which could lead to liability, and an error of judgment, which could not.[532] Today, the common law position has become complicated by statutory provisions at both the federal and provincial levels.

450. The first federal provision brought into play is section 717 of the *Criminal Code*, which becomes relevant on an application to quash a search warrant:

> Where an application is made to quash a conviction, order or other proceeding made or held by ... a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice ... or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it.

The wording of the section is permissive, and confers a discretion upon the court. Nonetheless, recent decisions would indicate that the order is granted almost automatically upon the invalidation of a search warrant; indeed, the expression "usual order" has even been used.[533] Perhaps the most surprising instance of such an order occurred in the *Den Hoy Gin* case, in which it was found that the police officer concerned had sworn a false information. Nonetheless, the usual order for protection was made.[534] On the other hand, in *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, the British Columbia Supreme Court refused to grant protection to the police officer executing the search, reasoning that an order should be made only where material before the Court shows neither any suggestion of bad faith nor ulterior motive on the part of the police nor any impropriety in the execution of the seizure.[535]

451. Quite aside from the protection afforded by section 717, the liability of an officer executing a warrant is circumscribed by subsection 25(2), which reads:

> Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

The good faith tests inherent in the two provisions are virtually identical; the difference between the sections is found in the context

of their application. While section 717 may only be invoked on a pre-trial application, subsection 25(2) may be raised in the civil proceedings themselves. Neither provision, however, would appear to protect the officer against liability arising from acts not authorized on the face of the warrant.

452. The justice of the peace, as well as the peace officer, are provincially appointed officials. Accordingly, the provincial legislatures have taken their own steps to enact protective rules. There has been a certain difference in approach with reference to the common law position. A number of provinces have maintained the distinction between judicial errors committed within the decision-maker's jurisdiction, and errors that themselves are pertinent to the question of jurisdiction.[536] Other provinces have given blanket protection to their justices, provided that their powers of decision are exercised in good faith.[537]

453. An argument may be made that the alternative of civil proceedings offers a certain balance as a means of enforcing rules of police conduct. Tort law, runs the argument, "confers on private individuals the competence to decide whether they have been hurt enough by some such abuse to make them want to undertake the trouble and expense of inflicting a necessary penalty on the defendant".[538] The problem with this argument is that the institutional restrictions upon inflicting this penalty are so formidable as to discourage all but the most intent of private individuals. Aside from the statutory hurdles and the costs of litigation, both of which can be formidable, there is the problem of quantifying damages. When the intrusion has caused considerable deprivation of privacy and dignity, but little obvious physical or economic injury, the individual faces formidable obstacles in obtaining a sizeable judgment. This may be particularly true when the individual is from an economic or social group associated in a jury's eyes with criminality.[539]

454. Once again R.C.M.P. statistics show infrequent use of the available civil remedies. In the years 1978 and 1979, six civil claims were initiated in connection with searches with warrant; another six claims were launched with respect to other searches.[540] The claims included allegations of the warrant's invalidity, improper execution, and violation of solicitor-client privilege. These statistics do not include the more frequent claims for damages arising out of legal searches, such as payment for doors lawfully knocked down in the course of narcotics or drugs searches. Since legality is not in issue in such claims (and indeed payment is understood to be made on an *ex gratia* basis), they cannot be considered to reflect the use of civil

proceedings to enforce the rules attending searches and seizures. Indeed, the greater frequency of claims for physical damages than for wrongful intrusions tends to prove the point that tortious remedies are more appropriate for physical and economic injuries than less concrete ones. Once again, the Commission's findings confirm earlier research by Spiotto, who concluded that "where the illegal conduct involved is an illegal search and seizure, very few [tort] actions appear to have been brought".[541]

D. The Need for Alternatives

455. That resort is rarely made to criminal, civil or complaint proceedings in order to challenge the legality of search and seizure laws is hardly a controversial proposition; police and Crown counsel admitted as much to Spiotto in the course of his studies in the early 1970s.[542] An explanation frequently offered for this circumstance has been that, due to high training standards among law enforcement personnel (*viz.* the effectiveness of internal enforcement), there are, in fact, few incidents of illegality.[543] In the light of evidence that the rules are not being followed, however, we suggest that the true explanation for the absence of challenges is less reassuring: no effective mechanism for remedying the relevant violations has been available under Canadian law.

456. Part of the problem may lie in obstructive aspects of the procedures traditionally available. There is no doubt that a great deal of improvement could be made to criminal, civil and complaint procedures to make them more accessible to the individual aggrieved. In civil proceedings, for example, full solicitor-client costs could be awarded to private litigants and minimum figures set for damage awards for illegal uses of police powers.[544] So too, the section 717 protection order, which is granted virtually as a matter of course, could be more vigorously opposed by counsel in cases in which a warrant is quashed. This would remove an existing obstacle to

subsequent action against the participants in the warrant process. Enhanced procedures to ensure the objectivity and thoroughness of prosecutions of police officers might allay perceptions of the ineffectiveness of criminal charges as an enforcement mechanism. But would such improvements really address the problem at the root of the present crisis?

457. That these remedies are not used to enforce the rules governing search and seizure may have less to do with the remedies themselves than with the way these rules are breached. The kind of illegality disclosed by the Commission's studies would rarely be a blatant manifestation of abuse. Peace officers conducting an organized search under a defective warrant or professionally frisking an individual whom they have no statutory authority to search may not be performing acts that create serious economic or physical damage. In the absence of such damage, an individual whose person or premises are searched may not even know that the police have done anything wrong. Canadians, as commentators have noted, tend to accord legitimacy to the actions of authority figures such as peace officers.[545] When the basis of illegality resides solely in a statutory distinction or evaluation of a document, the individual is in effect spared the obvious visible abuse that might provoke a challenge to the intrusion.

458. It may be argued that the less traumatic illegalities in the warrant process neither cause the injuries nor deserve the kind of censure associated with violent abuses of individual rights. However, this does not excuse or justify the evident laxity in enforcement of the procedural rules that exists today. Indeed, it is the focus of the present remedies on blameworthiness and individual loss that is at the heart of the problem of enforcement. For the damage done by prevalent procedural illegality is not simply the individuated kind that may be met by tort and criminal actions. Rather it also relates to values at the same time more abstract and more pervasive — the values inherent in the rule of law which underlies our criminal law enforcement system.

459. If it be accepted that it is important to breathe some life back into the model of a criminal law enforcement system bound by rules that authorize intrusions upon individual rights, it is necessary to look to alternatives outside the traditional remedies. One is to institute an effective procedure to implement the exclusionary principle set out in section 24 of the *Charter*. Another is to establish regulatory mechanisms to monitor and encourage police compliance with the rules.

III. The Exclusionary Principle and Restoration of Things Seized

A. Before the *Charter*

460. Before the enactment of the *Canadian Charter of Rights and Freedoms*, prerogative remedies and common law rules of evidence provided the grounds upon which a person affected by a seizure could seek to influence the disposition of things seized. These means, however, were quite limited. According to the Supreme Court of Canada decision in *Wray*, relevant evidence that had been improperly or illegally obtained could only be excluded if it were gravely prejudicial to the accused, of tenuous admissibility and of trifling probative value.[546] Although an application for prerogative relief has long been established as a means of challenging a seizure with warrant, the capacity to use this alternative to affect the disposition of things seized has not been clearly defined. In order to appreciate this latter alternative's usefulness for this purpose it is worthwhile to briefly canvass the pre-*Charter* law on point.

461. In the *Kehr* case, it was held that the issuance of a search warrant, being of a judicial character, could be reviewed by a superior court in *certiorari* proceedings.[547] These proceedings have generally been simplified over the past seventy years, and the application today may simply be styled "an application to quash", but the powers and role of the reviewing court have remained essentially the same. Basically, superior courts have justified their intervention in the issuance process on three grounds: that the information failed to give the justice of the peace jurisdiction to issue the search warrant; that the justice failed to exercise his discretion judicially; and that the search warrant issued failed to comply with legal requirements. In effect, these grounds have enabled reviewing courts to quash warrants for all but the most trivial formal defects.

462. A critical question which has remained unresolved in Canadian law, however, is that of the reviewing court's discretion regarding disposition of the items seized under a warrant found to be unlawful. While the *Bergeron* case[548] established that a superior court may order the return of such items to their owner as an incident of its power to quash, the decision specifically refrained from deciding whether an order could ever be made that would allow the Crown to

retain items it required for evidentiary purposes, despite the quashing of the warrant authorizing their seizure. Such an order was made in *Black*,[549] a case that the Supreme Court of Canada distinguished in *Bergeron*. A principled stand against the *Black* decision has been taken in *Alder*, Moshansky J. stating that "to allow the police to retain articles illegally seized under a defective search warrant which has itself been quashed strikes me as a mockery of the law".[550] On the other hand, numerous courts have made orders similar to that in *Black* since the *Bergeron* case, and the Supreme Court itself has recently declined to consider the matter anew.[551]

463. Until recently, Canadian search and seizure law had focused primarily on the application to quash as the mechanism by which the detention of illegally seized items could be challenged. The result was a state of discrimination in favour of instances in which an item had been seized with warrant and, within this context, in which the illegality pertained to the issuance rather than the execution of the document. This focus, however, has been broadened in two recent cases from British Columbia: *Capostinsky* and *Butler*.

464. In *Capostinsky*,[552] the plaintiff applied by way of replevin proceedings for the return of blood samples taken from him by a doctor without his consent and later seized by the police pursuant to a search warrant. Berger J. held that the warrant was a nullity, since it described no offence known to law, and ordered the return of the sample on alternative bases: as a matter of inherent jurisdiction in quashing the warrant, or an application of the remedy of replevin. The implication of this view, that a court could order restoration of items illegally seized when no warrant was involved, was picked up in *Butler*,[553] in which the British Columbia Supreme Court, exercising its inherent jurisdiction, ordered the return of personal items seized from the petitioners pursuant to their arrest.

465. In addition to the above-noted applications, there currently exist a number of statutory procedures under which individuals may regain items seized from them by the police: subsections 101(4), 160(2), 281.3(2) and 446(1) of the *Criminal Code*, subsection 10(5) of the *Narcotic Control Act* and subsection 37(5) of the *Food and Drugs Act*. Since these proceedings expressly consider the validity of continued *detention* of the items seized rather than the legality of their *seizure*, however, they cannot be regarded as enforcement mechanisms governing the exercise of police powers. These proceedings will be addressed in detail in the Working Paper on Post-Seizure Procedures, which concerns the procedures for determining the admissibility of things illegally seized, as well as

those necessary to ensure the restoration of takings, the preservation of evidence and the forfeiture of contraband.

466. A limitation of the available procedures has been that a successful application has not prevented the police from subsequently making a seizure of the same objects under newly acquired authority. In the course of discussions, both Crown counsel and defence lawyers offered a number of reasons why resort might be made to this option. These included using a successful application to pressure the Crown into plea bargaining, obtaining a preliminary decision on the question of legality before launching a civil suit, using the finding of legality to fight extradition to the United States, and embarrassing police witnesses at jury trials with the fact that their evidence had been gained at least in part through means determined to be illegal.

467. There was little enthusiasm for the prospect that the application could effectively accomplish what it might appear to have been designed for: nullifying the action taken illegally under it. Such a prospect has in effect been dimmed by decisions such as *Black*.[554] Indeed, the Crown has even on occasion gone so far as to concede the illegality of warrants before the reviewing court and simply filed materials to support its contention that the seized items have evidentiary significance. While such a position has reflected a certain realism and judiciousness on the part of Crown counsel in evaluating warrant documents, it has robbed the quashing application of its supervisory function, making it in essence a superior court inquiry into the questions of necessity which are specifically addressed in restoration procedures. This circumstance may change significantly, however, in the light of the enactment of section 24 of the *Charter*.

