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

Communiqué

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LAW REFORM COMMISSION RELEASES SEARCH AND SEIZURE REPORT
SEARCH AND SEIZURE POWERS SAID TO BE IN AN INCOHERENT STATE OF DISARRAY

The Law Reform Commission of Canada's Report 24 entitled Search and Seizure was tabled today in the House of Commons by Justice Minister John C. Crosbie. The Report calls on Parliament to overhaul Canada's search and seizure laws which are said to be in an incoherent state of disarray.

"The fault," according to Commission President, Justice Allen M. Linden, "lies with the proliferation of search and seizure powers contained in many different federal statutes as well as in the common law, which have generated administrative confusion and uncertainty."

"This must be corrected," Justice Linden stated, "so that Canadians can have laws that clearly define their rights and so that the police can enforce the law confident that their searches and seizures will stand up in court."

He added that "legislative reform cannot come too soon, as the Supreme Court of Canada and other courts of various levels throughout the country have begun striking out warrantless search provisions -- as well as certain statutory search provisions -- on the basis that they do not comply with the requirements of section 8 of the Canadian Charter of Rights and Freedoms which

provides that everyone has the right to be secure against unreasonable search and seizure."

The Report relies upon a comprehensive survey of search warrant practices in seven major cities across Canada which indicates that there is a clear gap between the legal rules for issuing and obtaining search warrants and the daily realities of practice, by the trend in recent years toward creation of new, widespread exceptions to search warrant requirements -- and by the ease in which warrantless searches can be conducted without any accountability on the basis of the citizens uninformed and undocumented consents.

The Report states in this regard that, "[t]he 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 to perform searches on consent, the peace officer's range of discretionary options is considerable."

The Commission proposes that Parliament remedy the "quite bewildering" state of Canada's search and seizure laws by:

* replacing the disparate array of search and seizure powers presently provided for criminal investigation with a single comprehensive regime. (SEE 'CONSOLIDATION': COMMUNIQUE PAGE 4)
* declaring search by warrant to be the rule -- so that any exercise of search and seizure powers must be determined to be reasonable by an impartial person judicially adjudicating before the event -- on the basis of a sworn information. (SEE 'WARRANTS THE RULE': COMMUNIQUE PAGE 4)
* restricting warrantless searches in the absence of consent to exigent circumstances involving searches of persons and vehicles incidental to arrest -- and searches of persons, places or vehicles where the delay necessary to obtain a warrant would result in danger to human life or safety. (SEE 'WARRANTLESS SEARCHES THE EXCEPTION': COMMUNIQUE PAGE 5)

* ensuring that consent to a search without warrant be 'informed' -- by requiring that the individual be informed of his or her right to refuse or withdraw consent once given -- and that the peace officer must obtain consent either orally or in writing. (SEE 'CONSENT MUST BE INFORMED': COMMUNIQUE PAGE 5)
* repealing writs of assistance and other search powers in statutes such as the Narcotic Control Act and the Food and Drugs Act which authorize warrantless searches or conflict with the Commission's proposed regime. (SEE 'STATUTES TO BE REPEALED': COMMUNIQUE PAGE 5)
* legislating consideration for the interests of persons affected by searches and seizures by:
  i) permitting seizure by taking photocopies rather than causing inconvenience by the taking of originals
  ii) requiring a copy of the warrant to be provided to the person affected before the search is commenced or as soon as possible thereafter
  iii) requiring a person whose property has been seized under a warrant to be provided with an inventory of things seized where requested
  iv) requiring a post-seizure report listing property seized without warrant, or objects seized which have not been mentioned in the warrant to be provided to the person affected. (SEE 'LEGISLATING CONSIDERATION': COMMUNIQUE PAGE 6)
* countering surreptitious searches by requiring notice of a search to be left at unoccupied premises and by repealing existing search and seizure powers which may authorize such searches (SEE 'COUNTERING SURREPTITIOUS SEARCHES': COMMUNIQUE PAGE 7)
* responding to the modern reality that much information is stored in computers by expanding the definition of seizure to include the obtaining of records which are the object of seizure regardless of their physical form or the manner in which they are stored -- and thereby clarifying the uncertain state of the law

in this regard. (SEE 'SEIZURE OF COMPUTER STORED DATA': COMMUNIQUE PAGE 7)

* resolution of particular search and seizure problems, namely
  i) protecting materials subject to the solicitor-client relationship
  ii) protecting unsuspected third parties such as banks, telephone companies, courier services and the media
  iii) safeguarding the rights to a fair trial of persons who could be prejudiced by publication of search-related documents
  iv) ensuring reasonable grounds for a warrant while protecting an informer's identity
  v) discouraging forum shopping
  vi) ensuring the proper qualification and independence of justices of the peace
  vii) seizure of profits from crime

(SEE 'RESOLUTION OF SEARCH AND SEIZURE PROBLEMS': COMMUNIQUE PAGE 8)

CONSOLIDATION

The Commission has provided Parliament with a comprehensive code of criminal procedure respecting police powers of search and seizure which is in draft statutory language and can be readily enacted. While some present practices are consolidated -- the Commission's legislative proposals represent a fresh new approach to Canada's search and seizure law.

WARRANTS THE RULE

The basic precept of the Working Paper that section 8 of the Charter requires, where possible, a prior assessment by an impartial judicial figure of the necessity of the state to conduct the search -- and that warrantless searches are presumptively unreasonable -- was subsequently accepted by the Supreme Court of Canada in Hunter et al. v. Southam Inc. It has

Text p. 9 Rec. 1 Sec. 1

since found favour in the Ontario Court of Appeal and many other courts throughout Canada. In addition to providing judicial intervention, the warrant process, with its reliance on documentary preparation, facilitates review of the legality of a search and seizure by providing a readily accessible record of the proceedings before the issuing justice.

WARRANTLESS SEARCHES THE EXCEPTION

Text p. 33 Rec. 1 Sec. 18

Warrantless searches are discouraged by the Commission because, "authorizing a peace officer to search without a warrant admits the possibility of biases in decision-making that stem from a peace officer's interests in the outcome of the decision." The two exceptions proposed by the Commission are justified by circumstances of informed consent and exigency.

CONSENT MUST BE INFORMED

Procedures are recommended to ensure that consent is informed because of, "the potential for intimidation which exists ... when an individual is confronted with a police request [which] creates a danger that the compliance obtained from the individual is not truly consensual."

Text p. 33 Rec. 1 Sec. 18

During consultations, police representatives objected that requiring consent in writing as suggested in the Working Paper represented a needless administrative burden -- and argued that a standard verbalized warning, indicating the right to refuse consent and to withdraw it at any time, would be adequate.

STATUTES TO BE REPEALED

The Commission proposes a set of rules applicable to all searches and seizures conducted in the interest of criminal law enforcement. This set of rules would make it unnecessary to maintain certain specially focused powers existing under present law.

Among the special provisions recommended for repeal on enactment of the Commission's code of search procedure are:

* Writs of Assistance - The Working Paper 30 urged abolition of the writs, described as "a licence to search without a warrant" and their replacement by a system of telephonic warrants where an appearance before a justice of the peace would be impractical. These recommendations were the subject of Report to Parliament 19 and have been adopted by the Government in Bill C-18, now before Parliament.

* Bawdy-House Warrants - Section 181 Criminal Code - Abolition of this search power is proposed because it is authorized by a "report in writing" instead of by an "information under oath" -- and it gives authority to seize persons found on the premises searched. The exceptional power is criticized as an unjustified provision for detention outside of conventional arrest procedures.

* Section 10 Narcotic Control Act and Section 37 Food and Drugs Act - These sections are said to exhibit exceptional features which depart significantly from the proposed search and seizure regime. They enable any peace officer to enter and search any place which is not a dwelling-house and search any person found therein -- without documentary authority of any kind -- and permit entry of a home for similar purposes under a writ of assistance.

Text p. 47 Rec. 2

LEGISLATING CONSIDERATION

These recommendations will make new ground in Canadian law, as peace officers currently have minimal obligation to provide information to the individual concerned about the intrusion upon his person or premises. Under the present law, a peace officer

is required merely to have a warrant with him where feasible -- and to produce it when requested to do so. Nothing requires the warrant to be produced at the commencement of the search when it is most important to determine the search's legality. The Commission would require the officer executing the warrant to provide a copy of the warrant before commencing the search or as soon as possible thereafter.

COUNTERING SURREPTITIOUS SEARCHES

The Working Paper indicates that the Commission declined to accede to submissions by representatives of government and police groups that a power to conduct surreptitious intrusions -- probes intended to secure information in furtherance of an investigation without alerting the subject to its existence -- would be a valuable investigative tool, especially in the fight against white-collar crime. The Report states, however, that, "[a]fter carefully considering the benefits and dangers of powers to conduct surreptitious intrusions, the Commission is persuaded that, as a matter of policy, the interests of criminal law enforcement do not justify enacting these powers." Such powers are rejected because they raise serious problems of accountability and impede the effective review of the legality of police conduct.

Text p. 61 Rec. 8

SEIZURE OF COMPUTER STORED DATA

This recommendation is based on the Commission's view that there is no reason why information that would be seizable if contained in a document should be immune from seizure merely because it is stored in a computer record. The Report states that although permitting peace officers to obtain information from computers may create certain dangers of invasion of privacy

and raise apprehensions of surreptitious monitoring of individuals, on the other hand, to confine search and seizure laws to relatively primitive technological methods is to discriminate in favour of the technologically sophisticated criminal. The Commission balances these competing concerns by making the acquisition of such information subject to the same principles and protections as the acquisition of conventional things.

Text p. 15

RESOLUTION OF SEARCH AND SEIZURE PROBLEMS

i) Materials subject to solicitor-client relationships - The recommendations contained in Working Paper 30 for a procedure allowing the sealing of such materials pending a judicial application, have been adopted by the Government in Bill C-18 now before Parliament. As a result of views expressed by several lawyers groups after release of the Working Paper, the Commission changed its views in two significant ways. The Report proposes that the special procedure should apply to all such materials which are recognized as confidential by the court in order to protect the solicitor-client relationship, no matter where they are located -- which includes materials in the possession of the client as well as that of the solicitor. Secondly, the Report proposes that the Crown should be denied access to materials protected by the solicitor-client privilege until the court has ruled on their status -- in order to fully protect the relationship.

Text p. 58 Rec. 7

ii) Protecting unsuspected parties - The Report says that no Canadian authority has suggested that unsuspected parties possessing information relating to an investigation should be generally immune from the exercise of search and seizure powers -- and states that, "[m]oreover, the Commission recognizes that such an approach would unduly hamper the police in carrying out their law enforcement functions. An unsuspected third party is thus distinguished from a party suspected of a crime by the likelihood that the unsuspected party will voluntarily produce the specified objects of seizure. The Commission recommends minimizing the intrusion of privacy by requiring a police officer to request an unsuspected party to produce the specified objects of seizure, unless there is reasonable ground to believe that a request will result in their loss or destruction. If a request is made and the unsuspected party fails to comply within a reasonable period of time, the peace officer is empowered to conduct the authorized search himself.

Text p. 44 Rec. 1 Sec. 26

iii) Safeguarding the rights to a fair trial of persons who could be prejudiced by publication of search-related documents - The Commission's recommendation that there should be unrestricted access to search warrants and to the sworn information upon which

they are based go farther than current Canadian law, which permits withholding these documents where there has been no seizure or where to do so would be contrary to the public interest. Having so provided, the Commission had to consider the need to protect the right to a fair hearing of individuals whose trial could be jeopardized if the contents of these documents were published. On the one hand, it was arguable that, in order to safeguard the fairness and quality of judicial proceedings, and to effectuate the constitutional protection afforded the freedom of the press, unrestricted rights of access to the search warrants and supporting information should be accorded to the public once the search warrant has been executed. On the other hand, it was recognized that respect for the individual's rights and privacy called for protection of the right to a fair hearing at the pretrial stage, as guaranteed by paragraph 11(d) of the Charter. The Commission recommended that no person should publish or broadcast the contents of any search warrant or supporting information unless the person subjected to the search has been discharged at a preliminary hearing, that person's trial has been completed, the contents of the search warrant or information have been disclosed in judicial proceedings not subject to a prohibition order, or a judge has ordered that the publication ban be terminated. The Report says, "[w]e recommend this restraint only after the most extensive debate among us, a debate focusing on the strong policy arguments in favour of absolute freedom of the press which stand against this position. It is our conclusion that in this particular context, these arguments are outweighed by others in favour of the limitation which we would impose." The Commission's recommendations in this regard have largely been adopted by the Government in Bill C-18 now before Parliament.

Text pp. 29-30 Rec. 1 Sec. 17

iv) Ensuring reasonable grounds for a warrant while protecting an informer's identity - The Commission is of the view that the need to protect the identity of confidential informers must not be allowed to frustrate the issuer's judicial duty to ascertain the existence of reasonable grounds for the issuance of a warrant. It achieves this balance by recommending that a peace officer applying for a search warrant shall not be required to reveal facts disclosing the identity of a confidential informer. If the officer chooses to disclose the name or characteristics of an informer, the justice issuing the warrant is empowered to obscure this information with a 'cypher'. It is also recommended that the electronic interception sections of the Criminal Code be amended to permit peace officers to disclose factual information received by way of an intercepted private communication on a search warrant application. Many police officers are said to lack confidence that an exemption for 'criminal proceedings' applies to search warrant applications.

Text p. 19 Rec. 1 Sec. 8 pp. 20-21 Sec. 9

v) Discouraging forum shopping - Under the present law, if an application for a search warrant is refused by a justice exercising his judicial discretion, there is nothing to prevent

the peace officer from reapplying for the same warrant on a subsequent occasion before another justice. While recognizing that an initial refusal should not be binding on an investigation as a whole, as new evidence may arise, the Report says, "[t]he potential for "forum shopping" which this situation creates may undermine the judiciality of warrant proceedings, which we accept as a fundamental objective." The words "of which the applicant is aware" were added in response to submissions by government and police representatives that an applicant may not be aware of other applications with respect to the same search warrant.

Text p. 18 Rec. 1 Sec. 7

vi) Ensuring the proper qualification and independence of justices of the peace - To secure these ends, the Commission recommends that all provinces undertake the initiative necessary to ensure that the officials responsible for issuing search warrants are properly qualified and sufficiently independent to discharge their significant judicial responsibilities. It is also recommended that consideration be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.

Text p. 55 Rec. 4

vii) Seizure of profits from crime - The Report states that, "[t]he Commission recognizes that the present law is inadequate to deal with profits generated through organized criminal activity, through illicit drug trade and through other consensual crime.... However, the legal and practical problems involved in tracing and freezing criminal proceeds and profits for the purpose of effecting their seizure and ultimate restoration or forfeiture are of such magnitude that we have determined to defer any recommendation in this regard pending further study and release of the report of the Federal-Provincial Task Force on Enterprise Crime."

The Law Reform Commission of Canada was established in 1971 for the purpose of modernizing Canada's federal laws and making them more meaningful, relevant and effective.

The Commission is now in the process of drafting a new Criminal Code for Canadians to reflect the Canada of the 1980s and not that of almost one hundred years ago, when the predecessor of our current Criminal Code was enacted.

This work was done for the Criminal Procedure Section of the Commission, which is headed by Commissioner Joseph Maingot and supervised by the Commission's Criminal Procedure Research Co-ordinator, Dr. Winston McCalla.

Copies of Report 24 are available by mail free of charge from the Law Reform Commission of Canada, 130 Albert Street, 7th Floor, Ottawa, Ontario, K1A 0L6, or Suite 310, Place du Canada, Montréal, Québec, Canada, H3B 2N2.

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Law Reform Commission of Canada

Commission de réforme du droit du Canada

REPORT

search and seizure

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REPORT 24

SEARCH

AND

SEIZURE

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REPORT

ON

SEARCH AND SEIZURE

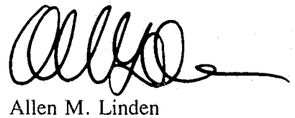
December, 1984

The Honourable John Crosbie, P.C., Q.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report, with our recommendations on the studies undertaken by the Commission on search and seizure.

Yours respectfully,



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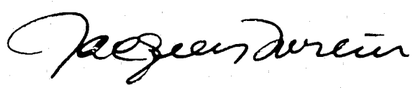

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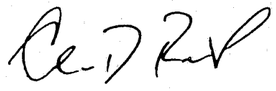

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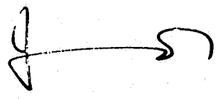

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Preface

In August of 1983, the Commission issued its Working Paper 30, entitled *Police Powers — Search and Seizure in Criminal Law Enforcement*. In that Working Paper, we reviewed the laws relating to police powers of search and seizure in criminal law enforcement, explained the need for a consolidation, rationalization and reform of these laws, outlined the Commission's tentative recommendations for reform, and invited comments on these recommendations.

Copies of the Working Paper were distributed to everyone the Commission considered might be interested in the issues raised in the Paper and we invited the public at large to make its views known in writing to the Commission. In addition, more formal cross-country consultations were held to gather the views of those involved in various aspects of the criminal justice system. These meetings involved representatives of the defence Bar, the Canadian Bar Association, provincial court judges, justices of the peace, academics and representatives of civil liberties associations. Also present were provincial Crown Attorneys, representatives of the Attorneys General of the federal and provincial governments, the Department of Justice and the Ministry of the Solicitor General, community and provincial police representatives, including police chiefs and commissioners, and representatives of the Canadian Association of Chiefs of Police. All of these consultants gave generously of their time in preparing comments on our Working Paper recommendations and we appreciate their involvement.

Search and seizure procedures may be viewed as consisting of four essential stages: first, the authorization of the search and seizure; second, the execution of the search and seizure; third, the detention of things seized pursuant to the execution of the search and seizure power; and fourth, the disposition of the things seized. A Working Paper respecting post-seizure procedures for the detention and disposition of things seized will be issued shortly by the Commission. Clearly, certain aspects of the first two stages of search and seizure procedures, which are the subject of this Report, will be comprehended within our Working Paper on Post-Seizure Procedures. However, we considered that we should proceed with these major recommendations relating to police powers of search and seizure in criminal law enforcement at this time. The need for a rationalization of search and seizure powers, presently provided for criminal and crime-related investigations, and for comprehensive standards and procedures to govern the exercise of such powers, is pressing. Accordingly, we recommend that Parliament implement the proposals made in this Report. Our recommendations for new legislative provisions have been prepared in the form of draft legislation, so that they can be incorporated within the present structure of the *Criminal Code*.

Following each of our recommendations in this Report, we briefly state how our recommendations would change the present law and the reasons for our recommendations. Those seeking a more comprehensive discussion of the subjects covered should refer to our Working Paper 30, *Police Powers — Search and Seizure in Criminal Law Enforcement*.

The recommendations made in this Report express the views of the signed Commissioners. However, two former Commissioners were involved in our discussions on police powers of search and seizure: the Honourable Mr. Justice F. C. Muldoon, and the Honourable Mr. Justice Réjean F. Paul.

Introduction

One of the central recommendations of Working Paper 30, entitled *Police Powers — Search and Seizure in Criminal Law Enforcement*,[1] was that the disparate array of powers governing the authorization and execution of search and seizure for criminal investigation be replaced by a single, comprehensive regime. The recommendations in this Report represent the culmination of our efforts to devise such a regime, taking into account public response to the tentative recommendations for reform outlined in our Working Paper.

Our inquiry into police powers of search and seizure was prompted by the perception that many problems in this area, both in law and practice, cut across the spectrum of existing laws and necessitate a consolidation, rationalization and reform of the various search and seizure regimes found within the common law, the *Criminal Code*,[2] and within such federal crime-related statutes as the *Narcotic Control Act*[3] and the *Food and Drugs Act*.[4]

One of the most readily apparent of these problems is the incoherent array of criminal search and seizure powers. At present, we have a complex and cumbersome collection of sections, which have accumulated indiscriminately as a result of historical increment and, in many cases, accident. When one adds to this array the various search and seizure powers available outside of the *Criminal Code* for the investigation of other federal offences, the cumulative effect is quite bewildering.

The present law of search and seizure is further complicated by the coexistence of common law and statutory sources of authority. In addition to the various powers of search and seizure set out in the *Criminal Code* and in federal crime-related statutes, such as the *Narcotic Control Act* and the *Food and Drugs Act*, criminal law enforcement relies heavily on common law provisions for warrantless search incidental to arrest and for searches permitted by consent.

The complexity and incoherence of the present assortment of available search and seizure powers cause administrative confusion and uncertainty which impact adversely

1. Law Reform Commission of Canada, *Police Powers — Search and Seizure in Criminal Law Enforcement*, [Working Paper 30] (Ottawa: Supply and Services, 1983).
2. This and all references to the *Criminal Code* pertain to R.S.C. 1970, c. C-34, as amended.
3. This and all references to the *Narcotic Control Act* pertain to R.S.C. 1970, c. N-1, as amended.
4. This and all references to the *Food and Drugs Act* pertain to R.S.C. 1970, c. F-27, as amended.

upon the efficacy and legality of search warrant practices. The lack of conformity of practice with applicable legal rules is most readily apparent in the context of warrant issuance. As part of our research program, we examined practices of search warrant issuance over four-month periods in seven major Canadian cities. A panel of Canadian judges drawn from superior and appellate courts was assembled to evaluate the legality of a stratified random sample of the application documents and warrants issued in these cities. The results of these evaluations indicated a clear gap between the legal rules for issuing and obtaining search warrants and the daily realities of practice. We believe that a significant part of this disparity between law and practice is attributable to the complexity and incoherence of the legal regimes by which the available powers of search and seizure are governed.

The deficiencies disclosed by our survey with respect to warrant issuance reflect another fundamental problem in the area of police powers of search and seizure — namely, shortcomings in standards of accountability. This problem is particularly acute as it pertains to warrantless searches and seizures.

Although empirical evidence points to certain shortcomings in the control over police discretion exerted by warrant procedures, nevertheless these procedures embody certain safeguards which purport to ensure that no intrusion occurs until the existence of a justification for it has been objectively and impartially determined upon information presented under oath and that the scope of the intrusion is clearly and particularly identified. As a result, warranted searches remain relatively constrained compared to warrantless ones. In addition, the warrant procedure with its reliance on documentary authority facilitates review of the legality of the search or seizure.

By way of contrast, a warrantless power of search and seizure represents a relatively discretionary mode of authorization, in respect of which accountability is impeded by the lack of any kind of documentary record. Accountability for warrantless intrusions is also impeded by the frequent use of consent as the source of authority for the warrantless search of persons and private premises. The absence of generally applicable procedural safeguards to ensure and verify the existence of meaningful consent is not only detrimental to the interests of individuals; some peace officers interviewed by Commission researchers were of the view that their tasks were made more difficult by the absence of clear guidelines.

These shortcomings in standards of accountability for warrantless intrusions assume particular importance in view of the creation of new and wider exceptions to warrant requirements. 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. 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.[5] When

5. The trend towards the creation of new and wider powers of search without warrant may be curtailed if Canadian courts continue the present trend of interpretation of the enjoinder against unreasonable search and seizure contained in section 8 of the *Canadian Charter of Rights and Freedoms*. Both *Lawson A. W. Hunter, Director of Investigation and Research of the Combines Investigation Branch* v. *Southam Inc.* (Sept. 17, 1984, S.C.C., not yet reported) and *R.* v. *Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.) indicate strong judicial support for a warrant preference in Canadian law. See *contra*: *R.* v. *Hamill* (Sept. 4, 1984, B.C. C.A., not yet reported).

his coercive powers are combined with the opportunities to perform searches on consent, the peace officer's range of discretionary options is considerable.

Paralleling the creation of new and wider exceptions to the warrant requirement has been a proliferation of the justifications for intrusions into zones of individual privacy. One of the critical aspects of this expansion has been the shift from responsive to preventive policing.

The first search and seizure powers were essentially responsive to the commission of a crime; indeed, they were closely tied to the powers to arrest the alleged offender. As powers of search and seizure have expanded to accommodate preventive and regulatory, rather than strictly penal, objectives, the association between crime and intrusive police powers has broken down. This breakdown is manifested in a number of *Criminal Code* provisions, namely, sections 160 and 281.3, which deal with the seizure and disposition of certain publications; section 101, which contains a special power of search and seizure with respect to firearms; and section 420, which affords a special statutory power of seizure without warrant of any paper or instrument by means of which possession offences relating to currency may be committed under the *Criminal Code*.

Finally, the piecemeal development of search and seizure powers over the past 300 years has resulted in the existence of certain anachronisms. One such anachronism is the existence of special search and seizure provisions, which are of doubtful contemporary validity. 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. This focus excludes from coverage intangible forms of property, such as funds in financial accounts and information from computers, which may represent the fruits of crime.

Warrant procedures have also failed to keep pace with technological advances. In this regard, Recommendation 19 of our Working Paper 30 advocated the institution of a telephonic warrant procedure in Canada. This procedure would permit search warrants to be obtained by telephone or other means of telecommunications in circumstances where a personal appearance before a justice would be impracticable. This recommendation, which is now the subject of a separate Report, entitled *Writs of Assistance and Telewarrants*,[6] represents an effort to introduce new technology into conventional warrant procedures, without diminishing the standards of particularity and judiciality which presently attach to the issuance of warrants, and to encourage resort to warrant procedures by removing some of the constraints upon access to the office of justice of the peace.

6. Law Reform Commission of Canada, *Writs of Assistance and Telewarrants*, [Report 19] (Ottawa: Supply and Services, 1983).

The preceding observations led us to conclude that the present array of search and seizure powers found within the common law, the *Criminal Code*, and within such federal crime-related statutes as the *Narcotic Control Act* and the *Food and Drugs Act* requires consolidation, rationalization and reform within the framework of a comprehensive set of standards and procedures.

The principal standard which we used in assessing both the present laws of search and seizure and, insofar as it can be captured accurately, the picture of actual police practice in the area, is the standard of "reasonableness." This standard is also a foundation upon which our recommendations for reform are built. In selecting the concept of reasonableness as a bench-mark for specifying the justifications and procedures for the exercise of police powers of search and seizure, we attended closely to the *Canadian Charter of Rights and Freedoms*. We have endeavoured to incorporate in our recommendations for reform the balance characteristic of the standard of reasonableness that informs the right, prescribed in section 8 of the Charter, to be secure against unreasonable search and seizure.

Our recommendations for reform are also shaped in large part by three fundamental premises, which derive from the deficiencies which we perceive in the present assortment of police powers of search and seizure. First, the disparate array of search and seizure powers found within the common law, the *Criminal Code* and federal crime-related statutes, such as the *Narcotic Control Act* and the *Food and Drugs Act*, should be replaced by a single, comprehensive regime. Second, if search and seizure powers are 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 an impartial person judicially adjudicating before the event and upon particularly sworn information. Third, the exception 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.

Part One of this Report contains our recommendations for legislative change. Recommendation One sets out proposed legislative enactments, which are designed to provide a comprehensive code of criminal procedure respecting police powers of search and seizure. In most instances, our proposed legislative enactments represent new law; in some cases, however, they are simply a codification of present practice. Recommendation Two sets out those sections of the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act* which should be repealed upon enactment of the provisions proposed in Recommendation One. Recommendation Three advocates the removal of certain special provisions from the *Criminal Code* and their incorporation into regulatory legislation.

Part Two of this Report sets out our recommendations for administrative action. These recommendations concern certain areas, which we believe require reform, but not in the form of legislative enactments. Part Two also includes two miscellaneous recommendations, which pertain to matters tangential to the thrust of our proposed legislative enactments.

Part Three provides a summary of the recommendations set out in Parts One and Two of this Report.

Certain recommendations which previously appeared in Working Paper 30 are not addressed in this Report. Our recommendations for the institution of a telephonic warrant procedure in Canada and the abolition of writs of assistance have been omitted. These recommendations, their purpose and effect, are the subject of Report 19, entitled *Writs of Assistance and Telewarrants*, and, accordingly, are not dealt with here.

We have also omitted from this Report our recommendations respecting: the use of force; the freezing of funds in financial accounts; the institution of procedures for challenging the legality of the seizure or the admissibility of illegally obtained evidence; and, the conduct of "medical examinations."

The use of force by law enforcement personnel is a substantive criminal law issue, which should be dealt with in the context of general rules and principles of criminal law, rather than in a code of procedure respecting police powers of search and seizure. Accordingly, we have chosen to defer our recommendation in this regard to our forthcoming Report on The General Part: Liability and Defences.