B. The *Charter* and Disposition of Things Seized

468. The impact of section 24 of the *Charter* upon the restoration of things seized and evidentiary rules of admissibility is a matter which Canadian courts are just beginning to address. It is clear that no remedy will lie under this section unless there has been a violation of the applicant's constitutional rights. If this requirement is met, subsection 24(1) allows for a court of competent jurisdiction to dispense an appropriate and just remedy, which in proper cases could include an order to restore a thing unconstitutionally seized.

Subsection 24(2) specifically empowers the court to exclude evidence if the administration of justice would be brought into disrepute by its admission. Although the circumstances in which these provisions will be triggered remain, for the present, a matter of uncertainty, the Commission believes that it would be timely to suggest procedures for challenging the legality of seizures, the detention of things seized, and the admissibility of evidence seized. As we take the view that these matters all pertain to the disposition of things seized, we shall defer our recommendations in this regard until the publication of our Working Paper on Post-Seizure Procedures.

IV. A Monitoring Panel

469. A balanced exclusionary rule could accomplish much towards the achievement of a law enforcement system bound by the rules that define its legal powers. Yet, however valuable it may be in "normative" terms, such a rule may not in itself be effective in ensuring actual widespread compliance with these rules. This is because an exclusion order is essentially conceived as a remedy granted in response to an individual incident of wrongdoing; like other remedies, it depends on both the initiative of an aggrieved individual to apply for it, and the willingness of a court to grant it. Whatever regulatory effect the rule has been accorded has been based on the perception that the possibility of exclusion of evidence acts as a deterrent on illegal police conduct. This perception is on the wane, however. While the American exclusionary rule, for example, was once promoted as a deterrent,[555] both recent case-law[556] and empirical studies[557] have disputed its significance as a deterrent. Moreover, insofar as the problems of non-compliance with legal standards are attributable to warrant issuers, the notion of a deterrent effect is simply inapplicable: the issuer has no apparent stake in the outcome of the police investigation and prosecution. To speak of enforcing the rules of search and seizure through external controls, therefore, entails looking at mechanisms other than an exclusionary rule.

470. It is necessary, in fact, to go beyond variations on remedies to be dispensed in deserving cases and look at the questions of controls in wider, regulatory terms. For the problem of illegality is more than

simply the sum of those individual conflicts brought before the courts. Rather, it may involve patterns of practice within police and judicial organizations as a whole. Such patterns of practice were evident in the results of the Commission's warrant survey: the detailed elements on Vancouver documents, for example, as opposed to the terse presentation on those from Montréal. In order to address these patterns, it is important to consider ways in which the practices of organizations as a whole can be addressed.

471. It is widely accepted that the most effective external controls upon the police are those that reinforce internal mechanisms. As one commentator has observed:

> [E]xternal controls should be designed in a manner that reinforces the internal systems of discipline upon which primary dependence continues to be placed. They should be oriented not towards the control of individual misconduct, but rather should be directed at a review of the conditions that make such misconduct possible.[558]

While there are many possible mechanisms of this kind to be explored and assessed, one specific measure which could have a valuable regulatory effect is advanced here.

472. We suggest that panels of representatives from the judiciary and the criminal bar could be established with continuing mandates to examine and evaluate the regularity and legality of search warrant documents in particular Canadian jurisdictions. Such evaluations, as well as including the legality of the information and warrant, could cover the return on the warrant with its attached inventory of items seized. In essence, such panels could continue and expand upon the functions performed by the judicial panel utilized in the present study. Like the sample selected for evaluation by the judicial panel, the documents monitored by such panels could be selected on a random basis. Not only could the findings of such bodies be made the subject of consultations with the individual police forces and court officials so as to bolster internal enforcement mechanisms, but they could also be made available to the public to indicate the extent of compliance with legal standards.

473. The effective monitoring of search warrants is arguably a necessary step towards fulfilling the policy recognized in the *MacIntyre* case, *viz.* that public scrutiny of search warrant documents is necessary to ensure that abuse will not go undetected.[559] While public access remains a laudable goal, it is not in itself likely to result in detection of deficiencies, particularly those of a legal nature. Such detection, rather, requires informed analysis, and

in order to put individual cases in perspective, this analysis should be conducted on a systematic basis. Indeed, since it would focus on the larger pattern of activity rather than the individual case, a monitoring panel would not jeopardize the privacy and law enforcement interests at stake in *MacIntyre*. By preserving the anonymity of individuals affected by the monitored searches and presenting the results in cumulative form, the proposed mechanism would reduce to negligible any risk of prejudice to either a concerned individual or the investigation against him.

474. Police and justicial powers have tended to come under scrutiny recently in the specific context of Royal Commissions appointed in response to publicized incidents of alleged abuse or impropriety. To cite a few recent examples in Canada, there have been the Laycraft Inquiry, conducted in the wake of the Royal American Shows investigation in Alberta;[560] the Pringle Report, commenced in response to a mass strip-search conducted at a motel in Fort Erie, Ontario;[561] and, of perhaps most recent significance, the McDonald and Keable Commissions.[562] While such Commissions may serve the public interest in investigating specific instances of alleged abuse, their inquiry is often focused on the outrageous and specific to the detriment of presenting the everyday, general picture. The words of an American Task Force Report on the police may well be applicable to Canada:

> Where there has been inquiry into police practice, it has commonly been precipitated by a crisis, has been directed towards finding incompetence or corruption, and whatever the specific finding, has failed to give attention to the basic law enforcement issues involved.[563]

475. In fact, some systematic monitoring of facets of crime-related procedures has been introduced into Canada in recent years. Of direct relevance is the ongoing evaluation of gun control legislation being conducted for the Solicitor General of Canada.[564] While the scope of the evaluation encompasses a range of aspects far broader than police adherence to legal procedures, the reporters have included conclusions about the legality of existing police practices in their *First Progress Report*; for example, they have criticized abuse of the return procedures in warrantless firearms searches.[565]

476. Considering the strong provincial constitutional interest in regulating search warrant practice, derived from provincial jurisdiction over the "administration of justice",[566] we believe that such monitoring panels should be established on a provincial or local level. By institutionalizing such panels at these levels, the aim of building external mechanisms onto internal structures is likely to be better

served, with respect both to provincial and local police forces and to the provincial courts responsible for the issuance of search warrants. For example, monitoring the performance of justices of the peace in issuing search warrants could be built into any provincial initiatives undertaken to improve the training and qualification of holders of this office.

477. Monitoring exercises would not have to be conducted on a constant basis; periodic review of representative random samples could be sufficient for the regulatory task envisaged here. Moreover, it should be emphasized that, since the present monitoring proposal would focus on the documents already required by law, it would not represent any additional burden upon the police themselves. Any organizational burdens placed upon court administrators responsible for the collation of these documents, as well as the responsibilities, expenses and efforts entailed in assembling a monitoring panel, seem justifiable in the interests of effectively regulating the important and exceptional powers granted for the purposes of search and seizure.

Endnotes

1. See text, *supra*, Part One, paras. 97-100.
2. Alan Grant, *The Police — A Policy Paper* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1980), p. 16.
3. Although the *Criminal Code* frequently confers warrant issuing functions on "a justice", the organization of Provincial Court officials and the assignment of functions of the "justice" to other judicial ranks remains within provincial discretion. See text, *supra*, paras. 198-205.
4. Grant, *supra*, note 2, pp. 36-38.
5. This is indeed the perception of many municipal and R.C.M.P. officers themselves. For example, when asked whether they used consent forms, a group of municipal officers responded, "No. That's for the R.C.M.P.".
6. Task Force on Policing in Ontario, *Report* (Toronto: 1974), p. 24.
7. See text, *supra*, Part One, paras. 212-227.
8. See text, *supra*, Part One, para. 228.
9. See text, *supra*, Part One, paras. 11-13.
10. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 11.
11. Herman Goldstein, *Policing a Free Society* (Cambridge: Ballinger, 1977), p. 160.
12. *MacIntyre* v. *Attorney General of Nova Scotia* (1982), 40 N.R. 181 (S.C.C.).
13. The distinction between "law enforcement", which necessarily involves a violation of the law and "order maintenance", which, though often entailing a legal infraction, involves a dispute or potential disorder, has been drawn by James Q. Wilson, *Varieties of Police Behavior* (Cambridge: Harvard University Press, 1968), pp. 83-84.

14. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), pp. 90-91.

15. See text, *supra*, paras. 42-45.

16. See text, *supra*, Part One, paras. 100-113.

17. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), pp. 25-26 (hereinafter cited as the "RCCP Report").

18. See text, *supra*, Part One, paras. 100-113.

19. Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976), p. 24.

20. *Robbins* v. *California* (1981), 69 L. Ed. 2d 744.

21. In *New York* v. *Belton* (1981), 69 L. Ed. 2d 768, the United States Supreme Court, on facts involving a vehicle search quite similar to those in *Robbins*, made a contrary finding as to the legality of the policeman's actions. In the recent decision of *United States* v. *Ross* (unreported, June 1, 1982), the Court attempted again to resolve the uncertainty in the area.

22. Martin L. Friedland, *Access to the Law* (Toronto: Carswell, 1975), p. 64.

23. American Law Institute, *Model Code of Pre-Arraignment Procedure* (1975) (hereinafter cited as the *ALI Code*).

24. Australian Law Reform Commission, *Criminal Investigation* (Report #2) (Canberra: Australian Government Publishing Service, 1975) and the *Criminal Investigation Bill, 1981.*

25. RCCP Report, *supra*, note 17.

26. See text, *supra*, paras. 31-34.

27. See text, *supra*, Part One, paras. 117-125.

28. See text, *supra*, paras. 64-69.

29. *Criminal Investigation Bill, 1981*, *supra*, note 24; sections 56-62 deal with search and seizure.

30. *ALI Code*, *supra*, note 23.

31. See text, *supra*, Part One, paras. 67-79.

32. See text, *supra*, Part One, paras. 71-79.

33. *Jones* v. *United States* (1959), 362 U.S. 257.

34. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.).

35. Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer", in *Studies in Canadian Tort Law*, edited by Allen

M. Linden, (Toronto: Butterworths, 1968), pp. 430-33.

36. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II (London: E. Rider, 1800), p. 113.

37. See John Kaplan, "Search and Seizure: A No Man's Land in the Criminal Law" (1961), 49 Cal. L. Rev. 474, at p. 478.

38. See text, *supra*, paras. 46-50.

39. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965), p. 188.

40. *Ibid.*, p. 208.

41. *Ibid.*, p. 188.

42. Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979), p. 156.

43. Dicey, *supra*, note 39, pp. 195-196.

44. *Canadian Charter of Rights and Freedoms*, sections 7, 8, 9, 11, 15.

45. Leon Radzinowicz, *A History of English Criminal Law*, vol. IV (London: Stevens and Sons, 1956), p. 163.

46. Jeremy Bentham, *Principles of Morals and Legislation*, vol. I (London: T. Payne & Son, 1789), pp. 367-368.

47. E. C. S. Wade, "Police Search" (1934), 50 L.Q.R. 354, at p. 364.

48. See text, *supra*, paras. 43-45.

49. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1976), p. 3.

50. See the *Criminal Code*, R.S.C. 1970, c. C-34, ss. 450(2)(*d*), 452(1)(*f*), 453(1)(*i*), and 457(7)(*b*).

51. In fact, the party whose premises are searched may not even be a suspect. See text, *supra*, paras. 324-330.

52. Ericson, *Making Crime*, *supra*, note 10, p. 148. Among 96 suspects involved in the investigation studied, 27 were subject to searches of their property.

53. See text, *supra*, Part One, para. 71.

54. *Re Liberal Party of Québec and Mierzwinski* (1978), 46 C.C.C. (2d) 118 (Qué. S.C.), at p. 122.

55. The survey's strategy, methodology and results have been presented in consultation documents prepared for each of the seven cities surveyed. These documents are presently being revised for publication within a single volume. For more details, see note 262, Part One.

56. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196 (Ont. H.C.)

57. Aside from the case of the common law warrant, this would appear to be the requirement, for example, of section 25 of the *Metropolitan Police Courts Act*, 2 & 3 Vict., c. 71, which provided for stolen goods found in the course of search to be conveyed before a magistrate. Under section 26, "such magistrate" could find the possessor guilty of a misdemeanour.

58. *An Act for the Forging and Counterfeiting of Foreign Bills of Exchange*, 43 Geo. 3, c. 139, s. 7.

59. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (Ont. H.C.), at pp. 266, 271.

60. *Dillon* v. *O'Brien* (1887), 16 Cox C.C. 245, at p. 249.

61. *Leigh* v. *Cole* (1853), 6 Cox C.C. 329, at p. 332.

62. R.S.C. 1970, c. E-10, s. 29(7).

63. The distinction between seizure and surveillance has been elaborated in Part one, *supra*, paras. 28-37. Search and seizure powers authorize obtaining "pre-existing information" only.

64. *Access to Information Act*, S.C. 1980-81-82, c. 111, Sch. I, s. 3.

65. *Rex* v. *Burgiss* (1836), 7 Car. & P. 488, 173 E.R. 217 (C.P.).

66. David G. Price, "Police Seizure of Bank Accounts under Section 29, *Criminal Law Amendment Act, 1975*" (1976-77), 19 Crim. L.Q. 86.

67. *Banque Belge pour L'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321 (C.A.).

68. For a discussion of the nature of the bank's relationship to its depositor, see Ian F. G. Baxter, *The Law of Banking and the Canadian Bank Act*, 2nd ed. (Toronto: Carswell, 1968), pp. 9-11.

69. *Regina* v. *Cuthbertson*, [1981] A.C. 470 (H.L.).

70. *Leigh* v. *Cole*, *supra*, note 61, pp. 330-31.

71. See text, *supra*, paras. 123-137.

72. See text, *supra*, paras. 423-435.

73. *Re Thomson*, unreported, August 28, 1979 (Ont. Prov. Ct.).

74. See notes 503 and 504, *infra*.

75. *ALI Code*, *supra*, note 23, s. 210.3(1)(*b*).

76. *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(*b*).

77. *Criminal Code*, R.S.C. 1970, c. C-34, s. 283.

78. *Criminal Code*, R.S.C. 1970, c. C-34, s. 312.

79. *Criminal Code*, R.S.C. 1970, c. C-34, s. 295.

80. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 4.

81. *Food and Drugs Act*, R.S.C. 1970, c. F-27, ss. 34 and 42.

82. *Criminal Code*, R.S.C. 1970, c. C-34, s. 159(1).

83. See text, *supra*, paras. 331-338.

84. Out of 1,825 executed warrants captured in our survey, 340 were for stolen property. See note 55, *supra*.

85. *R.* v. *Percival and MacDougall* (1971), 2 C.C.C. (2d) 585 (B.C. S.C.).

86. *Devoe* v. *Long*, [1951] 1 D.L.R. 203 (N.B. C.A.).

87. *Regina* v. *Kotrbaty* (1978), 5 C.R. (3d) S-13 (B.C. S.C.), at p. S-15.

88. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(6).

89. *Smith* v. *The Queen* (1975), 27 C.C.C. (2d) 252 (F.C. T.D.).

90. *Re Hicks and The Queen* (1977), 36 C.C.C. (2d) 91 (Man. C.A.).

91. Incorporated into what is known as *R.I.C.O.* (Rackateer Influenced and Corrupt Organizations) legislation, *in rem* proceedings are found in 18 U.S.C. ss. 1964. These provisions do not deal with all profits of crime but rather those which have been invested in commercial enterprises.

92. *The Business of Crime, An Evaluation of the American R.I.C.O. Statutes from a Canadian Perspective* (hereinafter cited as the "Henderson Report") (Victoria: British Columbia Attorney General, 1980).

93. See text, *supra*, paras. 414-422.

94. *Criminal Code*, R.S.C. 1970, c. C-34, s. 420(1).

95. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 3; *Criminal Code*, R.S.C. 1970, c. C-34, ss. 88 and 89.

96. See text, *supra*, paras. 65-66.

97. Our four-month survey of writ use in seven Canadian cities disclosed 100 incidents in which narcotic and drug writs were used. Use of drug writs was reported in five of these cities: Edmonton (20 instances), Montréal (3), Toronto (8), Winnipeg (10) and Vancouver (59). No incidents of writ use were reported in Fredericton or Saint John. The results of this survey are being assembled for publication in a separate Study Paper.

98. *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 34.

99. *Criminal Code*, R.S.C. 1970, c. C-34, s. 309(1).

100. *Criminal Code*, R.S.C. 1970, c. C-34, s. 159(1)(*a*).

101. *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (Ont. Prov. Ct.).

102. *House of Commons Debates*, 1959, vol. V, p. 5547 (July 6, 1959).

103. See, for example, the *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (LeDain Commission) (Ottawa: Information Canada, 1973), p. 130. Although amphetamines were recognized as dangerous, it was recommended that an offence of simple possession *not* be established due to the likelihood of ineffective and discriminatory enforcement of such a provision.

104. See text, *supra*, paras. 414-422.

105. See Lee Paikin, *The Issuance of Search Warrants: A Manual* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1980), p. 41.

106. See note 55, *supra*.

107. *Re Worrall*, [1965] 2 C.C.C. 1 (Ont. C.A.), at p. 5.

108. *Nimbus News*, *supra*, note 101, p. 321.

109. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (Ont. Prov. Ct.).

110. *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.), at p. 709.

111. Not one instance of a warrant issued under paragraph 443(1)(*c*) showed up in the judicial panel sample selected in our warrant survey.

112. These were among the objects commonly cited as seized by peace officers reporting in our warrant survey. See note 55, *supra*.

113. Kaplan, note 37, *supra*, p. 478. See also Frederick Pollock and F. W. Maitland, *The History of English Law*, 2nd ed., vol. 2 (Cambridge: University Press, 1911), p. 474.

114. *Re Hicks and The Queen*, *supra*, note 90, p. 96.

115. See text, *supra*, paras. 423-435.

116. *Criminal Code*, R.S.C. 1970, c. C-34, s. 247.

117. *Criminal Code*, R.S.C. 1970, c. C-34, s. 76.1.

118. See, for example, *The Child Welfare Act*, R.S.M. 1970, c. C-80, s. 9(1).

119. *ALI Code*, *supra*, note 23, s. 210.3(1)(*d*).

120. *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(*a*), as amended April 30, 1979.

121. *Eccles* v. *Bourque, Simmonds and Wise* (1975), 27 C.R.N.S. 325 (S.C.C.), at p. 326.

122. This power was recognized by the Ouimet Committee in its report: *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 59 (hereinafter cited as the "Ouimet Report"). See text, *supra*, Part One, paras. 129-130.

123. See text, *supra*, para. 37.

124. See text, *supra*, Part One, paras. 229-232.

125. Ericson, *Making Crime*, *supra*, note 10, p. 154.

126. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61.

127. *ALI Code*, *supra*, note 23, s. 240.2.

128. See text, *supra*, Part One, paras. 221-225.

129. Ouimet Report, *supra*, note 122, p. 41.

130. Project on Law Enforcement Policy, Arizona State University Law School, "Model Rules for Law Enforcement: Warrantless Searches of Persons and Places" (1973), 9 Crim. L. Bull. 645, at p. 680.

131. Ericson, *Making Crime*, *supra*, note 10, p. 154.

132. Arthur Maloney, "The Court and the Police Functions in the Developing of Effective Canadian Corrections" (1960), 2 Crim. L.Q. 164, at p. 177.

133. Ouimet Report, *supra*, note 122, p. 119.

134. Harry Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968), p. 76.

135. *Chromiak* v. *The Queen* (1979), 49 C.C.C. (2d) 257 (S.C.C.).

136. *Criminal Code*, R.S.C. 1970, c. C-34, s. 234.1.

137. See text, *supra*, para. 20.

138. See Martin R. Gardner, "Consent as a Bar to Fourth Amendment Scope — A Critique of a Common Theory" (1980), 71 J. Crim. L. & Criminology 443. Gardner's article also canvasses authorities against this position.

139. *Ibrahim* v. *The King*, [1914] A.C. 599 (P.C.), at p. 609.

140. *Boudreau* v. *The King*, [1949] S.C.R. 262, at p. 269.

141. *Goldman* v. *The Queen* (1979), 51 C.C.C. (2d) 1.

142. *Ibid.*, p. 24.

143. *Rosen* v. *The Queen* (1979), 51 C.C.C. (2d) 65, at p. 75.

144. *Goldman* v. *The Queen*, *supra*, note 141, p. 24.

145. *Schneckloth* v. *Bustamonte* (1972), 412 U.S. 218, at pp. 248-249.

146. See, for example, Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada* (New York: M. E. Sharpe, 1980).

147. RCCP Report, *supra*, note 17, p. 37.

148. Instructions regarding consent search were included in R.C.M.P., *Operational Manual* from "O" Division, circulated in 1977. Other divisions of the R.C.M.P. told our researchers that they did not use such guidelines.

149. David Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell, 1979), p. 61.

150. *Report of the Commission of Inquiry Relating to the Security and Investigation Services Branch within the Post Office Department* (Ottawa: Supply and Services, 1981), p. 159.

151. RCCP Report, *supra*, note 17, p. 37.

152. *Criminal Investigation*, *supra*, note 24, p. 97.

153. *Laporte* v. *Laganière J.S.P.* (1972), 18 C.R.N.S. 357 (Qué. Q.B.), at p. 365.

154. *Leigh* v. *Cole*, *supra*, note 61.

155. *Bessell* v. *Wilson* (1853), 20 L.T. 233.

156. Dangerous driving, according to subsection 233(4) of the *Criminal Code*, R.S.C. 1970, c. C-34, is a hybrid offence; accordingly, an officer could release an accused after arrest under paragraph 452(1)(*b*).

157. *ALI Code*, *supra*, note 23, s. 230.2

158. This matter is being addressed by the Law Reform Commission of Canada in a separate Working Paper.

159. See *New York* v. *Belton*, *supra*, note 21; *Robbins* v. *California*, *supra*, note 20; and *United States* v. *Ross*, *supra*, note 21.

160. See text, *supra*, paras. 146-147.

161. *Chimel* v. *California* (1960), 395 U.S. 752, at p. 763.

162. RCCP Report, *supra*, note 17, p. 63.

163. See, for example, *R.* v. *Stonechild* (1981), 61 C.C.C. (2d) 251 (Man. Co. Ct.) and *R.* v. *Landry* (1981), 63 C.C.C. (2d) 289 (Ont. C.A.). The latter case, which is on appeal to the Supreme Court of Canada, may conflict with *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 121.

164. See, for example, the dissent of Frankfurter J. in *United States* v. *Rabinowitz* (1950), 339 U.S. 56, at p. 79.

165. See text, *supra*, paras. 211-219.

166. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443.