The Commission is contemplating the use of a temporary freezing order to effect a seizure of funds in a financial account. We have, however, decided to defer our recommendation in this regard pending further study. Our reasons are twofold. First, we feel that any recommendation at the present time would be premature, pending the findings of the Federal-Provincial Task Force on Enterprise Crime. Second, the freezing of funds in financial accounts raises serious legal and practical issues that extend beyond the purview of this Report and require further consideration.

The Commission has recently issued its Report on *Questioning Suspects*.[7] In that Report, the Commission recommends that a new Part, Part XIII.1, be added to the *Criminal Code*, which would define the permissible limits of intrusion by agents of the state upon the private interests of its subjects for the purpose of investigating and prosecuting crime. Thus, this recommendation may be viewed as providing a structure within which the law on questioning suspects and other investigative powers, such as search and seizure, may be accommodated as part of our ongoing work towards a comprehensive code of criminal procedure.

Our Report on *Questioning Suspects* also recommends an exclusionary sanction for enforcing the procedural rules governing the questioning of suspects. This sanction proceeds on a presumption of inadmissibility that attaches to any evidence obtained in contravention of the prescribed procedural rules and, like the proposal for a new Part, has potential application to investigative powers other than the questioning of suspects.

7. Law Reform Commission of Canada, *Questioning Suspects*, [Report 23] (Ottawa: Supply and Services, 1984).

Although the Commission believes it would be timely to suggest a procedure for challenging the admissibility of evidence obtained in contravention of procedural rules prescribed for the exercise of police powers of search and seizure, we are not prepared to commit ourselves at this time to the form of exclusion proposed for questioning suspects. We are, however, convinced that a presumption of inadmissibility should attach to any evidence obtained by a peace officer who exercises a power of search and seizure in contravention of our proposed rules. The precise form of that sanction must depend, to some extent, on the particular exigencies that may arise in connection with its application, not only to the exercise of powers of search and seizure, but to the exercise of other investigative powers as well. In addition, we contemplate the inclusion of other remedies with regard to the exercise of investigative powers, which will ultimately be contained in the proposed Part XIII.1. These matters are beyond the scope of this Report and require further consideration in the course of the Commission's ongoing work towards a comprehensive code of criminal procedure.

We have decided to defer our recommendations respecting the conduct of "medical examinations," which were defined in Working Paper 30 to include both strip searches and manual or tactile examinations of body cavities, to our forthcoming Report dealing with Investigative Procedures in Respect of the Person.

It is our view that such examinations, like many other forms of investigative procedures directed at obtaining evidence directly from accused persons and/or criminal suspects, are highly intrusive procedures. The violation of individual integrity, dignity and privacy which these procedures inevitably involve and the possibilities for abuse inherent in their use require that they be closely circumscribed. Accordingly, it is our view that the authority to perform "medical examinations" or other highly intrusive investigative procedures in relation to the person, and procedural safeguards designed to limit the possibilities of their unjustified use, should be dealt with comprehensively in a separate Report.

PART ONE: Legislative Recommendations

Proposed Legislation

RECOMMENDATION ONE

That the following provisions on search and seizure be enacted as part of the* Criminal Code*:

PART I

General Provisions

1. A peace officer may search for and seize objects of seizure when authorized to do so by warrant.

2. A peace officer may search for and seize objects of seizure without a warrant,

(*a*) with consent, pursuant to section 18;

(*b*) as an incident of an arrest, pursuant to section 19;

(*c*) in circumstances of danger to human life or safety, pursuant to section 21;

(*d*) in circumstances of arrest involving a movable vehicle when the delay necessary to obtain a warrant would result in the loss or destruction of objects of seizure, pursuant to section 22; and

(*e*) when objects of seizure are in plain view, pursuant to section 25.

Comment

Section 1 of our proposed legislation entrenches as a general rule the principle that police powers of search and seizure in criminal law enforcement should be authorized by judicial warrant. As a corollary to that rule, this principle requires that before a warrantless intrusion can be permitted in a particular case, it must be established that resort to the warrant is impractical or unnecessary.

Historically, the warrant was invested with two essential characteristics designed to limit uncontrolled state intrusions upon individual rights: judiciality and particularity. These features respectively purport to ensure that no intrusion occurs until the existence of a justification for it has been objectively and impartially determined upon information presented under oath, and that the scope of the proposed intrusion is clearly and particularly identified. In addition to these safeguards, the reliance which warrant procedures place on documentary preparation facilitates review of the legality of a search or seizure by providing a readily accessible record of the proceedings before the issuing justice.

By way of contrast, a warrantless power of search and seizure represents a relatively discretionary mode of authorization, legal control and review of which are substantially diminished. The exercise of warrantless powers is dependent solely on the status of the prospective intruder as a peace officer and his ascertainment of certain pre-conditions to the exercise of the power. Authorizing a peace officer to search without warrant admits the possibilities of biases in decision making that stem from a peace officer's interest in the outcome of the decision. Moreover, accountability for warrantless intrusions is impeded by the fact that no documentary record of any kind is presently available to an individual aggrieved by a warrantless search or seizure.

We accept the proposition that respect for individual rights is a crucial social value and that discretionary intrusions by the state upon individual rights ought, therefore, to be carefully circumscribed. It follows that the control the warrant purports to exemplify ought to be generalized as much as possible. Indeed, this approach may now be mandated by the *Canadian Charter of Rights and Freedoms*. Accordingly, proposed section 1 sets out as a general rule our recommendation that, unless it is otherwise provided, peace officers should only be authorized to search for and seize "objects of seizure" with a warrant.

We recognize, however, that certain circumstances may render compulsory resort to warrant procedures impractical or unnecessary. These circumstances, which comprise exceptions to the warrant requirement, are set out summarily in proposed section 2.

Since warrant protections represent a response to the perception that a search or seizure entails a coercive intrusion upon individual rights, resort to warrant procedures should not be necessary when the coercive potential of a search or seizure activity is nullified by the concurrence of the individual affected. This exception to the generalized warrant requirement is addressed in greater detail in the comment to proposed section 18.

Resort to warrant procedures is impractical in situations of urgency. We have identified three categories of urgent situations: arrest, danger to human life or safety, and certain situations where delay risks the loss or destruction of objects of seizure. We address these exceptions in greater detail in the comments to proposed sections 19, 21 and 22, respectively.

The last exception to the warrant requirement — the "plain view" doctrine — empowers a peace officer who, in the course of a lawful search, discovers objects of

seizure not covered by the justification underlying his initial intrusion, to seize them without a warrant. The seizure 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; accordingly, the obtaining of a warrant specifically authorizing seizure of these objects should not be necessary.

3. (1) "Objects of seizure" means things, funds and information which are reasonably believed to be:

(*a*) takings of an offence;

(*b*) evidence of an offence; or

(*c*) contraband.

(2) "Takings of an offence" means property taken illegally, and includes property into or for which property taken illegally has been converted.

(3) "Contraband" means things, funds and information possessed in circumstances constituting an offence.

Comment

This section sets out those categories of things, funds and information for which the police should be empowered to search and seize, whether with a warrant or, if an exception to the warrant requirement obtains, without one.

Takings of an offence:

The recovery of "takings," by which term we refer to things or funds which correspond to, or represent, the proceeds of transactions traceable to property taken illegally, is the oldest justification for search with warrant. Although the warrant is likely to specify that the property is sought as evidence of the commission of an offence, the purpose of the state's acquisition of control over takings is their ultimate return to the victim of the offence. In this regard, section 655 of the *Criminal Code* provides for the restoration of property obtained by the commission of an offence.

There are, however, other restitutionary provisions available in the *Criminal Code* which contemplate the awarding of compensation to victims of crime, rather than simply the restoration of property taken illegally or property traceable to the original takings of an offence.[8]

We take the view that objects seized must be traceable to objects wrongfully taken. To allow seizure of items not traceable to the offence itself is essentially punitive. Not

8. Section 653 of the *Criminal Code* allows a court to make an order for compensation for loss of property; section 654 provides for compensation to *bona fide* purchasers and subsection 663(2) makes restitution a possible condition of a probation order.

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 the accused before trial by denying him items that are indisputably his own. 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 in section 2 of the *Criminal Code*, which includes property into, or for which, other property has been converted or exchanged. The seizure of such items is primarily redistributive, rather than punitive, in that it re-establishes the pattern of holdings that existed before the offence was committed.

Accordingly, we recommend that the definition of ''objects of seizure'' include the classification of ''takings.'' This classification, as defined in proposed subsection 3(2), incorporates by reference the relevant part of the definition of property in section 2 of the *Criminal Code* and thereby authorizes both the seizure of property taken illegally and the seizure of items traceable to the original takings.

The definition of ''objects of seizure'' does not include a separate classification for profits received from the commission of a criminal offence, such as income from the sale of prohibited narcotics or obscene publications. Bill C-19, the *Criminal Law Reform Act, 1984,* introduced in Parliament in 1984, proposed a wide range of non-carceral sentencing options, including the forfeiture of property ''... obtained, derived or realized directly or indirectly ...''[9] as a result of the commission of an offence. In order to facilitate this forfeiture scheme, the Act proposed a special search and seizure provision,[10] which would allow a justice, on the application of the Attorney General, to issue a warrant authorizing the search for, and seizure of, property in respect of which an order of forfeiture may be made upon the conviction and sentencing of an accused. These provisions are intended to attack one of the principal factors which motivate criminal activity, namely, profits.

The Commission recognizes that the present law is inadequate to deal with profits generated through organized criminal activity, through illicit drug trade and through other consensual crimes, in particular. However, the legal and practical problems involved in tracing and freezing criminal proceeds and profits for the purpose of effecting their seizure and ultimate restoration or forfeiture are of such magnitude that we have determined to defer any recommendation in this regard pending further study and release of the report of the Federal-Provincial Task Force on Enterprise Crime.

Evidence of an offence:

The evidentiary justification for search and seizure has been emphasized both by the courts and in practice, particularly in connection with warrants, and has long been recognized in the context of warrantless searches incidental to arrest.

9. See Bill C-19, *Criminal Law Reform Act, 1984,* 32nd Parl., 2nd Sess., 1984, s. 668.2, clause 206.
10. *Ibid.*, s. 445.1, clause 107.

In affirming this ground for seizure, the Commission recognizes that even when items seized are lawfully possessed, their evidentiary value to our criminal law enforcement system outweighs the inconvenience seizure may cause to their possessor. The question of procedures to limit the detention of, and effect the return of, items seized for their evidentiary value is a problem of post-seizure procedures and, accordingly, will be covered in our Working Paper dealing with this particular subject.

Contraband:

The third classification of objects justifying a search or seizure is that of ''contraband,'' which is defined in subsection 3(3) of our proposed legislation as ''things, funds and information possessed in circumstances constituting an offence.''

Many offences, such as those set out in narcotics and drugs legislation and in the weapons provisions of the *Criminal Code*,[11] prohibit the possession of certain items. Search and seizure powers serve to enforce the prohibitions that these offences define.

While affirming this ground for search or seizure, the Commission recognizes that the scope of seizure of items possessed in circumstances constituting an offence may be problematical, particularly when the item is illegal to possess only for a particular purpose. This category includes such items as controlled drugs,[12] burglary tools,[13] obscene publications and crime comics.[14] Since mere possession of these items is not illegal, it would be legitimate to restrict seizure to those items or that quantity of a substance required for evidentiary purposes. However, this approach countenances the possibility that unseized items will be distributed or used in precisely the illegal manner apprehended when the search was authorized.

The Commission, therefore, recommends expanding the scope of seizure to include all the relevant items or the whole of a substance possessed in circumstances constituting an offence in order to prevent the continuation or repetition of an alleged offence.

After careful consideration, the Commission rejected inclusion in the definition of ''objects of seizure'' of two additional categories of items in which the criminal law enforcement system has traditionally asserted an interest. These are items which must be seized in order to ensure the physical protection of peace officers and other persons or which are the instruments or means by which an offence has been or may be committed.

The protective justification for intrusion has been associated traditionally with common law searches incidental to arrest. In this context, the search serves to effectuate an arrest made pursuant to the commission of an offence by preventing escape and ensuring the safety of the police and the public. The sequence of crime and response to crime, which

11. *Narcotic Control Act*, s. 3; *Criminal Code*, ss. 88 and 89.
12. *Food and Drugs Act*, s. 34.
13. *Criminal Code*, s. 309(1).
14. *Criminal Code*, s. 159(1)(*a*) and 159(1)(*b*).

is integral to intrusive practices under our criminal law enforcement system, is maintained notwithstanding the essentially protective nature of the search. The same cannot be said, however, of purely protective searches in other circumstances.

Outside of the context of an arrest, the protective rationale for intrusion finds expression today in section 101 of the *Criminal Code*. This section permits searches for, and seizures of, various weapons for purely protective purposes in circumstances in which no offence has been committed. The provision fails to conform to the sequence of crime and response to crime and focuses on criminal propensity rather than criminal conduct. In so doing, it projects uncertainty into the criminal law and fosters opportunities for arbitrary intervention.

For these reasons, the Commission has concluded that, as a general rule, the protective rationale is not a sufficient justification for an intrusive search or seizure outside the context of arrest. Accordingly, we do not include a separate classification concerning protection in our basic definition of "objects of seizure."

Similar considerations informed our decision not to include a separate category for the instruments of crime in the definition of "objects of seizure."

In most cases, the instruments by means of which an offence may be committed, such as drug paraphernalia, constitute potential evidence of that offence; other instruments, such as weapons, might in themselves be illegal to possess or seizable on a protective basis incidental to an arrest. When none of these circumstances obtain, however, it is difficult to justify a discrete power to seize instruments, which may be used in the commission of an offence.

On the basis of common law authority, there appear to be two possible rationales for discrete powers to search for and seize such instruments. The first rationale is a preventive one. This rationale is, of course, subject to the same objections raised with respect to protection as a discrete justification for search and seizure: it violates the sequence of crime and response to crime, which we accept as a basic limitation upon intrusive search and seizure powers, and thereby creates the potential for arbitrariness and uncertainty in the criminal justice system.

The other possible rationale flows from the historical notion that items, once used by their owner in the commission of an offence, must be forfeited to the state. It is our view, however, that there is no justification for the retention of such items after seizure and pending the conviction and sentencing of the accused. Accordingly, it is difficult to rationalize the seizure of such items in the first place, unless they serve an evidentiary function. Certainly, the service of a sentencing function, be it punishment or deterrence, is not in itself a sufficient justification for pretrial search and seizure.