167. See text, *supra*, paras. 267-270.

168. See text, *supra*, paras. 288-298.

169. See text, *supra*, paras. 32-33.

170. See text, *supra*, Part One, para. 125.

171. See text, *supra*, paras. 32-33.

172. *ALI Code*, *supra*, note 23, s. 230.1(2).

173. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (Alta. C.A.), at p. 302.

174. See text, *supra*, paras. 423-435.

175. *United States* v. *Ross*, *supra*, note 21.

176. *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 121, p. 330.

177. See text, *supra*, Part One, para. 98 for an explanation of why narcotic and drug legislation is considered to be "crime related".

178. See note 97, *supra*.

179. *Criminal Code*, R.S.C. 1970, c. C-34, s. 312; *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 3.

180. See text, *supra*, Part One, para. 54.

181. Search powers related to motor vehicles may be found in provincial liquor legislation. R.S.B.C. 1979, c. 237, s. 67; R.S.A. 1980, c. L-17, ss. 115, 117; R.S.S. 1978, c. L-18, s. 131; R.S.M. 1970, c. L160, s. 248; R.S.O. 1980, c. 244, s. 48(2); R.S.N.B. 1973, c. L-10, ss. 163, 165; R.S.N.S. 1967, c. 169, s. 126; R.S.P.E.I. 1974, c. L-17, s. 60; S.N. 1973, c. 103, s. 93.

182. *Chambers* v. *Maroney* (1969), 399 U.S. 42, at pp. 50-51.

183. *ALI Code*, *supra*, note 23, s. 260.3.

184. RCCP Report, *supra*, note 17, p. 30.

185. See text, *supra*, paras. 157-163.

186. *Chromiak* v. *The Queen*, *supra*, note 135.

187. *Robbins* v. *California*, *supra*, note 20.

188. *New York* v. *Belton*, *supra*, note 21.

189. *United States* v. *Ross*, *supra*, note 21.

190. See text, *supra*, Part One, paras. 55-56.

191. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 60(1)(*d*).

192. Elisabeth Scarff, Ted Zaharchuk, Terrence Jacques and Michael

McAuley, *Evaluation of the Canadian Gun Control Legislation: First Progress Report* (Ottawa: Supply and Services, 1981), pp. 129-133.

193. *United States* v. *Rubin*, 474 F. 2d 262 (3d. Circ.) cert. denied (1973), 414 U.S. 833, at p. 268. See also: Linda Mullenbach, "Warrantless Residential Searches to Prevent the Destruction of Evidence" (1979), 70 J. Crim. L. & Criminology 255.

194. RCCP Report, *supra*, note 17, p. 33.

195. *ALI Code*, *supra*, note 23, s. 230.1(1).

196. *Ibid.*, Commentary, p. 263.

197. RCCP Report, *supra*, note 17, pp. 26-27.

198. See text, *supra*, Part One, para. 81.

199. Advisory Committee on Drug Dependence [Home Office], *Powers of Arrest and Search in Relation to Drug Offences* (London: Her Majesty's Stationery Office, 1970), p. 39.

200. Richard V. Ericson, *Reproducing Order* (Toronto: University of Toronto Press, 1982), p. 157.

201. See note 55, *supra*.

202. See text, *supra*, Part One, paras. 19-21.

203. *R.* v. *Whitfield*, [1970] S.C.R. 46.

204. L. H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975), pp. 50-51. See *Barnett and Grant* v. *Campbell* (1902), 21 N.Z.L.R. 484 (C.A.) at p. 493, *per* Cooper J.

205. *Dillon* v. *O'Brien*, *supra*, note 60.

206. The following are examples of things, possession of which constitutes an indictable or hybrid offence under the *Criminal Code*, R.S.C. 1970, c. C-34: a forged passport (s. 58(3)), a concealed weapon (s. 87), a prohibited weapon (s. 88), an unregistered restricted weapon (s. 89), a stolen credit card (s. 301.1), property obtained by crime (s. 312) and counterfeit money (s. 408). In addition, there are the possession offences under section 3 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and sections 34(2) and 41 of the *Food and Drugs Act*, R.S.C. 1970, c. F-27.

207. *Criminal Code*, R.S.C. 1970, c. C-34, s. 450(1)(*b*).

208. See text, *supra*, para. 158.

209. *The Brixton Disorders, 10-12 April, 1981*, Report of an Inquiry by the Rt. Hon. Lord Scarman, Cmnd. 8427 (1982), pp. 56-61.

210. See, for example, the Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974, *Report* (1975)

(hereinafter cited as the "Pringle Report").

211. See, for example, Peter K. MacWilliams, "Illegality of Random Searches" (1979), 27 Chitty's L.J. 199.

212. *Moore* v. *The Queen*, [1979] 1 S.C.R. 115; *Dedman* v. *The Queen* (1981), 59 C.C.C. (2d) 97 (Ont. C.A.).

213. See text, *supra*, paras. 257-258.

214. *Re Worrall*, *supra*, note 107, p. 11. Although Roach J.A. was writing in dissent, the majority did not disagree on this point.

215. *Re Den Hoy Gin* (1965), 47 C.R. 89 (Ont. C.A.).

216. See Arthur Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates" (1973), 64 J. of Crim. L. and Criminology 270.

217. *Campbell* v. *Clough* (1979), 61 A.P.R. 249 (P.E.I. S.C.), at p. 251.

218. See note 55, *supra*.

219. *R.* v. *Colvin; Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), at p. 11.

220. See text, *supra*, Part One, para. 219.

221. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

222. See *United States* v. *Chadwick* (1977), 433 U.S. 1, at p. 9, *per* Burger C.J.

223. See P. A. Kolers, "Readibility" in Friedland, *supra*, note 22, pp. 136-8.

224. James Fontana, *The Law of Search Warrants in Canada* (Toronto: Butterworths, 1974), p. 7.

225. *Re Pacific Press and The Queen*, *supra*, note 34.

226. Ericson, *Making Crime*, *supra*, note 10, pp. 152-53.

227. For case-law on forum-shopping in the context of arrest warrants, see *R.* v. *Allen* (1974), 20 C.C.C. (2d) 447 (Ont. C.A.).

228. Recent Canadian cases on particularity include *Re Abou-Assale and Pollock and The Queen* (1978), 39 C.C.C. (2d) 546 (Qué. S.C.), *PSI Mind*, *supra*, note 59, and *Royal American Shows Inc.* v. *The Queen*, [1975] 6 W.W.R. 571 (Alta. S.C.).

229. See *The Issuance of Search Warrants*, *supra*, note 105, p. 17.

230. See also the approach of the Advisory Committee on Drug Dependence, *supra*, note 199, p. 42.

231. *Re Newfoundland & Labrador Corp. Ltd.* (1974), 6 Nfld. & P.E.I.R. 274 (Nfld. C.A.).

232. *Re Abou-Assale and Pollock and The Queen*, *supra*, note 228.

233. *Regency Realties Inc.* v. *Loranger* (1961), 36 C.R. 291 (Qué. S.C.).

234. The judicial panellists evaluating the Montréal documents (and indeed the judicial panel as a whole) were provided with *The Issuance of Search Warrants*, *supra*, note 105, a handbook prepared for the Commission. The handbook outlined all of the relevant cases, including *Abou-Assale* and *Regency Realties Inc.* In evaluating the documents, it is evident that the panellists were inclined towards the stricter view adopted in the latter case. See note 262, Part One, *supra*.

235. *Re Lubell and The Queen* (1973), 11 C.C.C. (2d) 188 (Ont. H.C.), at p. 190.

236. For a discussion of informer privilege, see *Bisaillon* v. *Keable and Attorney General of Québec* (1980), 17 C.R. (3d) 193 (Qué. C.A.), at p. 232, *per* L'Heureux-Dubé J.A.

237. *Re Newfoundland & Labrador Corp. Ltd.*, *supra*, note 231, p. 281.

238. See *Royal American Shows Inc.* v. *The Queen*, *supra*, note 228. According to the Laycraft Report, the fact that the basis of the search warrant application was an intercepted communication was unknown to Mr. Justice Cavanagh, who heard the motion to quash the search warrant: *Royal American Shows Inc. and Its Activities in Alberta, Report of a Public Inquiry* (June, 1978), p. B-27.

239. The only exceptions to this rule are found in sections 101, 160, and 281.3 of the *Criminal Code*, R.S.C. 1970, c. C-34.

240. See, for example, *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 24(3).

241. New Brunswick actually retains justice of the peace legislation. *The Justice of the Peace Act*, R.S.N.B. 1952, c. 122, was not consolidated in the 1973 revised statutes, but nor has it been repealed. Justices are simply no longer appointed in the province.

242. Alberta Board of Review, *Administration of Justice in the Provincial Courts of Alberta* (1975), at p. 18 (hereinafter cited as the "Kirby Report").

243. See note 55, *supra*.

244. See sections 455.3, 457, 465, and 720 of the *Criminal Code*, R.S.C. 1970, c. C-34, respectively.

245. Pringle Report, *supra*, note 210, p. 20.

246. Royal Commission of Inquiry into Civil Rights, *Report Number One* (1968), p. 518. (hereinafter cited as the "McRuer Report").

247. The *Crown Attorneys Act*, R.S.O. 1980, c. 107, s. 12(*h*), and *The Crown Attorneys Act*, R.S.M. 1970, c. C330, s. 6(1)(*b*).

248. Royal Commission on Justices of the Peace, 1946-48, *Report* (London: Her Majesty's Stationery Office, 1948), and *The Training of Justices of the Peace in England and Wales* (London: Her Majesty's Stationery Office, 1965).

249. *Coolidge* v. *New Hampshire*, *supra*, note 166.

250. The Kirby Report, *supra*, note 242, and the McRuer Report, *supra*, note 246, are two examples.

251. Kirby Report, *supra*, note 242, p. 20.

252. Law Reform Commission of Canada, *Control of the Process* [Working Paper 15] (Ottawa: Information Canada, 1975), p. 41.

253. ALRC, Report #2, *supra*, note 24, p. 95.

254. See, for example, *People* v. *Aguirre* (1972), 103 Cal. R. 153. For a discussion of oral search warrant cases, see Paul D. Beechen, "Oral Search Warrants: A New Standard of Warrant Availability" (1973), 21 U.C.L.A. L. Rev. 691, at p. 694.

255. For an excellent example of an oral warrant system at work, see Charles E. Bell, "Telephonic Search Warrants" (1976), 5 San Diego City L. Enforcement Q. 10.

256. Beechen, *supra*, note 254, p. 702.

257. Bell, *supra*, note 255.

258. Hale, *supra*, note 36, p. 150.

259. Hawkins, while speaking expressly of warrants to arrest, encompasses within this subject the warrants to search for stolen goods which Hale had developed. In so doing he concedes that a warrant could be directed to "any constable or even a private person". See William Hawkins, *A Treatise of the Pleas of the Crown*, vol. II, 8th ed. (London: Sweet and Maxwell, 1824), p. 130.

260. *Criminal Code*, R.S.C. 1970, c. C-34, s. 449(3).

261. *Hetu* v. *Dixville Butter and Cheese Association* (1908), 40 S.C.R. 128, at p. 132.

262. Law Reform Commission of Canada, *Control of the Process*, *supra*, note 252, p. 41.

263. This proposition may be traced to the seventeenth-century philosopher, Thomas Hobbes. See Hobbes, *Leviathan* (London: Penguin, 1968), pp. 227-8, and also Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (New York: Franklin, 1883), p. 184.

264. *Fanning* v. *Gough* (1908), 18 C.C.C. 66 (P.E.I. S.C.).

265. *R.* v. *Solloway & Mills* (1930), 53 C.C.C. 271 (Ont. S.C. A.D.).

266. *Re Old Rex Café* (1972), 7 C.C.C. (2d) 279 (N.W.T. Terr. Ct.).

267. *Re Goodbaum and The Queen*, *supra*, note 221.

268. Hale, *supra*, note 36.

269. For example, of the section 443 warrants captured in our survey that were valid by day only, 87% were executed by day. See note 55, *supra*.

270. See the *French Code of Criminal Procedure*, article 59 (12-31-57); the translation used in preparing this study was by Kock, *The French Code of Criminal Procedure* (South Hackensack, New Jersey: Rothman, 1964). Substantial amendments to this Code, sharply curtailing the role of the *juge d'instruction*, were recently introduced, but these did not affect the provisions relevant to the present study.

271. *Crimes Act* 1914 (Cwlth., No. 12), s. 10.

272. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61(4)(*b*)(ii).

273. William E. Ringel, *Searches & Seizures, Arrests and Confessions* (New York: Clark Boardman, 1972), p. 243.

274. *Regina* v. *Execu-Clean Ltd.*, unreported, January 30, 1980 (Ont. H.C.).

275. See note 55, *supra*.

276. *R.* v. *Adams*, [1980] 1 All E.R. 473 (C.A.).

277. See note 55, *supra*.

278. See *The Liquor Control Act*, R.S.M. 1970, c. L160, s. 244(1).

279. See the RCCP Report, *supra*, note 17, p. 36, and the *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61(5)(*a*)(iii) and s. 61(5)(*b*)(iv).

280. For other expiry periods see the *ALI Code*, *supra*, note 23, s. 220.2(2)(*g*) (5 days), and the American *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(*c*)(1) (10 days).

281. Metropolitan Toronto Police, *Training Précis, Search of Persons and Premises* (March, 1978), p. 19.

282. See note 55, *supra*.

283. *Chic Fashions (West Wales) Ltd.* v. *Jones*, [1968] 2 Q.B. 299 (C.A.), at p. 313.

284. See text, *supra*, paras. 316-321.

285. *Stanley* v. *Georgia* (1969), 394 U.S. 557, at p. 572.

286. See text, *supra*, paras. 267-270.

287. Law Reform Commission of Canada, *The General Part — Liability*

and Defences [Working Paper 29] (Ottawa: Supply and Services, 1982), p. 111.

288. See text, *supra*, paras. 271-298.

289. See text, *supra*, para. 412.

290. *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.). See also *Harbison* v. *Chicago, R.I. and R.R. Co.* (1931), 37 S.W. Rep. 2d 609 (Mo. Sup. Ct.).

291. Ontario Police College, *Probationary Constable Training Outline*, Part A, No. 5, p. 1.

292. Metropolitan Toronto Police, *Training Précis, Narcotics & Drugs Programme*, Appendix (September, 1977), pp. 47-48.

293. See text, *supra*, paras. 288-298.

294. *Semayne's Case* (1603), 5 Co. Rep. 91a, 77 E.R. 194 (K.B.), at p. 195.

295. *Wah Kie* v. *Cuddy (No. 2)* (1914), 23 C.C.C. 383 (Alta. C.A.).

296. *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 121, p. 330.

297. See *Dunfee* v. *State* (1975), 346 A. 2d 173 (Del. Supr.), and *U.S.* v. *Johns* (1972), 466 F. 2d 1364 (C.A. 5th Cir.).

298. *U.S.* v. *West* (1964), 328 F. 2d 16 (C.A. 2d. Cir.).

299. *Levitz* v. *Ryan*, *supra*, note 290.

300. *ALI Code*, *supra*, note 23, s. 220.3(4).

301. On some warrants issued in Montréal at the time of our warrant survey, the "reasonable grounds" on the information were duplicated on the warrant due to use of carbons. However, these grounds were usually specified merely as "police investigation".

302. See text, *supra*, paras. 304-315.

303. RCCP Report, *supra*, note 17, p. 29.

304. *Levitz* v. *Ryan*, *supra*, note 290.

305. See text, *supra*, Part One, paras. 17-27 for our distinction between powers of arrest and search and seizure.

306. *Scott* v. *The Queen* (1975), 24 C.C.C. (2d) 261 (F.C.A.).

307. RCCP Report, *supra*, note 17, p. 29.

308. *French Code*, *supra*, note 270, arts. 57, 66, and 96.

309. Metro Toronto Police, *supra*, note 281, p. 19.

310. *Entick* v. *Carrington* (1765), St. Tr. 1067.

311. *Federal Rules of Criminal Procedure* 18 U.S.C. Rule 41(*d*).

312. RCCP Report, *supra*, note 17, p. 36.

313. See text, *supra*, paras. 131-133.

314. See text, *supra*, paras. 237-238.

315. *Coolidge*, *supra*, note 166, p. 467.

316. *Ibid.*, p. 468.

317. Sheldon R. Shapiro, *Annotation: Search and Seizure: Observation of Objects in "Plain View" — Supreme Court Cases* (1972), 29 L. Ed. 2d 1067, at p. 1069.

318. *Ibid.*, p. 1073.

319. *Coolidge*, *supra*, note 166, pp. 467-68, 471.

320. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(1)(*b*).

321. *R.* v. *Jaagusta* (1974), 3 W.W.R. 766; followed in *R.* v. *Erickson* (1978), 39 C.C.C. (2d) 447 (Ont. Dist. Ct.).

322. Pringle Report, *supra*, note 210.

323. *Ibid.*, pp. 59 and 72. Slightly different instructions, permitting strip searches "on reasonable and probable grounds that the suspect has physical possession of evidence or a weapon", were found in a 1977 divisional R.C.M.P. Operational Manual.

324. See note 55, *supra*.

325. *Ybarra* v. *Illinois* (1979), 444 U.S. 85.

326. See, *The Brixton Disorders*, *supra*, note 209.

327. *Ybarra*, *supra*, note 325, uses both "reasonableness" and "probable cause" criteria.

328. *Terry* v. *Ohio* (1967), 392 U.S. 1.

329. RCCP Report, *supra*, note 17, p. 29.

330. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 57(1).

331. See text, *supra*, Part One, para. 81.

332. See notes 23-24, *supra*, as well as sections 101 and 353 of the *Criminal Code*, R.S.C. 1970, c. C-34.

333. This comment may also be directed at section 101, which permits searches without warrant when search with warrant would be impracticable. The history of section 101 discloses that the warrant provision was enacted before the provision for warrantless search and that when the latter was introduced it was envisaged as applicable only in exceptional cases. See text, *supra*, Part One, paras. 173-177.

334. See text, *supra*, Part One, para. 207.

335. Of personal searches in the course of executed *Narcotic Control Act* and *Food and Drugs Act* warrants reported in our warrant survey, 22.4% were reported to involve strip search and 0.1%, internal search. The corresponding figures for other kinds of warrants were 5.3% and 0.5%. See note 55, *supra*.

336. See text, *supra*, para. 273.

337. *Giordano* v. *State* (1953), 100 A. 2d 31 (Md. C.A.).

338. *Rex* v. *Gibson* (1919), 30 C.C.C. 308 (Alta. S.C.).

339. *Royal American Shows Inc.*, *supra*, note 228.

340. See text, *supra*, Part One, para. 232.

341. See *State* v. *De Simone* (1972), 288 A. 2d 849 (N.J. Sup. Ct.), for a discussion of the problem.

342. *Criminal Investigation*, *supra*, note 24, p. 58. The ALRC recommendations were implemented in the *Customs Amendment Act* 1979 (Cwlth., No. 92), s. 6, under which searches of body cavities must be authorized by warrant and carried out by a medical practitioner.

343. Pringle Report, *supra*, note 210, p. 63.

344. Advisory Committee on Drug Dependence, *supra*, note 199, p. 39.

345. Pringle Report, *supra*, note 210.

346. See for example, the Ontario Police College, *Search and Seizure Précis* (1976), p. 31.

347. *Laporte* v. *Laganière J.S.P.*, *supra*, note 153.

348. *Rochin* v. *California* (1981), 342 U.S. 165.

349. Louis S. Goodman and Alfred Zack Gilman (eds.), *The Pharmacological Basis of Therapeutics*, 4th ed. (New York: Macmillan, 1970), p. 381 (cocaine), p. 247 (morphine and other opiates), p. 108 (barbiturates).

350. *Scott* v. *The Queen*, *supra*, note 306, p. 269.

351. See text, *supra*, paras. 271-275.

352. This statement of R.C.M.P. policy was set out in the Pringle Report, *supra*, note 210, p. 60.

353. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.1.

354. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12, p. 194.

355. *Ibid.*, p. 205.

356. *MacIntyre* v. *Attorney General of Nova Scotia and Grainger* (1980),

38 N.S.R. (2d) 633, at p. 655.

357. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12, p. 192.

358. *Realty Renovations Ltd.* v. *Attorney General of Alberta* (1978), 44 C.C.C. (2d) 249, at p. 253. This conclusion was also reached by the British Royal Commission on Criminal Procedure. See RCCP Report, *supra*, note 17, p. 36.

359. *Privacy Act*, S.C. 1980-81-82, c. 111, Sch. II, s. 3.

360. See the United States *Freedom of Information Act*, Title 5 U.S.C. (1976), s. 552(b)(e)(7) which exempts: "investigatory records compiled for law enforcement purposes ... to the extent that the production of such records would ... constitute an unwarranted invasion of personal privacy."

361. *Kimber* v. *The Press Association Ltd.*, [1893] 1 Q.B. 65 (C.A.), at p. 68.

362. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12, p. 191.

363. See text, *supra*, paras. 460-468.

364. *Canadian Bill of Rights*, s. 1(*f*). See also the *Canadian Charter of Rights and Freedoms*, s. 2(*b*).

365. *Re F.P. Publications (Western) Ltd. and The Queen* (1979), 51 C.C.C. (2d) 110.

366. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 457.2(1) and 467(1).

367. Of the 1,879 executed warrants reported in our warrant survey, 14.6% involved searches of telephone companies.

368. See, for example, J. S. Williams, *The Legal Protection of Privacy* (Ottawa: Information Canada, 1974).

369. See text, *supra*, para. 296.

370. *ALI Code*, *supra*, note 23, ss. 280.2(2).

371. See text, *supra*, Part One, note 262.

372. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 495.

373. *Criminal Code*, R.S.C. 1970, c. C-34, s. 629.

374. See text, *supra*, Part One, note 262.

375. *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C. S.C.), at p. 341.

376. 42 U.S.C. 2000 aa 11.

377. See text, *supra*, paras. 62-63.

378. *Business Practices Act*, R.S.O. 1980, c. 55, s. 12(1).

379. The Uniform Law Conference of Canada was held in Saskatoon, August 16-25, 1979. The freezing order scheme was adopted by the Criminal Law Section. See the Uniform Law Conference of Canada, *Proceedings of the Sixty-First Annual Meeting* (1979), p. 44.

380. Henderson Report, *supra*, note 92. Attached to the Report was draft legislation. Interim freezing orders were covered in section 6.

381. 18 U.S.C. 1963 (b). For a discussion of the scope of freezing orders under American legislation, see Harry Myers and Joseph P. Brzostowski, *Drug Agents' Guide to Forfeiture of Assets* (Washington: U.S. Gov't. Printing Office, 1981), pp. 331-333.