The Commission is, therefore, of the view that the appropriate way to control the possession of potentially dangerous items is to enact prohibitions against their possession. In the absence of such prohibitions, an individual should not be vulnerable to intrusion

before sentencing or forfeiture merely because of the illegal potential of an item he lawfully possesses. Accordingly, the definition of "objects of seizure" does not include a separate classification for the instruments by means of which an offence may be committed.

4. The ways in which a seizure may be made include:

(*a*) taking possession of an object of seizure;

(*b*) taking photographs or visual impressions of an object of seizure;

(*c*) obtaining records, regardless of the physical form of the records or the manner in which they are stored, where the records are objects of seizure; and

(*d*) acquiring control over funds which are objects of seizure in financial accounts.

Comment

This section sets out the ambit of procedures available to law enforcement personnel to establish control over objects of seizure as defined in proposed section 3.

Paragraph 4(*a*) is simply declaratory of the traditional approach, as manifest in section 443 of the *Criminal Code*, according to which a seizure has been perceived as a physical taking of things for confiscation or restoration or for evidentiary purposes. It is included in our search and seizure regime for clarity and completeness.

Paragraph 4(*b*) expands the definition of seizure to encompass taking photographs or visual impressions, for example, photocopies, of objects of seizure. At the present time, the alternative of recording information rather than removing items from premises is explicitly recognized by the *Canada Evidence Act*.[15] Subsection 29(7) of the Act restricts search and seizure with respect to financial institutions to the searching of such premises for the purposes of inspecting and making copies of entries in the books and records of such institutions, unless the warrant is expressly endorsed by the issuer as not being limited by this subsection.

While financial institutions may have a particularly acute interest in maintaining physical possession of their records, the Commission recognizes that the principle in favour of minimal disruption of an individual's interests is a general one. In this regard, the acquisition of information in secondary or recorded form is often less intrusive and likely to cause less inconvenience to the affected individual than the physical taking of things revealing that information. The Commission, therefore, recommends that where the photographing or copying of information is sufficient to serve the interests of law enforcement, it should be not only authorized but encouraged. This is the purpose of proposed paragraph 4(*b*). It is not our intent, however, in expanding the definition of

15. *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 29(7).

seizure in this fashion to authorize surveillance activities designed to record events or information occurring subsequent to the commencement of the intrusion. As explained in Working Paper 30, search and seizure powers, by definition, only authorize the obtaining of information pre-existing the commencement of the intrusion.

Paragraph 4(*c*) expands the definition of seizure to include the obtaining of records, which are objects of seizure, regardless of their physical form or the manner in which they are stored. The intent of this proposed paragraph is to allow the collection of data from computers, since the Commission is of the view that there is, in principle, no reason why information that would be seizable if contained in a document should be immune from seizure merely because it is stored in a computer record.

The Commission recognizes that permitting peace officers to obtain information from computers may create certain dangers of invasion of privacy and raise apprehensions of surreptitious monitoring of individuals, owing to the less visible nature of this form of intrusion. On the other hand, to confine search and seizure laws to relatively primitive technological methods is to discriminate in favour of the technologically sophisticated criminal. We have sought to balance these competing concerns by making the acquisition of information subject to the same principles and protections as the acquisition of things; specifically, the same categories which, in proposed section 3, limit things subject to seizure, also cover information recorded or stored in other ways.

Paragraph 4(*d*) is directed towards clarifying the legal situation with respect to the seizure of funds in financial accounts. The original common law search warrant was for stolen ''goods.'' This focus on tangible objects of seizure was carried into subsequent provisions for search and seizure covering crimes of theft, including the present subsection 443(1) of the *Criminal Code*, which refers to the seizure of ''anything'' fitting within the designated classifications. This expression may exclude from coverage intangible forms of property, such as funds in financial accounts,[16] which represent the takings of an offence. The expansion of the offences of theft and fraud to include intangible forms of property demands a modernization of search and seizure law. Accordingly, the Commission believes that it is prudent to authorize explicitly the seizure of funds, which are objects of seizure, in financial accounts.

PART II

Search and Seizure Pursuant to Warrant

5. Where a justice is satisfied, upon an application made [under section 6], that there are reasonable grounds to believe that an object of seizure is to be found upon a person or in a place or vehicle, he may issue a warrant authorizing a peace officer to search that person, place or vehicle and seize the object of seizure if it is found as a result of that search.

16. The House of Lords in *Regina* v. *Cuthbertson*, [1981] A.C. 470 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.''

Comment

A comprehensive examination of the various search warrant provisions of the *Criminal Code* has led the Commission to the view that there is an apparent need to simplify and rationalize the existing assortment of search and seizure powers. Accordingly, section 5 outlined above, along with proposed section 6, sets out in general terms the procedure for issuing warrants.

A search warrant is to be issued by a justice adjudicating upon an information in writing sworn under oath. The wording of proposed section 5, which is permissive rather than mandatory, gives the justice a discretion, which must, according to case-law, be exercised judicially. In determining whether or not to issue a search warrant, the justice must consider whether he is satisfied, upon the facts alleged in the information, that there are reasonable grounds to believe that an object of seizure, as defined in proposed section 3, related in a designated way to a specific offence, is to be found upon a specific person or in the place or vehicle to be searched. The test incorporates both the ''judiciality'' and ''particularity'' features essential to the warrant. If the justice is satisfied that this test has been met, he has jurisdiction to issue the warrant.

6. Except as otherwise authorized, an application for a search warrant by a peace officer or other person shall be in the form of an information in writing sworn under oath.

Comment

At present, the issuance of a search warrant is almost exclusively a documentary procedure, which requires an ''information upon oath'' to be tendered personally by an informant and in writing before a justice.[17] The Commission has recommended the institution of a telephonic warrant procedure in Canada, which would permit search warrants to be obtained by telephone or other means of telecommunications in circumstances where a personal appearance before a justice would be impractical. Although this procedure would dispense, in appropriate cases, with the usual requirement that the information upon oath be tendered personally and in writing, the documentary emphasis of present warrant procedures is maintained since the justice would be required to record verbatim the information submitted by telephone or other means of telecommunication and to file a transcription of that record with the clerk of the court for the territorial division in which the warrant is intended to be executed.

17. At present, there is no requirement in Canadian law that the person who appears before the warrant issuer be the officer in charge of an investigation; indeed, some jurisdictions have used ''court liaison'' officers who make applications for search warrants based on information received from investigating officers. We make no recommendation for legislation in this respect, but express the hope the warrant issuers, through diligence in the maintenance of legal standards, insist that the informants before them be ''well informed'' ones.

The emphasis on documentary preparation which characterizes present warrant procedure promotes accountability by facilitating review of the legality of the search or seizure. Rather than being forced to wait for a transcript of an application hearing to be prepared, an individual wishing to challenge the legality of the issuance of a search warrant need only obtain the existing written information in order to ascertain the formal, substantive and probative sufficiency of the application. For this reason, it is the view of the Commission that the documentary emphasis of the warrant procedure must be retained.

Despite the present emphasis on documentary completeness, the *Criminal Code* provides little guidance as to the form and content of the documentary preparation required. The only model form of information provided by the *Criminal Code* is Form 1, which pertains to section 443 warrants. This form, however, fails to meet the substantive and probative requirements of section 443. Confronted with this dilemma, different cities have developed different variations on Form 1. Indeed, as indicated by our search warrant survey, different court offices in the same city were found to be using radically dissimilar forms.

This situation has certain undesirable consequences. First, erratic documentary practice impacts adversely on the formal validity of search warrants. We believe that the fluctuation in validity rates between various cities surveyed by Commission staff is attributable to some extent to the success of local improvisational efforts. Second, the form of the document tends to influence the presentation of substantive and probative details on the warrant application. Empirical evidence from our search warrant survey suggests that even if the statutory requirements are followed precisely, the spacing and structuring of these requirements on the documentary form may discourage meaningful disclosure of the substantive and probative details required by law.

In order to avoid the problems of local improvisation and encourage compliance with the legal rules for issuing and obtaining search warrants, a standard form of information to be used with respect to warrant applications should be adopted. We have, therefore, provided a suggested form of "Information to Obtain a Warrant to Search" in Appendix A to this Report. This form has been structured so as to guide the applicant in setting out the formal, substantive and probative criteria required by our search warrant regime. We have endeavoured to accommodate these details in relatively comprehensible language, which avoids "legalese," and to structure the form in such a manner as to encourage thorough and meaningful disclosure of the grounds for the application. We have also provided in Appendix B to this Report a suggested form of "Warrant to Search," which meets the requirements of proposed sections 11, 12 and 13. (A decision about whether these forms should be included in the new code of criminal procedure is reserved for later consideration.)

7. A peace officer or other person applying for a search warrant shall disclose on the information all previous applications made with respect to the search of the same person, place or vehicle for objects of seizure related to the same or a related transaction of which the applicant is aware.

Comment

Under the present law, if an application for a search warrant is refused by a justice exercising his judicial discretion, there is nothing to prevent the peace officer from reapplying for the same warrant on a subsequent occasion before the same or another adjudicator. The potential for "forum shopping" which this situation creates may undermine the judiciality of warrant proceedings, which we accept as a fundamental objective. On the other hand, we do not recommend that an initial refusal to issue a search warrant should be binding on an investigation as a whole, since circumstances may change after an initial application is refused. For example, new evidence in support of the application may be discovered. Moreover, if an initial refusal to issue a search warrant were to be binding, adjudicators might well be deterred from ruling against applications perceived to be insufficient.

Accordingly, proposed section 7 sets out what we believe is a balanced solution, requiring the applicant to disclose on the information all previous applications with respect to the same search warrant of which he is aware.

The inclusion of the words, "of which the applicant is aware," is a response to objections raised by government representatives and the police during our consultations with them that the applicant for a search warrant may not be in a position to know of other applications with respect to the same search warrant. The Commission acknowledges the legitimacy of this objection. Accordingly, the duty to disclose all previous applications with respect to the same search warrant is limited to those previous applications of which the applicant is personally aware.

We believe that this requirement gives appropriate recognition to a refusal to issue a search warrant, yet does not go so far as to make the consequences of a refusal inimical to the exercise of judicial discretion.

8. A peace officer applying for a search warrant shall not be required to reveal facts disclosing the identity of a confidential informer.

Comment

This section codifies the common law rule against disclosure of the identity of police informers, which applies in both criminal and civil actions.[18] At common law, this rule has chiefly taken the form of rules of evidence, which prohibit disclosure of a police informer's identity by peace officers who have learned the informer's identity in the course of their duties. Its application does not depend on the judge's discretion, nor is

18. The decision of the Supreme Court of Canada in *Bisaillon* v. *Keable* (1984), 7 C.C.C. (3d) 385 contains an excellent discussion of the secrecy rule regarding police informers' identity.

it subject to any formal requirements. It is a legal rule of public order by which the judge is bound and must be applied by the court on its own motion if no one raises it.

The policy on which this rule is based is plain: if the identity of police informers were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. While this policy is a sound one, the Commission is of the view that the need to protect the identity of confidential informers must not be allowed to frustrate the issuer's judicial duty to ascertain the existence of reasonable grounds for the issuance of a search warrant. In order to achieve the fine balance that must exist between the fact-finding duty inherent in judiciality and the law enforcement interest in protecting the identity of confidential informers, a distinction must be drawn between protecting the identity of the confidential source from disclosure and protecting the grounds of belief yielded by the source from judicial scrutiny.

The Commission recommends that the rule against disclosure of the identity of confidential police informers should be entrenched in our search and seizure regime. While a peace officer cannot, therefore, be compelled to disclose the identity of a confidential source at a search warrant hearing, the grounds of belief yielded by the source must, nevertheless, be revealed so that the issuer can determine whether reasonable grounds exist to support the issuance of a search warrant. If, in the course of providing the issuer with the grounds of the warrant application, a peace officer discloses the name or characteristics of a confidential informer, proposed section 9 empowers the issuer to cypher such information, which might otherwise jeopardize the safety of the informer.

A somewhat related problem arises when a peace officer wishes to perform a search on the basis of factual information received by way of an intercepted private communication. Subsection 178.2(1) of the *Criminal Code* prohibits disclosure of the existence of an intercepted private communication. Although subsection 178.2(2) makes this prohibition inapplicable to "criminal proceedings" and "other proceedings" in which "evidence on oath" is required, the results of our search warrant survey indicate that many peace officers are not confident that this exemption applies to search warrant applications. As a result, they are often reluctant to disclose the grounds of belief yielded by the intercepted communication necessary to support the issuance of a search warrant.

It is the view of the Commission, therefore, that section 178.2 of the *Criminal Code* should be amended so as to specify that subsection 178.2(1) does not apply to search warrant proceedings. As in the case of confidential informers, it should be made clear that peace officers are not precluded from disclosing the facts obtained from an intercepted private communication, which establish the requisite reasonable grounds of belief necessary to support the issuance of a search warrant.

9. (1) A justice receiving an application for a search warrant, if requested by a peace officer or other applicant, may

(*a*) obscure with a cypher any telephone number appearing on a search warrant or supporting information when the telephone number would be likely to reveal the existence of electronic surveillance activities if not obscured; and

(*b*) obscure with a cypher the name or characteristics of an informer appearing on a search warrant or supporting information when the safety of the informer would be jeopardized if his name or characteristics were not obscured.

(2) When a telephone number or name or characteristics of an informer have been obscured pursuant to paragraph 9(1)(*a*) or 9(1)(*b*), the justice shall attest on the search warrant or information on which the cypher appears that the only facts which have been obscured are the digits of a telephone number, a name, or the characteristics of an informer, as the case may be.

Comment

The relevant concern in the judicial evaluation of the sufficiency of a search warrant application is whether reasonable grounds exist to support the issuance of a warrant. The Commission recognizes that, in certain cases, disclosure of the grounds of belief yielded by a wire-tap or confidential informer may necessarily reveal the existence of the wire-tap itself or the identity of the confidential informer. For example, in an application for a warrant to search telephone company premises for records relating to a specific telephone number, the wire-tap is inevitably identified in both the search warrant and the supporting information. Accordingly, this proposed section empowers a justice, at the request of the applicant for the warrant, to obscure with a cypher certain information which, if accessible to the public, could frustrate electronic surveillance activities or threaten the safety of a confidential informer.