382. *West Mercia Constabulary* v. *Wagener*, [1982] 1 W.L.R. 127 (Q.B.).

383. *Criminal Law Amendment Act, 1978*, (Bill C-21), s. 59. The sealing procedure set up by this legislation was endorsed by the Canadian Bar Association in a motion calling for protection of the solicitor-client privilege: Resolution No. 11, passed August 28, 1980.

384. As this Working Paper is being completed, no decision in *Mierzwinski* has been delivered by the Supreme Court.

385. *R.* v. *Colvin*, *supra*, note 219.

386. *Combines Investigation Act*, R.S.C. 1970, c. C-23.

387. *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70 (F.C.A.), at pp. 78-79.

388. *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 232.

389. Manitoba Law Reform Commission, *Report on Enforcement of Revenue Statutes* (1979), pp. 24-25.

390. *Canadian Charter of Rights and Freedoms*, s. 2(*b*).

391. *Zurcher* v. *Stanford Daily* (1978), 436 U.S. 547.

392. *The Privacy Protection Act of 1980*, introduced in response to the *Zurcher* case, contains provisions which would in large measure overrule the majority opinion, subject to a number of exceptions, including the need to intervene in cases of national security and danger to human life. It is now unlawful to search for or seize "work product" materials in the possession of journalists: 42 U.S.C. 2000 aa.

393. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 494.

394. See text, *supra*, paras. 324-330.

395. *Senior* v. *Holdsworth; Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23.

396. *Ibid.*, p. 34.

397. *Reid* v. *Telegram Publishing Co. Ltd. and Area* (1961), 28 D.L.R. (2d) 6.

398. *McConachy* v. *Times Publishers Ltd.* (1964), 49 D.L.R. (2d) 349.

399. *Rapport de la Commission d'enquête sur des opérations policières en territoire québécois* (Québec: Gouvernement du Québec, 1981) (hereinafter cited as the "Keable Report").

400. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law* (Second Report); (Ottawa: Supply and Services, 1981) (hereinafter cited as the "McDonald Report").

401. Keable Report, *supra*, note 399, p. 423. McDonald Report, *supra*, note 400, p. 1019.

402. Keable Report, *supra*, note 399, pp. 247-308.

403. *Ibid.*, p. 259.

404. McDonald Report, *supra*, note 400, pp. 115-117.

405. A public submission to the McDonald Commission by the R.C.M.P. concluded that "when the legality of intelligence probes is considered, their legality is less than clear".

406. The McDonald Report's position was criticized in a memorandum, dated June 14, 1981, prepared for the Department of Justice by the law firm of Lang, Michener, Farquharson and Wright. It was released by the Department on August 27, 1981, along with a memorandum by the Honorable Wishart Spence, the former puisne judge of the Supreme Court of Canada.

407. *Re Bell Telephone Company of Canada*, *supra*, note 56, p. 197.

408. *Ghani* v. *Jones, supra,* note 110, and *Eccles* v. *Bourque, Simmonds and Wise, supra*, note 121, are cited in the Lang, Michener memorandum, note 406.

409. *Colet* v. *The Queen* (1981), 57 C.C.C. (2d) 105 (S.C.C.).

410. *R.* v. *Dass* (1979), 47 C.C.C. (2d) 194 (Man. C.A.); leave to appeal to the Supreme Court of Canada denied at p. 214 .

411. *United States* v. *Dalia* (1979), 441 U.S. 238.

412. See, for example, *Wah Kie* v. *Cuddy (No. 2)*, *supra*, note 295. In American case-law it has been held that the "no knock" rule is not confined to covert entry: *United States* v. *Dalia*, *supra*, note 411, pp. 247-248.

413. McDonald Report, *supra*, note 400, p. 1019.

414. *Ibid.*, pp. 592-598.

415. *Ibid.*, pp. 571-572.

416. *Ibid.*, pp. 594-596 and in particular, subsections (2)(a) and 8(c) of the proposed legislation.

417. See text, *supra*, Part One, paras. 78-79.

418. McDonald Report, *supra*, note 400, pp. 140, 570.

419. See text, *supra*, paras. 42-50.

420. See text, *supra*, Part One, para. 73.

421. McDonald Report, *supra*, note 400, p. 108.

422. See text, *supra*, paras. 55-60.

423. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12.

424. See Recommendations 26, 27, 28, 29, 35 and 36.

425. *McDonald Report*, *supra*, note 400, p. 1019.

426. *Ibid.*, pp. 115-117.

427. *Ibid.*, p. 116.

428. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.22. See also Canada, House of Commons, *Standing Committee on Justice and Legal Affairs, Minutes of Proceedings*, June 5, 1973, p. 13: 6 and *House of Commons Debates*, November 27, 1973, p. 8199.

429. Louise Savage, "An Analysis of the Federal and Provincial Annual Reports relating to the Use of Court Authorized Electronic Surveillance by Law Enforcement Officials in Canada" (an unpublished study prepared for the Law Reform Commission of Canada, 1979), pp. 69-76.

430. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 178.12(3) and 178.23(3).

431. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.14.

432. See text, *supra*, paras. 55-61.

433. See the Keable Report, *supra*, note 399, pp. 241-308, 349-379.

434. *Gouled* v. *United States* (1921), 255 U.S. 298, at p. 306.

435. *United States* v. *Dalia*, *supra*, note 411, p. 247.

436. See, for example, Bill C-26, 1977-78, which would have added a mail-opening power to the *Criminal Code*. See also Recommendation 268 of the McDonald Report, *supra*, note 400, p. 1113.

437. See text, *supra*, Part One, paras. 84-95.

438. See, for example, *Payton* v. *New York* (1979), 445 U.S. 573, at pp. 583-584.

439. R.S.C. 1970, c. C-40, s. 139.

440. R.S.C. 1970, c. E-12, s. 76.

441. These requirements are set out in the 1980 R.C.M.P. Operations Manual.

442. See text, *supra*, para. 321.

443. See text, *supra*, Part One, para. 71.

444. Solicitor General Robert Kaplan has indicated his willingness to apply greater safeguards, but at the time of completion of this Working Paper, he has not put forward specific proposals. See "Kaplan Pushing to Renovate R.C.M.P. Search and Seizure Power", *Globe & Mail*, October 30, 1981.

445. These proposals were contained in a press release, dated April 6, 1978, issued by the Minister of Justice. See also "Ottawa Retreats from Its Intention to Abolish Long-running Search Writs", *Globe & Mail*, March 14, 1978.

446. *Re Writs of Assistance*, [1965] 2 Ex. C.R. 645.

447. See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, November 26, 1981, p. 56: 38, for statements of Solicitor General Robert Kaplan in this regard.

448. See note 97, *supra*. While 80% of writs reported in our survey resulted in something being seized, 63% resulted in the seizure of the object which the officer specified in his account of the grounds for search. The figures for *Narcotic Control Act* and *Food and Drugs Act* writs are higher: 94% and 71%.

449. See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, November 26, 1981, p. 56: 25. See also the Ouimet Report, *supra*, note 122, pp. 65-67.

450. See text, *supra*, Part One, para. 210.

451. See note 163, *supra*.

452. See text, *supra*, paras. 211-219.

453. Ouimet Report, *supra*, note 122, pp. 65-67.

454. A possession offence was reported in 29% of the 165 instances of writ use, a trafficking offence (including possession for the purpose of trafficking) in 28.5%. Heroin was reported as sought in almost half of the possession cases.

455. ALRC, *Criminal Investigation*, *supra*, note 24, p. 92.

456. Bill C-53, 1980-81, s. 11. [Ed. note: See S.C. 1980-81-82, c. 125, s. 12].

457. But see *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*,

[1964] 3 C.C.C. 82 (B.C. S.C.).

458. See text, *supra*, Part One, paras. 145-146.

459. Foster, *supra*, note 457.

460. Of the searches of bawdy- and gaming-houses reported in the warrant survey, 125 were performed with section 443 warrants, 82 with section 181 warrants. This was largely a product of the situation reported in Montréal, in which the relevant figures were 109 and 55 respectively. Toronto and Edmonton also showed a division of gaming- and bawdy-house searches between section 443 and section 181 warrants. See *supra*, Part One, note 262.

461. *Re Sommerville's Prohibition Application* (1962), 38 W.W.R. 344 (Sask. Q.B.), at p. 351.

462. *Rockert* v. *The Queen*, [1978] 2 S.C.R. 704.

463. Law Reform Commission of Canada, *Our Criminal Law*, *supra*, note 49, p. 35.

464. See text, *supra*, paras. 97-100.

465. See text, *supra*, Part One, paras. 178-180.

466. Law Reform Commission of Canada, *Theft and Fraud* [Working Paper No. 19] (Ottawa: Supply and Services, 1977), p. 57.

467. See, for example, Ontario Police College, *Search and Seizure Précis* (May, 1976), p. 27.

468. Statistics provided by Canadian Centre for Justice Statistics.

469. *Ibid.*

470. See, for example, *The Prevention of Cruelty to Animals Act*, R.S.B.C. 1979, c. 335.

471. See note 467, *supra*.

472. See note 55, *supra*.

473. In what was intended as a pilot study of warrantless search practices, the Law Reform Commission carried out a self-reporting survey in a downtown Toronto division over a ten-day period. Of the 371 person searches and 73 vehicle searches captured, 19.4% and 35.6% respectively were reported as including drugs as an object.

474. *Misuse of Drugs Act 1971*, s. 23(3) (U.K.).

475. RCCP Report, *supra*, note 17, p. 33.

476. *Payton* v. *New York*, *supra*, note 438, pp. 586-587.

477. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 60(1), and ALRC, *Criminal Investigation*, *supra*, note 24, p. 96.

478. *Misuse of Drugs Act 1975*, (Cwlth., No. 112) s. 18(2).

479. See text, *supra*, paras. 147-150.

480. See text, *supra*, Part One, para. 159.

481. *Ybarra* v. *Illinois*, *supra*, note 325.

482. Pringle Report, *supra*, note 210, p. 70.

483. See note 55, *supra*. Seizures of objects "in clear view" accounted for 47.3% of marijuana seizures and 10% of chemicals seizures. Corresponding figures for "cupboards, drawers, files, etc." were 47.4% and 43.6%.

484. S.C. 1960-61, c. 35, s. 10; S.C. 1960-61, c. 37, s. 1.

485. See text, *supra*, paras. 244-249.

486. See text, *supra*, Part One, para. 139. If the search and seizure powers were removed from the *Narcotic Control Act*, R.S.C. 1970, c. N-1, *Goodbaum*, *supra*, note 221, would arguably lose its value as a precedent and the general rules in the *Criminal Code*, R.S.C. 1970, c. C-34, would be applicable to narcotic searches.

487. See text, *supra*, para. 50.

488. See text, *supra*, paras. 42-44.

489. See, for example, *R.* v. *Penthouse Magazine* (1977), 37 C.C.C. (2d) 376 (Ont. Co. Ct.).

490. *R.* v. *Pipeline News* (1971), 5 C.C.C. (2d) 71 (Alta. Dist. Ct.).

491. In *R.* v. *Penthouse International Ltd.* (1979), 23 O.R. (2d) 786, for example, the Ontario Court of Appeal handed down its decision eighteen months after the seizure.

492. See the Law Reform Commission of Canada, *Study Paper on Obscenity* (December, 1972), p. 66. At pp. 131-134 of the study, there is a tabulation of replies to a survey of local police practices. Only in Ottawa, Ontario, which reported 248 warrants issued under section 160 in 1970, could the use of these warrants be termed frequent. In Montréal, by contrast, one warrant was reported issued in 1971-72, as opposed to 222 section 159 prosecutions.