During consultations on this issue, certain representatives of government and the police expressed concern that the protection afforded by the cyphering of certain delicate information would not be sufficient, in all cases, to protect the identity of a confidential informer or the existence of electronic surveillance activities, as the case may be, and suggested adoption instead of a sealing procedure. While appreciating this concern, the Commission is persuaded that, as a matter of policy, the cyphering of information represents a better alternative.

The Commission believes that the criminal process should not be conducted in conditions of low visibility, which necessarily diminish accountability and impede review of the propriety of law enforcement activities. Although some issuers of search warrants are adopting the practice of sealing warrant applications based on information obtained from confidential sources, this procedure makes it difficult for the subject of a search warrant to challenge the legality of the warrant and its execution, by denying access to the grounds upon which the warrant application was based. A cyphering procedure, on the other hand, affords some degree of confidentiality and is, at the same time, a more public method of protecting the confidentiality of informers or the existence of electronic surveillance activities. Provided the issuer of the warrant attests that the only facts which have been obscured are the digits of a telephone number or the name or characteristics of an informer, as the case may be, the Commission is confident that no significant

sacrifice will be made in terms of the capacity of the public to evaluate or monitor the standards of warrant procedures.

10. (1) A justice considering an application for a search warrant may

(*a*) examine orally the peace officer or person making the application; and

(*b*) exclude persons from the search warrant hearing when the ends of justice will best be served by such an order.

(2) When a justice issues a search warrant and in doing so relies either in whole or in part upon grounds of belief disclosed in the course of oral examination under paragraph (1)(*a*), he shall require the peace officer to include such grounds in the information in writing.

Comment

As indicated in the commentaries to proposed sections 5 and 6, the procedure for issuing a search warrant is almost exclusively documentary. While special rules may apply to the issuance of warrants under section 181 of the *Criminal Code*,[19] there is no onus, generally speaking, upon the issuer of a search warrant to perform such adjudicative tasks as asking questions of the deponent or checking the credibility of his sources if the application documents are complete and proper on their face. Conversely, if the contents of the documents are not sufficient, the applicant cannot remedy the deficiency through an oral presentation.

While this emphasis upon documentary preparation encourages good police practices and facilitates review of the legality of issuance by providing a basic and readily accessible record of the proceedings before the issuing justice, it can have a counter-productive effect if it encourages a justice to assume a merely clerical role. For example, a lack of judicial inquisitiveness may allow a warrant to be issued on the basis of terse or ill-defined grounds. This situation undermines the notion of the warrant as a judicial form of protection against unmerited intrusions against the individual and admits the possibility that a reviewing court may subsequently quash the warrant. Ultimately, it weakens the protection against unreasonable search and seizure afforded by section 8 of the *Canadian Charter of Rights and Freedoms*.

While the documentary emphasis of the warrant procedure must be retained to facilitate review, the Commission is of the view that a justice, hearing an application for a search warrant, ought not to be restrained from asking questions designed to elicit the

19. 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." In *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*, [1964] 3 C.C.C. 82 (B.C. S.C.), it was held, however, 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.

true basis of the application. Accordingly, proposed paragraph 10(1)(*a*) explicitly empowers the justice to conduct such inquiries.

Proposed subsection 10(2) requires any additional details elicited as a result of the justice's inquiries and relied upon in issuing the warrant to be included on the written application and properly attested to. This requirement ensures that the person affected by the search has access to all the facts which were relied upon at the application hearing and is not prejudiced by the justice's inquiry.

The issuance of a search warrant is a judicial act on the part of a justice which, by the very nature of the proceeding, is usually performed *ex parte* and *in camera*. The Commission recognizes that the effective administration of justice may justify exclusion of the public from the proceedings attending the issuance of a search warrant. To require a search warrant application to be made in open court would impair the efficiency of a search warrant as an aid in the investigation of crime and hinder, if not defeat, the ability of the police to search for and seize objects of seizure. This position accords with that taken by the majority of the Supreme Court of Canada in the case of the *Attorney-General of Nova Scotia* v. *MacIntyre*.[20]

Accordingly, proposed paragraph 10(1)(*b*) expressly empowers a justice, hearing an application for a search warrant, to exclude persons from the hearing when, in his view, the ends of justice will best be served by such an order.

11. (1) Any peace officer within the territorial jurisdiction of the issuer of a search warrant may execute the warrant.

Comment

Among existing warrant provisions, there are discrepancies as to which peace officers are authorized to execute a warrant. Section 443 of the *Criminal Code* has been interpreted as allowing a warrant to be issued to all peace officers in a given province.[21] Case-law suggests that a section 181 warrant could include such a wide direction also.[22] However, warrants issued under provisions of the *Narcotic Control Act* and the *Food and Drugs Act* must be executed by "a peace officer named therein"; accordingly, a general direction would invalidate these warrants.[23]

This proposed section reflects the Commission's view that no legitimate interest is served by restricting the execution of a search warrant to a named peace officer. Such a restriction does not lessen the intrusiveness of the search, nor does it represent any

20. *Attorney-General of Nova Scotia* v. *MacIntyre* (1982), 65 C.C.C. (2d) 129 (S.C.C.).
21. *R.* v. *Solloway and Mills* (1930), 53 C.C.C. 271 (Ont. S.C. A.D.).
22. *Re Old Rex Café* (1972), 7 C.C.C. (2d) 279 (N.W.T. Terr. Ct.).
23. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

evaluation of the particular fitness of the named party to execute the warrant. Moreover, the authorization of particular officers is an anachronism in a law enforcement system in which established lines of command in a modern police organization have replaced the archaic notion of a one-to-one communication of authority from the justice to a constable. Accordingly, the decision as to who should execute a warrant is an administrative one which should be left to the appropriate police force.

The one practical limitation upon the designation of executors is the territorial jurisdiction of the issuer. The question of jurisdiction is beyond the scope of this Report. The existing structure of territorial divisions and the current practice of "backing" warrants for execution in another territorial division[24] have been accepted, therefore, for present purposes.

(2) A peace officer executing a search warrant may bring into the place or vehicle to be searched any private individual whose presence he reasonably believes to be necessary to the successful execution of the warrant.

Comment

Proposed subsection 11(1) permits search warrants to be executed only by peace officers. Although search warrants issued pursuant to sections 353 or 443 of the *Criminal Code* may be executed by private individuals, this power is very rarely exercised. The Commission is of the view that there is no apparent need to retain the power of a private person to execute a search warrant. Moreover, the party executing a search warrant should be free of any material interest in the outcome of the search. It follows, therefore, that a private individual should not be given authority to execute a warrant.

This reasoning should not, however, preclude a private individual from assisting a peace officer in the execution of a search warrant. The Commission recognizes that, in some cases, the assistance of a private complainant or other individual may facilitate the search and thereby minimize the intrusion suffered as a result. For example, in a complex commercial crime case, the presence of an accountant may assist the officer in isolating those business documents relevant to the alleged offence. Accordingly, this subsection specifically empowers a peace officer executing a search warrant to enlist the aid of a private individual whose presence he reasonably believes is necessary to the successful execution of the warrant.

Some consultants suggested that authority to enlist the aid of a private individual in the execution of a warrant should be accorded a peace officer only when specifically granted by a justice in a particular case. The Commission disagrees with this position and recommends that such authority should be available in all cases in which the officer executing the search reasonably believes that the presence of the individual is necessary

24. *Criminal Code*, s. 443(2).

to the successful execution of the warrant. Permitting a peace officer to enlist the aid of a private individual in the execution of a search does not represent a distinct intrusion upon the rights of the individual affected by the search. Accordingly, special authorization should not be required.

12. A justice shall issue a warrant authorizing execution by day only unless the peace officer or person applying for the warrant shows reasonable cause for allowing execution by night.

Comment

Many of the existing warrant provisions of the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act* permit the nocturnal execution of search warrants. Only warrants issued pursuant to section 443 of the *Criminal Code* are subject to a special rule in this regard. A section 443 warrant must be executed "by day, unless the justice, by the warrant, authorizes execution of it by night" as mentioned in section 444. This situation under statute may be contrasted with the early common law, which permitted searches of premises with warrant only during the day, in part because of the great disturbance caused by nocturnal searches.

Nocturnal searches still represent particularly intrusive disruptions of normal life. The Commission recognizes, however, that a restriction of searches to daytime hours may, in certain cases, render a search ineffectual. Accordingly, this proposed section permits a search to be conducted at night provided the applicant can show "reasonable cause" for nocturnal execution. This onus would presumably be discharged by proof that the warrant cannot be executed in the daytime or that the objects of seizure will be removed or destroyed if execution at night is not permitted.

13. (1) Subject to subsection (2), a search warrant shall expire after ten days.

(2) Where a justice hearing an application to issue a warrant is satisfied that, having regard to the nature of the investigation

(*a*) an expiration period longer than ten days is reasonable, he may fix an expiration period not exceeding twenty days; or

(*b*) an expiration period shorter than ten days is reasonable, he may limit the expiration period to what is reasonable in the circumstances of the case.

Comment

At present, the *Criminal Code* does not contain any statutory requirement that searches pursuant to warrant be performed within a specified period of time. Despite the

lack of statutory authority, however, our search warrant survey disclosed a tendency among some issuers of search warrants to attach deadlines for execution. The data also indicated that those warrants with expiry dates were executed more quickly than those without such deadlines.

It is the view of the Commission that the elements of "judiciality" and "particularity," which provide the corner-stones of a search warrant regime, require a reasonable proximity in time between the issuance and execution of a search warrant. Accordingly, in Working Paper 30, we recommended that a warrant should expire eight days after issuance. The intent of this recommendation was to ensure that the warrant was executed in substantially the same circumstances that prompted the issuer to grant it. If a search warrant could not be executed before its expiry date, the applicant was entitled to apply for a new warrant, provided reasonable grounds for search still existed.

During consultations with government representatives and police forces across Canada, objections were raised concerning the need to apply for the issuance of a new search warrant, rather than for a longer expiration period if, having regard to the nature of the investigation, it appeared that the warrant applied for could not be executed within the general deadline. We are persuaded that to empower a justice to provide a longer expiration period in such circumstances would be more convenient for the police and would not adversely affect the underlying rationale of our Working Paper recommendation. Accordingly, proposed paragraph 13(2)(*a*) allows a justice, hearing an application to issue a search warrant, to fix a longer expiration period than that which is generally provided for in proposed subsection 13(1) if he is satisfied that to do so is reasonable having regard to the nature of the investigation. The Commission recognizes that, in certain circumstances, a deadline shorter than that generally provided for the execution of a search warrant may be appropriate. Therefore, proposed paragraph 13(2)(*b*) provides the issuer with discretion to shorten the time for execution to what is reasonable in the circumstances of the case.

During consultations with certain police groups, we were urged to adopt a substantially longer expiration period than that which we recommended in our Working Paper. In response to these representations, we have extended the general period for execution of a search warrant from eight to ten days. We have also placed a ten-day limit on the expansion to the general period for execution permitted by proposed subsection 13(2).

Although this section extends, only marginally, the time-limit imposed on the execution of a search warrant by our Working Paper recommendation, the Commission is of the view that general deadlines longer than ten days would seriously undermine the rationale for the existence of an expiry date. Moreover, the discretion to fix a longer expiration period, which is provided a justice hearing an application to issue a search warrant by proposed paragraph 13(2)(*a*), makes a longer general deadline unnecessary, especially in view of the fact that our search warrant survey has revealed that most search warrants are executed within two days of issuance.

14. A peace officer executing a search warrant may search only those areas within the places and vehicles or upon the person mentioned in the warrant where it is reasonable to believe that the objects specified in the warrant may be found.

Comment

The concept of particularity requires that the warrant authorize entry of specified premises to search for specified objects with a view to a specified offence. Accordingly, a search warrant cannot be so broadly worded as to amount to a *carte blanche* to search and seize at will.

This proposed section does not make any major change in the present law. It simply entrenches the common law principle, which flows from the concept of particularity, that the conduct of the search must be reasonable. Accordingly, a peace officer executing a search warrant is not entitled to make unconfined searches for seizable objects. Rather, the scope of search pursuant to warrant should be restricted to those areas where the officer reasonably believes the objects specified in the warrant may be found. To hold otherwise is to undermine the notion of control which a search warrant purports to exemplify.

15. (1) A peace officer executing a search warrant shall, before commencing the search or as soon as practicable thereafter, give a copy of the warrant

(*a*) in the case of a search of the person, to the person to be searched; or

(*b*) in the case of a search of a place or vehicle, to a person present and in apparent control of the place or vehicle to be searched.

(2) A peace officer executing a search warrant within any place or vehicle that is unoccupied at the time of the search or seizure shall upon entry, or as soon as practicable thereafter, affix a copy of the warrant in a prominent location, within the place or vehicle.

Comment

At the present time, a peace officer executing a search warrant is under a minimal obligation to provide information to the individual concerned about the intrusion upon his person or premises. Under subsection 29(1) of the *Criminal Code*, a peace officer is required to have the warrant with him, where that is feasible, and to produce it when requested to do so.

It is the view of the Commission that this provision, while it goes some distance towards assuring persons against whom a warrant is executed that the search is authorized, is deficient in two respects. First, the requirement that the warrant be produced is a

conditional one, depending upon both the feasibility of the peace officer having the warrant with him and the request of the individual affected. Second, the provision 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.

The Commission supports the principle that the warrant should be shown to the individual affected as soon as possible, regardless of whether a request has been made or not. Although this requirement may, in some cases, inconvenience the officer in a minor way, it ultimately benefits both the officer and the individual concerned, by making the officer's authority visible as soon as possible and by providing the individual concerned with considerable information as to the premises to be searched, the objects to be seized and the offence to which the search relates.

Accordingly, this proposed section requires the executing officer to give a copy of the warrant to the person to be searched, or the person in apparent control of the place or vehicle to be searched, as the case may be, before commencing the search or as soon as practicable thereafter. If the place or vehicle is unoccupied, the officer is required to affix a copy of the warrant to the place or vehicle upon entry or as soon as practicable thereafter.

16. (1) Where a peace officer makes a search and seizure with a warrant he shall provide, on request, an inventory of things seized in the course of the search to the person who has been searched, or whose place or vehicle has been searched.

(2) Where the peace officer who makes the search and seizure is aware of the identity of a person with a proprietary interest in the things seized, other than the person who has been searched or whose place or vehicle has been searched, he shall provide an inventory to that person.

Comment

At the present time, there is no statutory requirement that a person whose possessions are seized in the course of a search with warrant be provided with an inventory of the items seized. Some police forces in Canada have, however, voluntarily adopted an inventory procedure.

As a general principle, the Commission believes that the execution of a search warrant should be as visible an exercise of police powers as possible. A statutory requirement that a person whose possessions are seized be provided with an inventory would clearly enhance the visibility of search and seizure procedures. Accordingly, proposed subsection 16(1) requires a peace officer to provide an inventory of things seized in the course of a search and seizure with warrant to the person who has been searched or whose place or vehicle has been searched.

The Commission recognizes that there may be cases in which, for any number of reasons, the person subject to a search and seizure does not wish to receive an inventory of the items seized. Accordingly, the obligation to provide an inventory of things seized in the course of a search with warrant is not mandatory in all cases, but is conditional upon a request to receive such inventory from the person whose possessions have been seized. In order to apprise the person who has been searched or whose place or vehicle has been searched of his right to receive, upon request, an inventory from the peace officer who executed the search and seizure, a notice to that effect is included in our form of "Warrant to Search," which is Appendix B to this Report.

The owner of the objects seized pursuant to warrant may be someone other than the person from whom they are seized directly. The Commission is of the view that a person with a proprietary interest[25] in the objects seized ought to be entitled to receive an inventory of those objects; however, the Commission recognizes that lack of notice of the seizure and the right to receive an inventory of the items seized may prevent that person from requesting receipt of an inventory. Accordingly, proposed subsection 16(2) provides that where a peace officer is aware of the identity of a person with a proprietary interest in the things seized, other than the person who has been searched or whose place or vehicle has been searched, he is required to provide an inventory to that person without the necessity of a request.

The counterpart to this proposed section with respect to searches or seizures without warrant is provided by proposed section 23, which requires the completion of a post-seizure report, including an inventory of things seized, and provision of a copy of the report to the person who has been searched, or whose place or vehicle has been searched, and to persons with a proprietary interest in the things seized of whom the peace officer who completes the report is aware.

17. (1) Any person has the right, upon request, to examine a copy of a search warrant and supporting information following execution of the warrant.

(2) No person shall publish in any newspaper or broadcast the contents of any search warrant or supporting information unless:

(*a*) a preliminary inquiry has been held in respect of a person who has been searched or whose place or vehicle has been searched with that warrant, and that person has been discharged at the preliminary inquiry;

(*b*) a person mentioned in paragraph (*a*) has been tried or committed for trial, and the trial of that person is ended;

(*c*) the contents of the search warrant or information have been disclosed in judicial proceedings in respect of which publication or broadcast is not prohibited;

(*d*) an order has been made under subsection (3).

25. "Proprietary" interest includes not only rights of ownership, but possessory and equitable interests as well. The equivalent term in the civil law system could be "un droit réel."

(3) Upon application by a person mentioned in paragraph (*a*), or by any person with the consent of a person mentioned in paragraph (*a*), a judge may order that the prohibition on broadcasting and publication imposed by subsection (2) be terminated.

(4) In this section

(*a*) "newspaper" has the same meaning as in section 261 of the *Criminal Code*;

(*b*) "judge" means a judge of a superior court or judge as defined in section 482 of the *Criminal Code*.

Comment

Paragraph 10(1)(*b*) of our draft legislation recognizes that the effective administration of justice may, on occasion, justify the exclusion of the public, including the person who is to be searched, or whose place or vehicle is to be searched, from proceedings attending the issuance of a search warrant. This reflects the position that was taken by the Supreme Court of Canada in the *MacIntyre* case.[26]

The Commission is of the view that once the search warrant has been executed, however, the need to control information about the search warrant hearing is clearly diminished. At this point, the person searched knows about the police investigation by virtue of the search itself and the police have had their opportunity to make the authorized seizures. Moreover, in order to effectuate his right to apply to quash a search warrant based on a defective information, or otherwise to seek review of the legality of the intrusion, the searched person must be able to inspect both the information and the search warrant immediately after it has been executed. This position is incorporated in proposed subsection 17(1). It is also advanced by the notice provision in our suggested form of "Warrant to Search," which forms Appendix B to this Report.

Proposed section 17 also deals with the questions of access to the search warrant and supporting information to be permitted the public at large, including the media, and dissemination by the media of the contents of these documents. These questions are complex ones, involving significant competing interests. On the one hand, it is arguable that in order to safeguard the fairness and quality of judicial proceedings, and to effectuate the constitutional protection afforded freedom of the press in both paragraph 1(*f*) of the *Canadian Bill of Rights* and paragraph 2(*b*) of the *Canadian Charter of Rights and Freedoms*, unrestricted rights of access to the search warrant and supporting information should be accorded the public once the search warrant has been executed. On the other hand, respect for individual rights and privacy is a crucial social value upon which intrusions must be carefully circumscribed.

In *MacIntyre*, the Supreme Court of Canada resolved these issues by reference to the policy of "protection of the innocent." The majority held that where a search warrant

26. *MacIntyre*, *supra*, note 20.

is executed and nothing is found, arguments in favour of public access should give way to concerns for individual privacy. Where objects are seized, however, the interests in favour of access would prevail.[27] Our position is sympathetic to that of the majority in *MacIntyre*, but strikes the balance in a different way. It is the view of the Commission that a better solution, which does not make such a direct association between the results of a search and the question of an individual's guilt, begins by distinguishing between access to the warrant and information and the publication of their contents.

Our approach is inspired in part by subsections 457.2(1) and 467(1) of the *Criminal Code*, which empower a court, upon application of the accused, to impose a non-publication order covering the evidence adduced, representations made, and reasons given by the court at show-cause hearings, and preliminary inquiries respectively. Our [illegible] subsection 17(2) in many respects parallels these prohibitions. Subsection 17(4), by incorporating the definition of "newspaper" found in these provisions, makes the coverage of our proposal congruent with that of the existing prohibition sections. Our recommendations, however, differ from these sections in a number of respects.

The most significant difference is the provision that the ban on publication and broadcast be automatic, rather than dependent on the making of a specific order by the judge presiding at the proceedings. Subsections 457.2(1) and 467(1) both provide that the judge "shall" make such an order upon the application of the accused; otherwise, under subsection 457.2(1) only, the judge "may" make such an order. The reason for the automatic character of the ban which we would impose in the case of the documents relevant to search warrant proceeding is their *ex parte* nature. In effect, we presume that the person searched would apply for such a ban were he to be present at the search warrant hearing; if that person wishes to permit publication or broadcast of the documents, he may apply for a lifting of the ban or consent to another person making such an application. However, since the warrant or information may disclose facts about a number of different persons, only some of whom may wish to see the facts disseminated, the right of the party whose person, place or vehicle has been searched to obtain revocation of the non-publication order is not absolute; rather, the application must be adjudicated by a judge of a high-level court, who will presumably be best equipped to resolve the competing interests which may be presented by the case.

The provisions which we recommend do not permit any person other than the person who has been searched or whose place or vehicle has been searched to make an application for permission to broadcast or publish, without the consent of that party. This means that if none of paragraphs (*a*), (*b*) or (*c*) of proposed subsection 17(2) apply to a particular case, and the party concerned does not so consent, institutions of the media are precluded from disseminating information about the contents of the documents. We recommend this restraint only after the most extensive debate among us, a debate focusing on the strong policy arguments in favour of absolute freedom of the press which stand against this position. It is our conclusion that in this particular context, these arguments are outweighed by others in favour of the limitation which we would impose.

27. *Ibid.*

Our conclusion is based largely on the premise that at the pretrial stage, the need for dissemination of facts about judicial proceedings through the media is not as weighty as at trial proceedings themselves. It is public *trial* which has been of paramount concern in the common law tradition; in making the present recommendations we do not imply that this concern should be compromised. One policy underlying the tolerance of restrictions at the pretrial stage is the protection of the right to a fair hearing, which is guarded by paragraph 11(*d*) of the Charter. Preliminary case-law on our Charter, like corresponding American case-law, suggests that the need to prevent prejudicial pretrial publicity may justify such restrictions.[28]

We recognize of course that this concern would not apply to a case in which the police or Crown decided after the search not to proceed with criminal charges against the party searched. In some such cases the possibility arises that this party has suffered injury or a violation of privacy needlessly. In other such cases, there might be a suspicion that a meritorious investigation has been dropped. Clearly, it would profit our criminal justice system to have any suggestions of injustice aired through the media. The problem is that it is often difficult to distinguish with certainty the case in which no charges will arise from that in which charges have been merely delayed. This may be particularly true in the kind of complex commercial crime cases which may attract media interest if public figures are thought to be involved.

We are also cognizant of other kinds of prejudice to the party concerned which might stem from permitting the media to apply for permission to publish or broadcast. Like the majority in *MacIntyre*, we believe that individual privacy is of critical importance and that this interest is heightened where an individual is "innocent." In effect, our recommendation departs from *MacIntyre* by drawing a line in cases in which criminal proceedings have not been commenced rather than those in which a search has not been resultant. We also are concerned about the expenses which might well be entailed for an individual in hiring counsel specifically to represent his interests in opposing an application by the media. The present context differs in this respect from the situation in show-cause hearings and preliminary proceedings in which the application is part of the proceedings themselves, and hence likely to be of negligible financial prejudice to the accused.

As outlined in paragraph 17(2)(*c*), we propose a departure from the present subsections 457.2(1) and 467(1) in another respect. We would terminate the prohibition if and when the contents of the search warrant or supporting information are disclosed in any judicial proceedings which are not themselves covered by a non-disclosure order or rule. This is of some significance in the case of preliminary inquiries and trials, the two proceedings covered by paragraphs 17(2)(*a*) and (*b*) in that the media would be free to publish or broadcast the relevant facts immediately rather than waiting for the termination of the proceedings. This seems to us to be a sensible position; if the rest of the proceedings are open to dissemination through the media as they occur, there does not seem to be a

28. See, *e.g. Gannett Co. Inc.* v. *De Pasquale*, 443 U.S. 368 (1969), which includes a lengthy discussion of the distinction between publicizing trials and pretrial proceedings; *Re Southam Inc. and the Queen (No. 2)* (1982), 70 C.C.C. (2d) 264 (Ont. H.C.J.); and *Re Global Communications Ltd. and Attorney General for Canada* (1984), 10 C.C.C. (3d) 97 (Ont. C.A.).

valid reason for maintaining a special ban pertaining to the warrant documents. Further, we believe that the position should be the same in the case of other judicial proceedings. If, for example, a search warrant were adduced into evidence at a civil trial brought by an individual against police officers who executed a search in his premises, our proposal would permit the media to broadcast the contents of that warrant to the same extent as the other evidence adduced at the trial.

We realize that our proposed section 17 may represent a limitation upon freedom of the press as protected in paragraph 2(*b*) of the Charter. If this is so, we believe that this is a limit which would be reasonable and demonstrably justified and hence constitutionally valid within the meaning of section 1 of the Charter. In our view, many of the interests which would be served by permitting publication and broadcasting in the present context, specifically the interest in opening up judicial proceedings to public inspection, are substantially served, albeit to a more modest degree, by the provision for access to the warrant documents. As this Report is being completed, there are decisions among the developing case-law on the Charter which support our view, as well as others which do not.[29] It is clear that future action on our recommendation by the legislature must be acutely sensitive to future developments in the case-law.

PART III

Search and Seizure without Warrant

18. (1) A peace officer may search without warrant

(*a*) a person who consents to a search of his person, and

(*b*) a place or vehicle, with the consent of a person present and apparently competent to consent to such a search,

and may seize any objects of seizure found in the course of the search.

(2) A peace officer, before executing a search under this section, shall inform the person whose consent is sought that the person has a right to refuse to consent and to withdraw his consent at any time.

(3) Consent under this section may be given orally or in writing.

(4) The signature of a person on a document warning him of his right to refuse to consent and of his right to withdraw his consent at any time is *prima facie* proof of the consent of the person to the search.

29. Our position is supported by *Southam (No. 2), supra,* note 28; *R.* v. *T.R. (No. 1)* (1984), 10 C.C.C. (3d) 481 (Alta. Q.B.); *Global Communications, supra,* note 28; and *R.* v. *Banville* (1983), 3 C.C.C. (3d) 312 (N.B. Q.B.).

The contrary position is supported by *R.* v. *Robinson* (1983), 5 C.C.C. (3d) 230 (Ont. H.C.J.). *Re Southam Inc. and the Queen (No. 1)* (1982), 70 C.C.C. (2d) 257 (Ont. H.C.J.) includes remarks about the absence of justification for blanket denials of public hearings; however, the case itself involved a juvenile's *trial*.

Comment

This section, which confers an exceptional power to search and seize without a warrant, reflects the Commission's belief that resort to warrant procedures should not be required when the coercive element of a search or seizure is nullified by the consent of the individual affected.

Historically, the common law tolerance of searches performed with consent was founded on the proposition that such searches do not constitute actionable intrusions. According to this proposition, once an individual consents to police action, he effectively waives the right to invoke the normal legal protections against the intrusions inherent in such actions. In effect, then, the giving of consent has been treated as a private transaction between individuals, thus rendering irrelevant such public law concerns as the sufficiency of the peace officer's grounds for acting and the adherence to procedural prerequisites to intrusions. As a result, generally applicable procedural safeguards to control the consensual transaction between the peace officer and the individual affected do not exist at the present time.

It is the view of the Commission that the failure of existing law to articulate standard procedural safeguards has a number of distinct disadvantages. First, it frustrates accountability. Peace officers are persons in positions of authority. The potential for intimidation which exists, therefore, when an individual is confronted with a police request creates a danger that the compliance obtained from the individual is not truly consensual. Without the existence of procedures to ensure or verify the existence of meaningful consent, the subsequent determination of consent may be difficult, especially in view of the serious evidentiary problems presented in accurately reconstructing the search incident at trial. Second, although the utility of this exception to the warrant requirement presumably depends heavily upon citizen co-operation with police investigations, unfettered discretion to use consent as the basis of authority for search and seizure may actually undermine public co-operation with the police if compliance is the result of intimidation or fear, rather than a true state of co-operation based upon informed consent. Third, in situations in which the authority to search does not exist outside of the consensual transaction, the law envisages the individual being protected by tortious and criminal prohibitions against intrusions upon private interests. To the extent that consent searches encroach upon such interests through compliance based on fear or misinformation, the force and meaning of these protections are undermined. Fourth, the enjoinder against unreasonable search and seizure set out in section 8 of the *Canadian Charter of Rights and Freedoms* makes it desirable to codify procedures to ensure that the search or seizure agreed to is reasonable.