493. *Nova Scotia Board of Censors* v. *McNeil*, [1978] 2 S.C.R. 662, at p. 691.

494. This viewpoint may indeed have certain limitations. As Laskin C.J.C. pointed out in his dissent (at p. 682), the focus on the form of a prohibition rather than its substance invites a legislature to attempt by prior restraint what it cannot do by defining an offence and prescribing *post facto* punishment. However, by the same token, the mere fact that legislation is concerned with a subject-matter that could be dealt with

constitutionally under the criminal law power does not mean that the legislation is itself criminal law.

495. See, for example, Mark M. Krotter, "The Censorship of Obscenity in British Columbia: Opinion and Practice" (1970), 5 U.B.C. L. Rev. 123.

496. W. A. McKean, "The War against Indecent Publications" (1965), 1 Otago L. Rev. 75.

497. 18 U.S.C. 1465.

498. *Customs Tariff*, R.S.C. 1970, c. C-41, s. 14. "Books, printed paper ... or representations of any kind of a treasonable or seditious, or of an immoral or indecent character" are prohibited under schedule C, No. 99201-1.

499. See text, *supra*, paras. 65-69.

500. See text, *supra*, Part One, para. 176.

501. Martin L. Friedland, "Gun Control: The Options" (1975-76), 18 Crim. L.Q. 29, at p. 36. This article portrays much of the history of gun control legislation in Canada.

502. See the memorandum prepared by the National Police Committee for the Protection of Citizens, appended to the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirtieth Parliament, p. 43: 175.

503. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 84-87.

504. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 88 and 89.

505. *First Progress Report*, *supra*, note 192, p. 130.

506. See text, *supra*, paras. 46-50.

507. Friedland, *supra*, note 501, pp. 40-46.

508. *Explosives Act*, R.S.C. 1970, c. E-15.

509. *Re Thomson*, *supra*, note 73.

510. *Ibid.*, pp. 15-16.

511. *Attorney-General of Canada* v. *Pattison*; *Attorney-General of Canada* v. *Metcalfe* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.).

512. Metropolitan Toronto Police, *Search of Persons and Premises* (March, 1978), p. 4.

513. *Ibid.*, p. 2. While the Metropolitan Toronto Police Department's instruction materials include a restrictive interpretation of section 101, other forces' materials often simply recite the section itself, with its inherent ambiguities. In the *Progress Report* prepared for the Solicitor General, *supra*, note 192, it was noted that the researchers had found "one or two jurisdictions where subsection 101(2) has been

employed to facilitate searches of known or suspected criminals". (*Report*, p. 131).

514. See Recommendations 2, 7, 8, 9 and 46 in particular.

515. See text, *supra*, Part One, paras. 129-130.

516. A noted proponent of "internal controls" is Professor David Bayley of the University of Denver, whose paper "American, Japanese and Western European Systems of Accountability over the Police", as yet unpublished, was presented at the International Conference on Police Accountability at the University of British Columbia, January 30, 1980. See also, Bayley, "The Limits of Police Reform" in *Police and Society*, edited by D. Bayley (Beverley Hills: Sage Publications, 1977), p. 219.

517. See text, *supra*, Part One, para. 226.

518. In addition to challenging a search perceived to be illegal after the fact, an individual could try to prevent it either through physical obstruction or a court injunction: *Solloway Mills & Co.* v. *Attorney General of Alberta* (1930), 53 C.C.C. 306 (B.C. C.A.). In the former case, the alternative is both physically and legally risky; the latter is of limited effectiveness since it permits peace officers to return to search if they subsequently obtain proper authorization.

519. See text, *supra*, Part One, para. 97-100.

520. See, for example, "Charges of Mayhem on the Beat", *MacLeans*, March 15, 1982, p. 51.

521. *R.* v. *Coutellier, Cobb and Cormier*, unreported, June 16, 1977 (Qué. Sess. Ct.).

522. Weiler, *supra*, note 35, pp. 443-44.

523. James Spiotto, "The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule", [1973] 1 J.P.S.A.A. 36, at p. 47.

524. The information as to all civil and criminal proceedings initiated against R.C.M.P. members was obtained from the R.C.M.P.'s own national files by Commission research personnel. Only actions involving challenges to legality were taken into consideration. Thus, civil suits that involved, for example, claims for damages incurred during execution of a search or by virtue of detention of goods seized, were excluded from the study if the claims conceded, or refrained from questioning, the legality of the R.C.M.P. members' actions. The study covered all challenges made that resulted in the opening of an R.C.M.P. file at headquarters during the years 1978 and 1979.

525. *R.* v. *Ella Paint* (1917), 28 C.C.C. 171 (N.S. C.A.).

526. *Coutellier, Cobb and Cormier*, *supra*, note 521.

527. For an excellent discussion of complaint procedures, see Goldstein, *supra*, note 11, pp. 157-186.

528. The R.C.M.P. did not keep national files for complaints made against its members that did not involve civil or criminal proceedings. However, a study of complaints made against the force nation-wide was completed by its own Internal Affairs Branch in the winter of 1980. The study covered a six-month period ending on September 30, 1979, during which 1,042 complaints were received. Of these, 26 related to searches and 18 to seizures. The results of the study received by the Commission did not distinguish between searches executed with or without warrants or writs of assistance.

529. Spiotto, *supra*, note 523, p. 47.

530. Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police, *Report* (Ottawa: Information Canada, 1976), p. 50.

531. See, for example, Herman Goldstein, "Administrative Problems in Controlling the Exercise of Police Authority" (1967), 58 Jour. of Crim. Law , Crimin. and Pol. Sc. 160, at pp. 167-168.

532. *Cave* v. *Mountain* (1840), 1 Man. & C. 257, 133 E.R. 330 (C.P.).

533. *Re Alder and The Queen* (1978), 37 C.C.C. (2d) 234 (Alta S.C.), at p. 252.

534. *Den Hoy Gin*, *supra*, note 215.

535. *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, [1964] 3 C.C.C. 381, at pp. 386-387.

536. For example, see the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 3; *The Justices and Magistrates Protection Act*, R.S.N.S. 1967, c. 157, ss. 2 and 3; and *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, ss. 4 and 5.

537. See *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 37; *The Provincial Court Act*, S.A. 1971, c. 86, s. 15(3); and *The Provincial Judges Act*, S.M. 1972, c. 61, s. 12.

538. Weiler, *supra*, note 35, p. 445.

539. *Ibid.*, p. 448.

540. See *supra*, note 524.

541. Spiotto, *supra*, note 523, p. 45.

542. *Ibid.*

543. *Ibid.*

544. Weiler, *supra*, note 35, p. 449.

545. A recent book on topic is Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada*, *supra*, note 146. See also Ericson, *supra*, note 10, p. 138.

546. [1971] S.C.R. 272, 293 *per* Martland J. This position has been codified in section 22 of the *Canada Evidence Act, 1982* (Bill S-33), introduced in the Senate and given first reading in Parliament on 18 November 1982.

547. *R.* v. *Kehr* (1906), 11 O.L.R. 517 (Ont. Div. Ct.).

548. *Bergeron* v. *Deschamps* (1977), 33 C.C.C. (2d) 461 (S.C.C.).

549. *Re Black and The Queen* (1973), 13 C.C.C. (2d) 446 (B.C. S.C.).

550. *Re Alder and The Queen*, *supra*, note 533, p. 251.

551. *Re Model Power (A Division of Master Miniatures Ltd.) and The Queen*, unreported, October 1, 1979 (Ont. H.C.); affirmed January 25, 1980 (Ont. C.A.); leave to appeal denied March 11, 1980 (S.C.C.). *Re Atkinson and The Queen* (1978), 41 C.C.C. (2d) 435 (N.B. S.C.); *Re Barton* (1979), 60 A.P.R. 631 (N.B. Q.B.); *R.* v. *Pomerleau*, unreported, February 14, 1979 (Qué. C.A.).

552. *Capostinsky* v. *Olsen*, unreported, April 3, 1981 (B.C. S.C.).

553. *Re Butler and Butler and Solicitor General* (1981), 61 C.C.C. (2d) 512 (B.C. S.C.)

554. *Re Black and The Queen*, *supra*, note 549.

555. See, for example, *Elkins* v. *United States* (1964), 364 U.S. 206, at p. 217.

556. See, for example, *Stone* v. *Powell* (1976), 428 U.S. 465, at pp. 482 (*per* Powell J.) and 498 (*per* Burger C.J.).

557. See, for example, J. David Hirschel, *Fourth Amendment Rights* (Lexington: D.C. Heath, 1979).

558. Goldstein, *supra*, note 531, pp. 171-172.

559. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12.

560. Laycraft Inquiry, *supra*, note 238.

561. Pringle Report, *supra*, note 210.

562. See notes 399 and 400, *supra*.

563. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Police* (Washington: U.S. Government Printing Office, 1967), p. 34.

564. *First Progress Report*, *supra*, note 192.

565. *Ibid.*, p. 131.

566. *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(14).

PART THREE:

SUMMARY

OF

RECOMMENDATIONS

Things, Funds and Information

1. To accord with modern techniques of acquiring and storing things and information, it should be specified that powers of seizure may authorize:

(a) taking photographs of a thing which is an "object of seizure";

(b) obtaining records which are "objects of seizure", regardless of the physical form or characteristics of the storage of the records; and

(c) acquiring control over funds which are "objects of seizure" in financial accounts.

Objects of Seizure

2. "Objects of Seizure" means things, funds and information which are:

(a) takings of an offence;

(b) evidence of an offence; or

(c) possessed in circumstances constituting an offence.

"Takings of an offence" means stolen property or other property taken illegally from the victim of an offence. It includes property into, or for which, takings of an offence originally in the possession of an individual have been converted or exchanged.

Persons Illegally Detained

3. In addition to their powers regarding "objects of seizure", peace officers should be empowered to search for and rescue persons detained in circumstances constituting an offence.

Exceptions to the Warrant Requirement

4. Unless otherwise specified, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. A warrant should not be required:

(a) for a search performed with consent obtained pursuant to Recommendations 5 and 6;

(b) for a search and/or seizure following arrest as specified in Recommendations 7 and 8;

(c) for a search and/or seizure in circumstances of danger to human life or safety, as specified in Recommendation 9;

(d) for a search of a movable vehicle in circumstances of possible loss or destruction of "objects of seizure", as specified in Recommendation 10; and

(e) for a seizure of "objects of seizure" in plain view, as specified in Recommendation 30.

Consent

5. A peace officer should be authorized to search without a warrant:

(a) any person who consents to a search of his person; and

(b) any place or vehicle, with the consent of a person present and ostensibly competent to consent to such a search.

A peace officer should be empowered to seize any "objects of seizure" found in the course of a consent search.

6. The consent should be given in writing in a document warning the person of his right to refuse to consent and to withdraw his consent at any time. The absence of a completed document should be *prima facie* evidence of the absence of consent.

Arrest

7. Peace officers should be empowered to search a person who has been arrested if such a search would be reasonably prudent in the circumstances of the case. This power should be extended to spaces within the person's reach at the time of the search.

8. In addition to "objects of seizure", a peace officer arresting an individual should be empowered to seize:

(a) anything necessary to identify the arrested individual; and

(b) any weapon or other thing that could either assist the arrested individual to escape or endanger the life or safety of the arrested individual, the peace officer or a member of the public.

Where Delay Is Dangerous to the Life or Safety of Persons

9. Where a peace officer believes on reasonable grounds that:

(a) an "object of seizure" is to be found on a person or in a place or vehicle; and

(b) the delay necessary to obtain a warrant would result in danger to human life or safety,

he should be empowered to search for and seize the "object of seizure" without a warrant.