Accordingly, our proposals respond to the need we perceive to regulate, by way of standardized procedural guidelines, the consensual transaction between the peace officer and the individual affected in order to ensure that the use of this exception to the warrant requirement is restricted to appropriate cases. In this regard, we accept at the outset the premise that, in order to be legally effective, consent must be voluntary and informed. We believe that to regard as consensual the acquiescence of an individual obtained through inducement, threat or manipulation would be to undermine the policy of advancing public co-operation with the police.

In Working Paper 30, we recommended that consent should be given in writing in a document warning the person of his right to refuse consent and to withdraw his consent at any time. Resort to the documentary procedure was not mandatory; however, absence of a completed document was *prima facie* proof of the absence of consent. One objective of this recommendation was to ensure that the individual concerned received clear notice of his right to refuse consent and to maintain discretion over when and by whom his private interests may be compromised or infringed. Moreover, the use of a written form affords clear evidence of the existence of consent, which is 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 whom it assists in making an informed decision as to whether to rely on consent as a basis of authorization to search, and in responding to any subsequent challenge to his decision to do so.

A number of objections to the use of written notification and consent forms were raised during our consultations on this issue. Some representatives of the police felt that a documentary procedure represented a needless administrative burden and argued that a standardized verbal warning, indicating the right to refuse consent and to withdraw it at any time, would be adequate. The Commission appreciates these concerns and recognizes that production and completion of a consent form may not be practicable in all cases. Accordingly, proposed subsection 18(3) provides that consent may be given orally or in writing. However, in order to encourage peace officers to use the documentary procedure where it is practicable to do so, we have attached an evidentiary presumption of consent to the presence of a completed form, rather than making the absence of a completed document *prima facie* proof of the absence of consent.

19. (1) A peace officer may search without a warrant a person who has been arrested, where the search is reasonably prudent in the circumstances.

Comment

Canadian case-law appears to stipulate that a warrantless search incidental to arrest is authorized if it is a reasonable precaution in the circumstances of the case to prevent access by the arrested person to destructible evidence or to items that could endanger human safety or facilitate an escape.

The Commission is of the view that this position is a sound one. The power to perform a personal search incidental to an arrest should not be automatic in all cases. For example, a peace officer may legitimately arrest a person suspected of the commission of a relatively minor offence, such as dangerous driving, and, having ascertained his identity, release him with a form of process, such as a summons or appearance notice. 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.

To wed unconditionally the power of search to arrest ignores 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. To permit the former purpose to be served once the latter has been effected is to miss the critical question: When does the state's interest in the control of things or information outweigh the individual's interest in maintaining the inviolability of his person?

In the instance of arrest, as in all other instances, the justification for search must come from the circumstances of the case. Accordingly, we recommend a codification of the present common law requirement that a search be a reasonably prudent measure in order to be authorized as an incident of arrest.

(2) A peace officer searching a person pursuant to subsection (1) may also search without warrant the spaces within the person's reach at the time of the arrest.

Comment

At present, the scope of the power of search incidental to arrest is generally conceded to extend to areas within the "control" of the arrested person. This proposed subsection attempts to define more precisely the scope of search by limiting it to those spaces within the reach of the arrested person at the time of the arrest. The Commission is of the view that this test provides an appropriate and workable definition of the scope of warrantless search permissible as an incident of arrest, sufficient to prevent access by the arrested person to destructible evidence or items that could endanger human safety or facilitate escape, without unduly violating the sanctity of the person's private spatial domain.

The adoption of this rule would leave a number of viable options open to peace officers wishing to search the premises of a person they intend to arrest: a search warrant could be obtained either before entry or after the arrest.

The "plain view" doctrine, as set out in proposed section 25, would permit the warrantless seizure of "objects of seizure" in plain view of the peace officer at the time of the arrest, yet beyond reach of the arrested person.

In situations of arrest involving a movable vehicle, our recommendation for expanded powers of search in proposed section 22 would give the police clear power to search the entirety of vehicles occupied by arrested persons once the requisite grounds exist.

20. In addition to objects of seizure, a peace officer searching a person pursuant to section 19 may seize without warrant

(*a*) a weapon or other thing that could assist the arrested person to escape or endanger the life or safety of the arrested person, the peace officer or a member of the public; and

(*b*) anything necessary to identify the arrested person.

Comment

This section acknowledges the fact that the need to preserve safety in the context of an arrest may justify expanding the scope of seizure beyond those "objects of seizure" as defined in proposed section 3. For example, it may be a reasonable precaution to remove certain dangerous instruments from an accused at the time of his arrest, even though they do not fit strictly with the provisions of the *Criminal Code* covering illegal use or possession of a weapon. Accordingly, 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 arrested person to escape or endanger the life or safety of the arrested person, the peace officer or a member of the public.

In addition, it is the view of the Commission that the occurrence of an arrest justifies seizure of items that will enable the police to identify the arrested person. The power to search the person for identification once he has been arrested has been recognized at common law.[30] We propose that it be entrenched in our proposed search and seizure regime.

21. A peace officer may search for and seize an object of seizure without a warrant where the officer believes on reasonable grounds that

(*a*) an object of seizure is to be found upon 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.

Comment

This section, which confers an exceptional power to search and seize without a warrant and outside the context of an arrest, reflects the Commission's belief that whenever human life or safety is endangered by the delay necessary to obtain a warrant, the sacrifice of warrant protections is clearly justifiable. Although detaching the power to perform such searches from the prerequisite of an arrest may arguably increase the potential for abuse of this power, we believe that the paramount interests of preserving human life and safety justify the relatively broad provisions of this section.

30. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (Alta. C.A.), p. 302.

While this section would subsume the powers for warrantless seizure of weapons which exist under sections 99 and 100 of the present *Criminal Code*, it is, in certain respects, more limited than either the residual common law power to preserve the peace or the provisions of section 101 of the *Criminal Code*.

22. A peace officer may search for and seize an object of seizure without a warrant when

(*a*) he has arrested a person who is in control of, or an occupant of, a movable vehicle; and

(*b*) the officer believes on reasonable grounds that:

(i) an object of seizure is to be found in the vehicle; and

(ii) the delay necessary to obtain a warrant would result in the loss or destruction of the object of seizure.

Comment

At the present time, the power to search without warrant incidental to an arrest is limited to those areas within the arrested person's control or, as we have proposed in section 19, his reach. In situations of arrest involving a movable vehicle, this power in itself might not empower a peace officer to search all areas of a motor vehicle in which objects of seizure may be located; rather, the peace officer's authority to search could become circumscribed by unrealistic and confusing divisions of the vehicle into areas of permitted and prohibited investigation. This problem would be compounded by the fact that a vehicle is likely to escape an officer's control in the time required to obtain a warrant to search its entirety.

In order to deal with the special problems posed by movable vehicles, proposed section 22 expands the scope of search incidental to arrest in cases involving a movable vehicle beyond the limits which would otherwise be imposed by the rule for search incidental to arrest. Accordingly, when the delay necessary to obtain a warrant would result in the loss or destruction of objects of seizure, we propose that the scope of warrantless search of a motor vehicle incidental to an arrest be as wide as that which could be authorized by warrant.

This exception to the warrant requirement is limited by the prerequisite of an arrest for essentially two reasons. First, in order to avoid unnecessary increments in police discretion, we are, as a matter of policy, reluctant to confer warrantless powers of search and seizure outside the context of arrest. Since the justification for a legal arrest requires a finding of "reasonable and probable grounds," we believe that the pre-condition of an arrest provides some measure of control by which cases of unjustifiable search may be limited. Second, we recognize the fact that, except for instances in which the vehicle is unattended and unoccupied, the search of a vehicle frequently involves an arrest in fact: the detention of the person concerned against his will during the duration of the search.

Extension of this exception to the warrant requirement to searches of private premises was rejected by the Commission for three reasons. First, premises are stationary and there is, therefore, a negligible danger of their disappearing. Second, an individual's interest in maintaining the inviolability of his private domain has been given particularly strong recognition in the law. Third, there is a danger that such a power might be used so frequently as to render the warrant requirement meaningless in practice. This would defeat the basic premise underlying our search and seizure regime that, as a general rule, search should be authorized by warrant.

Persons, like vehicles, are mobile and, therefore, the failure to conduct a personal search immediately upon encountering an individual reasonably believed to be carrying objects of seizure may create similar risks of loss or destruction of evidence. Our legal tradition, however, has attached particular importance to the concept of personal inviolability. For this reason, the Commission would permit warrantless searches of the person to be conducted only if the person has been arrested or, pursuant to proposed section 21, when the delay necessary to obtain a warrant would result in danger to human life or safety.

The Commission recognizes that the preservation of objects of seizure is a significant concern. However, the desirability of preventing the potential loss or destruction of objects of seizure does not justify the creation of a general exception to the warrant requirement. Such an exception would make search without warrant the effective rule, thereby violating one of the fundamental precepts on which our search and seizure regime is based.

23. (1) A peace officer shall complete a post-seizure report

(*a*) where things are seized without warrant; and

(*b*) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to section 25.

(2) The post-seizure report shall include

(*a*) the time and place of the seizure;

(*b*) the reason for the seizure; and

(*c*) an inventory of things seized.

(3) A peace officer who completes a post-seizure report shall provide a copy of the report to the person who has been searched, or whose place or vehicle has been searched, and to persons with a proprietary interest in the things seized of whom the officer is aware.

Comment

The execution of a warrantless search or seizure in circumstances justifying an exception to the warrant requirement does not obviate the need for accountability mechanisms or diminish our concern that an individual affected by a search or seizure be

permitted access to certain basic information. The Commission has determined, however, that mandatory reporting of all warrantless searches or seizures, so as to provide a record as extensive as that available in cases of search and seizure with warrant, would not be beneficial.

The Commission's reasons for taking this position are several. First, the costs of reporting all warrantless searches and seizures would place undue strain on the resources available to police forces, especially in view of the fact that warrantless searches, particularly of the person and vehicles, currently outnumber warranted searches and may continue to do so. Second, the encroachment upon individual interests suffered as a result of a warrantless intrusion is often limited and relatively fleeting, particularly when, in cases of searches of vehicles and persons, nothing is seized. It is open to doubt, therefore, whether the benefits to be received from mandatory reporting procedures would, in these instances, justify the expenditure of resources required to implement them. The possible corollary dangers to individual privacy, which may result from increasing reporting requirements generally, also call into question the desirability of instituting mandatory reporting procedures with respect to all warrantless searches and seizures.

Accordingly, the reporting procedure set out in proposed subsection 23(1) is confined to those cases in which an actual seizure of things is made without warrant, including cases in which objects of seizure in plain view are seized pursuant to proposed section 25 in the course of a warranted search. In these instances, the peace officer is required to complete a post-seizure report, containing the time, date and place of the seizure, the reasons why it was made and an inventory of items seized.

In Working Paper 30, we recommended that a copy of the post-seizure report should be available, on request, to an individual affected by the seizure described in the report. We recognize, however, that the person affected by a warrantless seizure may not be apprised of his right to receive, upon request, a copy of the post-seizure report. As a result, access to the basic information which this reporting procedure is intended to provide may be frustrated. Accordingly, in order to ensure such access and to facilitate review of the legality of the search and/or seizure, proposed subsection 23(3) requires that a copy of the post-seizure report be provided to the person who has been searched, or whose place or vehicle has been searched, and to persons with a proprietary interest[31] in the things seized of whom the officer is aware, without the necessity of a request.

PART IV

Search of the Person

24. A person may be searched

(*a*) if named in a search warrant;

31. See *supra*, note 25.

(*b*) if found in a place or vehicle specified in a search warrant, if the peace officer believes on reasonable grounds that the person to be searched is carrying or concealing an object of seizure specified in the warrant; or

(*c*) pursuant to the powers of search without warrant set out in sections 18, 19 and 21.

Comment

This section sets out the ambit of police powers to perform personal searches, with or without a warrant. The authority to perform a personal search pursuant to this section is limited to relatively light body searches of the so-called "frisk" type. It does not empower a peace officer to conduct a visual examination of the naked body or a manual probing of the body cavities of the person to be searched. As indicated in the Introduction to this Report, we defer all recommendations respecting the authority to perform more intrusive searches of the surface of the body and various body cavities, to our forthcoming Report dealing with Investigative Procedures in Respect of the Person.

Proposed paragraph 24(*a*) recognizes that a search warrant may specifically authorize a personal search. Although many personal searches are undertaken in situations of urgency, which render the obtaining of a warrant impractical, the exclusion of personal searches from current warrant provisions means that a peace officer cannot go to a judicial officer for authorization to perform a personal search even when it may be practicable and desirable for him to do so. The Commission accepts the premise that a warrant, with its inherent features of judiciality and particularity, should be available to authorize all justifiable searches and seizures. Resort to warrantless powers of search and seizure ought to be carefully circumscribed so as to limit discretionary intrusions by the state upon individual rights. We conclude, therefore, that the omission of personal searches from warrant provisions is contrary to the principles upon which our search and seizure regime rests. Accordingly, proposed paragraph 24(*a*) enables the authorizing of personal searches under warrant.

At the present time, in searches under section 443 of the *Criminal Code*, the executor of a search warrant must rely on independent sources of authority to search a person found in the place or vehicle searched pursuant to the warrant, even though the peace officer may wish to search the person for the same objects of seizure as those mentioned in the warrant. The Commission is of the view that in such cases it is appropriate to view the personal search in the context of the search as a whole, rather than as a distinct intrusion requiring independent authorization. Accordingly, proposed paragraph 24(*b*) provides a statutory power to search persons as an incident of a warranted search of a place or vehicle.

The Commission believes that it is critical that the justification for intrusion should be related to the specific individual whom the peace officer wishes to search. Therefore, proposed paragraph 24(*b*) does not provide a *carte blanche* to search any person found in the place or vehicle searched; rather, the authority to search such person is conditional

upon the existence of reasonable grounds to believe that the person to be searched is carrying or concealing an object of seizure specified in the warrant.