Searches of Vehicles where Delay Risks the Loss or Destruction of Objects of Seizure

10. Where a peace officer has arrested a person who is in control of, or an occupant of, a movable vehicle, and believes on reasonable grounds that:

(a) an "object of seizure" is to be found in the vehicle; and

(b) the delay necessary to obtain a warrant would result in the loss or destruction of the "object of seizure",

he should be empowered to search for and seize the "object of seizure" without a warrant.

Issuance of Warrants

11. A justice of the peace should be empowered to issue a warrant to search a person, place or vehicle if there are reasonable grounds to believe that the person, place or vehicle is carrying, containing or concealing an "object of seizure".

12. Except as authorized in the telephonic warrant procedures set out in Recommendation 19, the application for all search warrants should be an information in writing sworn under oath. The issuer

should be empowered to question the applicant to ascertain additional facts underlying the application. However, if such facts are relied upon in the adjudication of the application, they should be attested to on the face of the information.

Documentation

13. Standard statutory forms should be drafted so as to eliminate the problems of improvised drafting that currently exist. These forms, unlike the current Form 1, should truly guide the officer in setting out the details the law requires. "Legalese" should be rejected in favour of comprehensible language. Guidelines used by the police should stress the need for thoroughness on the information and warrant rather than on exclusively administrative documents.

Judicial Discretion and Refusal to Issue a Warrant

14. A peace officer applying for a warrant should be required to disclose on the information form any previous applications made with respect to the same warrant (*viz.* a warrant to search the same person, place or vehicle for "objects of seizure" related to the same or a related transaction).

The Test to Be Met

15. A peace officer applying for a warrant should not be required to reveal facts disclosing the identity of confidential sources. However, this policy should not permit warrants to be issued on the basis of applications that fail to meet the "reasonable ground" test.

16. Section 178.2 of the *Criminal Code* should be amended so as to make clear that peace officers are not precluded from disclosing facts obtained from an intercepted private communication in the course of search warrant applications.

The Issuer

17. The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. Steps should

be taken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the *Criminal Code*. New provincial initiatives should be undertaken to examine the office of justice of the peace and either abolish or reorganize it where necessary.

The Participation of Crown Counsel

18. More use of Crown or private police counsel would improve the quality of applications for warrants. However, the Crown's participation in the process should remain discretionary. While issuers of warrants should remain free to request the Crown's participation in appropriate cases, the Crown should be a submitter rather than an adviser to the issuer.

The Telephonic Warrant

19. A telephonic warrant procedure, similar to that set out in the American Federal Rules, should be instituted in Canada. It should be available only when grounds exist to obtain a warrant under Recommendation 11 but resort to conventional procedure is impracticable. Safeguards should be implemented to ensure that a record of the proceedings is subsequently made available to persons affected, and that the warrant used by the officer is identical to that authorized by the issuer.

Execution of Warrants

20. Private individuals should continue to be entitled to apply for search warrants. Once the issuer has decided to authorize a search, however, the responsibilities of execution should lie entirely with peace officers. Peace officers should be empowered to bring into the place or vehicle to be searched any private individual whose presence is reasonably believed to be necessary to the successful execution of the warrant.

Which Peace Officer May Execute the Warrant?

21. It should be legally permissible for any peace officer within the territorial jurisdiction of the issuer to execute a search warrant.

Daytime or Night-time Execution

22. Warrants should authorize execution by day only, unless the applicant shows reasonable cause for allowing execution by night.

Deadline for Execution

23. A warrant should expire after eight days, but an applicant should be entitled to apply for a new warrant if grounds for search still exist after this period.

Scope of Search and Seizure with Warrant

24. A peace officer executing a search warrant should be empowered to search only those areas, within the places and vehicles or upon the persons mentioned in the warrant, in which it is reasonable to believe that the objects specified in the warrant may be found. A peace officer performing such a search should be empowered to seize, in addition to "objects of seizure" specified in the warrant, other "objects of seizure" he finds in plain view.

The Use of Force

25. The use of force should continue to be governed generally by the standards presently set out in subsection 25(1) of the *Criminal Code*, which recognize that a peace officer, if he acts on reasonable and probable grounds, is justified in using as much force as is necessary.

Unannounced Entry

26. In the absence of circumstances justifying either unannounced or forceful entry into private premises, a peace officer should be required to make a demand to enter in all cases. If an occupant does not comply with the demand within a reasonable time, the officer should be empowered to use force to gain entry.

Duties toward Individuals Affected by the Search or Seizure

27. Where a peace officer makes a search or seizure with a warrant, he should be required, before commencing the search or as

soon as practicable thereafter, to give a copy of the warrant to the person to be searched, or to a person present and ostensibly in control of the place or vehicle to be searched. A copy of the warrant should be suitably affixed within any place or vehicle that is unoccupied at the time of the search or seizure.

28. Where practicable, a person present and ostensibly in control of a place or vehicle should be entitled to observe the search.

29. If objects are seized in the course of a search, the individual affected should be entitled to receive an inventory of these objects on request. If the owner of the objects seized is known to be a different person from the individual whose place, person or vehicle is searched, he should be provided with an inventory without the necessity of a request. The extent of detail on the inventory should be that which is reasonable in the circumstances.

The "Plain View" Doctrine

30. If a peace officer, in the course of a lawful search or otherwise lawfully situated, discovers "objects of seizure" in plain view, he should be empowered to seize them without a warrant. In such cases, a post-search report should be filed, as specified in Recommendation 37.

Searches of Persons

31. A peace officer may search a person:

(a) named in a search warrant;

(b) found in a place or vehicle specified in a search warrant if:

(i) there is reasonable ground to believe that the person is carrying an object of seizure specified on the warrant; and

(ii) the issuer of the warrant has authorized the search of persons found in the place or vehicle on the face of the warrant; or

(c) pursuant to the powers of search without warrant set out in Recommendations 5-10.

However, no "medical examination" or mouth search may be conducted except as provided in Recommendations 32 and 33.

32. No activity involving the puncturing of human skin should be authorized under search and seizure law. A "medical examination" (*viz.* a sexually intimate search, examination of the naked body or probing of body cavities not involving puncturing the skin) should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) pursuant to a specific warrant naming the person to be examined;

(c) if performed by a qualified medical practitioner; and

(d) if conducted in circumstances respectful of the privacy of the person to be examined.

33. A search of the mouth of a person should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) if performed in a manner not dangerous to human life or safety;

(c) on the condition that the peace officer performing the search complete a post-search report, as set out in Recommendation 37.

Search with Warrant

34. An issuer of a search warrant should be empowered to exclude persons from a search warrant hearing where it appears to him that the ends of justice will best be served by making such an order.

35. An individual affected by a search or seizure with warrant should be entitled to inspect the warrant and supporting information upon oath immediately after the execution of the warrant. Other persons should be granted access to these documents but should be subject to a prohibition against publishing or broadcasting their contents until:

(a) upon application by an individual affected, the prohibition is revoked by a superior court judge or judge as defined in section 482 of the *Criminal Code*;

(b) the individual affected is discharged at a preliminary inquiry; or

(c) the trial of the individual affected is ended.

36. If the release of either an information or warrant would be likely to reveal the existence of electronic surveillance activities, the issuer of the warrant, upon application by the Crown or a peace officer, should be empowered to obscure any telephone number mentioned on the document and replace it with a cypher. Similarly, if the identity of a confidential informant would be jeopardized, the peace officer or issuer should be empowered to obscure the name or characteristics of the informant and replace them with a cypher. In either case, upon so doing, the issuer should attest on the document that the only facts so obscured are the digits of a specific telephone number or name and characteristics of an informant, as the case may be.

Search without Warrant

37. A peace officer should be required to complete a post-search report in the following circumstances:

(a) where objects are seized without warrant;

(b) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to Recommendation 24;

(c) where a search of a person's mouth is conducted, pursuant to Recommendation 33.

The report should include the time and place of the search and/or seizure, the reason why it was made and an inventory of any items seized. It should be available on request to an individual affected by the search or seizure described in the report.

The Unsuspected Party

38. Where a party in possession of "objects of seizure" is not suspected of being implicated in the offence to which the search relates, an officer executing the search should be required generally to request the party to produce the specified objects. The officer should be empowered to conduct the search himself if:

(a) the party refuses to comply with the request within a reasonable time; or

(b) there is reasonable ground to believe that a request will result in the destruction or loss of the specified objects.

Financial Accounts

39. Where "objects of seizure" are reasonably believed to be in a financial account, the police should be empowered to obtain a warrant to transfer the amount of the seizable funds to an official police account under judicial control. A temporary freezing order on a financial account should be made available where police officers seize financial records that are reasonably believed to contain information that will enable them to apply for a warrant to seize funds in the account. The freezing order should be of fixed duration and limited by the amount of the seizable funds. It should be obtainable from a superior court judge or a judge designated under section 482 of the *Criminal Code*, and subject to an immediate right on the part of the individual concerned to apply for its revocation.

Solicitor-Client Privilege

40. The sealing and application procedures set out in Bill C-21, proposed in 1978, should be instituted with two new provisions — the protection should extend to materials in possession of the client as well as the solicitor, and counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application.

Searches of the Press and Other Media

41. The press should have no special protections against unreasonable search and seizure, other than those conferred by the *Charter* and by these recommendations.

Surreptitious Intrusions

42. Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Absent compelling evidence of the need for such sacrifices, the modifications should not be made in the context of criminal or crime-related investigations.

Writs of Assistance

43. The writs of assistance under the *Narcotic Control Act*, *Food and Drugs Act*, *Customs Act* and *Excise Act* should be abolished.

Other Special Powers

44. The following special provisions should be abolished:

(a) **bawdy- and gaming-house powers — section 181 of the *Criminal Code*;**

(b) **warrants for women in bawdy-houses — section 182 of the *Criminal Code*;**

(c) **special interrogation procedures for persons found in disorderly houses — section 183 of the *Criminal Code*;**

(d) **precious metals warrants — section 353 of the *Criminal Code*;**

(e) **powers to search for stolen timber — subsection 299(3) of the *Criminal Code*;**

(f) **powers to seize cocks in a cockpit — section 403 of the *Criminal Code*;**

(g) **powers to seize counterfeit money — section 420 of the *Criminal Code*;**

(h) **powers relating to narcotics and drugs — section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*.**

Obscene Publications, Crime Comics and Hate Propaganda

45. Special warrant provisions for obscene publications, crime comics, and hate propaganda should be regarded as regulatory provisions rather than legitimate components of criminal procedure. Accordingly, if they are to be retained, they should be incorporated into regulatory legislation and removed from the *Criminal Code*.

Weapons

46. Powers to seize firearms currently authorized under sections 99 and 100 of the *Criminal Code* are subsumed in the Recommendations set

out above. Section 101 of the *Criminal Code* is not a valid mechanism for the enforcement of criminal law. However, it may serve legitimate objectives as a regulatory instrument of gun control. The section should be redrafted in this light so as to:

(a) tie the search and seizure sections more firmly to *in rem* confiscation provisions; and

(b) permit a search to be performed only when there is a reasonable belief that the person concerned is in possession, custody or control of a weapon.

Enforcing the Rules

47. A procedure should be instituted to implement the principle that illegally obtained evidence should not be admitted at trial, where its use as such would tend to bring the administration of justice into disrepute. The details of this procedure will be developed in the Working Paper on Post-Seizure Procedures.

48. Consideration should be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.