In Working Paper 30, we recommended that responsibility for determining the existence of such grounds should be divided between the issuer and the peace officer executing the warrant. The issuer was empowered to include a clause in the warrant authorizing the executing officer to search persons if it appeared that the objects of seizure named in the warrant might be concealed upon persons in the place or vehicle to be searched. However, the peace officer was permitted to search only those persons whom he reasonably believed to be in possession of those objects of seizure.

In proposed paragraph 24(*b*), the decision as to the existence of reasonable grounds is left solely to the peace officer executing the search warrant. The function of the issuer of the warrant in this regard has been eliminated in response to objections raised during consultations that the use of the warrant to confer authority to search unnamed persons, who might be on the premises or in the vehicle to be searched, is inappropriate. The officer is in a far better position than the issuer of the warrant to ascertain the likelihood that an individual encountered in a place or vehicle is carrying or concealing an object of seizure. Indeed, 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, if any, might be in personal possession of the objects of seizure. The Commission recognizes, therefore, that the judicial protections offered by the issuer's participation would be, in this context, largely illusory and we have modified our recommendation accordingly.

Proposed paragraph 24(*c*) refers to police powers to conduct personal searches without warrant with consent, incidental to arrest, or in circumstances in which the delay necessary to obtain a warrant would result in danger to human life or safety. These exceptions to the warrant requirement, and the procedural safeguards designed to limit possibilities for their unjustified use are discussed earlier in our comments to proposed sections 18, 19 and 21.

PART V

Rules Applicable to All Searches and Seizures

25. Subject to section 23, where a peace officer in the course of a lawful search or otherwise lawfully situated discovers objects of seizure in plain view, he may seize them without warrant.

Comment

A peace officer executing a lawful search, based on a valid search warrant or on one of the exigent circumstances set out in proposed section 2 justifying the failure to obtain a warrant, may discover objects of seizure not covered by the justification underlying his initial intrusion. For example, a peace officer searching premises for stolen

goods may discover a cache of illegal drugs; a peace officer arresting an individual in his home may observe a prohibited weapon lying outside of the ambit of the reach test proposed in subsection 19(2).

At the present time, the case-law appears to support a warrantless seizure of such items where the peace officer has reasonable grounds for making the seizure. In addition, with respect to warrants issued pursuant to section 443 of the *Criminal Code*, section 445 allows a 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." By implication, a seizure of items outside of that class, such as items of a purely evidentiary nature, would require a second warrant or the existence of circumstances, such as an arrest, justifying the exercise of a warrantless power of seizure.

Clearly, to require a peace officer to obtain a warrant authorizing seizure of items not specified in the original warrant or covered by the justification for his initial intrusion may result, in some cases, in the loss or destruction of such items. Moreover, obtaining a telephonic warrant may not be a viable alternative in all cases, since there may be a risk of injury to the officer or destruction of the objects even with the officer's continuing presence on the premises. Although the criminal law enforcement interest may be served by permitting seizure of all objects of seizure found in the course of a search, such a power creates the danger that objects will be seized on a discretionary basis, rather than on reasonable grounds for believing that they are legally seizable. It may also invite peace officers to conduct unconfined searches for objects of seizure which are totally unrelated to the original rationale for intrusion.

The Commission is of the view that the incorporation of the American "plain view" doctrine into Canadian law will provide a balanced solution to this dilemma.[32] This doctrine, which limits the warrantless seizure of incriminating objects to those objects in "plain view" of a peace officer executing a lawful search or otherwise lawfully situated, would prevent any general or exploratory intrusion into the privacy of the individual concerned.[33] The seizure 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 for intrusion; accordingly, the obtaining of a warrant specifically authorizing seizure of these objects is not necessary.

The Commission further recommends that a peace officer should be required 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 proposed section 23. This reporting procedure would discourage seizure based on mere speculation or arbitrary exercises of discretion by letting the peace officer know that he will be accountable for his actions. It would also give an individual affected by such a seizure an informed basis upon which to challenge the legality of the officer's actions.

32. The application of the "plain view" doctrine in Canada was discussed in *Re Regina and Shea* (1982), 1 C.C.C. (3d) 316 (Ont. H.C.J.).

33. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

26. (1) Subject to paragraph (2)(*b*), a peace officer authorized to search a place or vehicle of a party believed to be in possession of objects of seizure who is not suspected of being implicated in the offence to which the search relates shall, before conducting the search himself, request that the party produce the specified objects.

(2) The peace officer may conduct the search himself where

(*a*) the party refuses to comply with his request within a reasonable time; or

(*b*) there is reasonable ground to believe that a request will result in the loss or destruction of the specified objects.

Comment

Search and seizure powers are used not only to obtain evidence for trial, but also as investigative tools to gain information preliminary to the making of an arrest or the laying of a charge. As a result, it is not uncommon for these powers to be exercised against a party, who is in possession of objects of seizure, yet not suspected of being implicated in the offence to which these objects relate. The unsuspected party may be a bank, a telephone company, an institution of the press, a courier service, a solicitor or simply an acquaintance of a suspected individual. In some of these cases, such as searches of solicitors' offices, special procedures may be necessitated by reason of the type of party affected or the special interest involved. This section, however, addresses the basic issue of what, if any, additional protections ought to be accorded generally to such parties by virtue merely of their lack of suspected involvement in the alleged criminal offence.

No Canadian authority has suggested that unsuspected parties should be generally immune from the exercise of search and seizure powers. Moreover, the Commission recognizes that such an approach would unduly hamper the police in carrying out their law enforcement functions.

The Commission is of the view that what distinguishes the exercise of search and seizure powers in circumstances where the party subject to search is not implicated in the commission of the offence to which the search relates, is the likelihood that the unsuspected party will voluntarily produce the specified objects of seizure. Accordingly, in order to minimize the intrusion upon the privacy of an unsuspected party, this proposed section requires a peace officer to request an unsuspected party to produce the specified objects of seizure, unless there is reasonable ground to believe that a request will result in their loss or destruction. If a request is made and the unsuspected party fails to comply within a reasonable period of time, the peace officer is empowered to conduct the authorized search himself.

27. (1) A peace officer, before undertaking a search of private premises, shall make a demand to enter the premises unless the peace officer has reasonable grounds to believe that compliance with this requirement would result in the loss

or destruction of objects of seizure or would endanger the life or safety of the officer or another person.

(2) A peace officer may make a forcible entry into private premises

(*a*) if a demand to enter is unnecessary under subsection (1); or

(*b*) if an occupant of the premises does not comply with a demand made pursuant to subsection (1) within a reasonable time.

Comment

At the present time, the law generally requires a peace officer to make a demand to open, prior to entering to search a dwelling-house. However, no such general rule applies when the search is of non-residential premises. In the latter event, an officer is bound only by the duty to use no more force than is reasonably necessary to effect entry.[34]

The Commission is of the view that the distinction between dwelling-houses and other private premises ought to be de-emphasized in favour of circumstantial factors which may, in individual cases, justify unannounced entry. These factors are the need to prevent the loss or destruction of objects of seizure and the need to preserve human life or safety. Accordingly, proposed subsection 27(1) requires that, whatever the use of private premises, a peace officer must make a demand to enter unless the officer has reasonable grounds to believe that a demand would result in the loss or destruction of objects of seizure or would endanger his life or safety or the life or safety of another. In cases in which a demand is unnecessary, or in which an occupant of the premises does not respond to the officer's demand to enter within a reasonable period of time, the officer is empowered to use force to gain entry. At present, the degree of force permissible in this instance would be governed generally by the standards 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 to effect his lawful purpose. Ultimately, however, we envisage that the use of force will be governed by the standards, generally applicable to law enforcement personnel, which are currently being formulated in the course of our work in the area of substantive criminal law and which will form part of our Report on The General Part: Liability and Defences.

PART VI

Search for and Rescue of Persons Illegally Detained

28. (1) When authorized to do so by warrant or without a warrant where there is danger to human life or safety, peace officers may search for and rescue a person detained in circumstances constituting an offence.

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

(2) The provisions of sections 5 to 17, 23 and 25 to 27 apply, *mutatis mutandis*, to searches and rescues under subsection (1).

Comment

The present provisions of the *Criminal Code* do not confer upon peace officers the authority to search for and rescue persons detained in circumstances constituting an offence. As a result, police efforts to rescue a person who is illegally detained may only be authorized as incidental to the arrest of the offender or pursuant to the residual common law authority of peace officers to preserve the peace, a power that has been held to extend to entering premises without a warrant to prevent the commission of an offence that would cause immediate and serious injury to a person.[35]

The failure of existing law to accord statutory recognition to the fact that individuals detained unlawfully are legitimate objects of search and rescue has two distinct disadvantages. First, police authorities indicated to the Commission their reluctance to proceed in cases of illegal detention without documentary authority. Second, the power to search for and rescue a person who is illegally detained as an incident of the arrest of the offender may be stymied if the person is detained at a location different from that at which the offender is apprehended.

The Commission, therefore, recommends that peace officers be specifically empowered to search for and rescue persons who are illegally detained.

The Commission recognizes that there are important definitional and practical distinctions between this power and the power to search for and seize things, funds or information which are "objects of seizure." Notwithstanding these distinctions, we recommend the inclusion of a search and rescue power in our proposed regime of police powers of search and seizure because of the apparent need for such a power and because of the widespread support that this recommendation received during consultations upon Working Paper 30. We propose, however, that the search and rescue power be set out separately, rather than recognized in a classification of "objects of seizure."

As in the case of search and seizure powers, the power to search for and rescue persons illegally detained would be exercisable by warrant as a general rule. Moreover, the illegality of the detention should be connected to the commission of a criminal offence in order to prevent the potential use of the search and rescue power in lieu of the writ of *habeas corpus* when the basis of the illegality is a procedural impropriety, rather than the commission of a criminal offence by the custodian.

35. This power was recognized by the Ouimet Committee in its *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 59.

RECOMMENDATION TWO

That, upon enactment of the provisions proposed in Recommendation One, the following sections of the* Criminal Code, *the* Narcotic Control Act *and the* Food and Drugs Act *be repealed in whole or in part:

(a) Section 443 of the *Criminal Code*, except as it relates to the practice of "backing" warrants for execution in another territorial division, and section 444 of the *Criminal Code*;

(b) Section 181 of the *Criminal Code* — bawdy- and gaming house powers;

(c) Section 353 of the *Criminal Code* — precious metals warrants;

(d) Subsection 299(3) of the *Criminal Code* — powers to search for stolen timber;

(e) Section 403 of the *Criminal Code* — powers to seize cocks in a cock-pit;

(f) Section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act* — powers relating to narcotics and drugs.

Comment

If the proposed legislative enactments set out in Recommendation One are adopted as a comprehensive code of criminal procedure respecting police powers of search and seizure, then certain sections of the present *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act* must be repealed, either in whole or in part.

(a) Sections 443 and 444

Specifically, section 443 of the *Criminal Code*, the general warrant provision, departs significantly in a number of respects from the requirements of our proposed search and seizure regime and should, therefore, be repealed, except as it relates to the current practice of "backing" warrants for execution in another territorial division. Similarly, section 444 of the *Criminal Code* respecting the execution of section 443 warrants, should be repealed since it conflicts with the provisions of section 12 of our proposed regime.

(b) Section 181

The statutory power of search and seizure afforded by section 181 of the *Criminal Code* was invested historically with two essential characteristics: the use of a "report in

writing,'' instead of an information under oath, and the authority to seize persons found on the premises searched. These characteristics have survived to the present day and represent departures from our proposed legislative enactments.

The ''report in writing'' procedure is unique in two respects. First, it does not require the applicant for the warrant to present the actual reasonable grounds for his belief in the written application. Second, there is no requirement that the ''report in writing'' be sworn and, since the word ''report'' is used instead of ''information,'' there can be no implied requirement of an oath.

The Commission is of the view that these special features serve no legitimate purpose and should, therefore, be abolished. They are rooted in historical circumstances, which have no contemporary validity. Moreover, to the extent that the ''report in writing'' procedure eliminates the requirement of an oath and the disclosure of the applicant's reasonable grounds for belief, it departs from the true warrant model and detracts from the judiciality of issuance proceedings. On a more pragmatic note, the Commission is able to discern little practical difference in the preparation of applications for section 443 and section 181 warrants. Indeed, pre-Charter case-law has held that the proper exercise of judicial discretion requires the justice to inquire into the basis of the reporter's belief that reasonable grounds exist for the issuance of the warrant, if such grounds are not presented on the face of the report.[36] It may be argued that disclosure of the applicant's reasonable grounds for belief is now required by section 8 of the Charter, which enjoins unreasonable search and seizure. The argument that ordinary warrant procedures are too time-consuming for the offences listed in section 181 and would unduly impair police efficiency was also contradicted by the results of the search warrant survey conducted by Commission staff, which disclosed that officers in some cities surveyed were more likely to respond to the alleged commission of a section 181 offence by resorting to section 443 than to the special provisions of section 181.

Nor does any legitimate justification exist for retention of the authority to seize persons found on the premises searched. This power is not really a search and seizure power as such. Rather, it is a provision for detention outside of conventional arrest procedures.

It might be possible to defend these special provisions were the interests at stake in enforcing prohibitions against gaming and bawdy-houses more critical. In light of present social attitudes, however, the retention of such exceptional powers of search and seizure in the present *Criminal Code* cannot be justified.

In Working Paper 30, we recommended that the special powers of search and seizure, relating to gaming and bawdy-houses, conferred by sections 181, 182 and 183 of the *Criminal Code*, should be abolished. Sections 182 and 183 have now been repealed by Parliament.[37] The Commission recommends that Parliament now take steps to abolish

36. *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*, *supra*, note 19.
37. S.C. 1980-81-82, c. 125, s. 12.

the special powers of search and seizure accorded by section 181 of the *Criminal Code* in respect of the offences set out therein.

(c) Section 353

The special warrant provision afforded by section 353 of the *Criminal Code* in respect of precious metals alleged to be unlawfully deposited in any place or held by any person contrary to law, was created to deal with frontier mining in the mid-nineteenth century and is clearly anachronistic.

The only *Criminal Code* provision to which section 353 has reference is the offence of fraud in relation to minerals, defined in section 352. The Commission has, however, proposed a regime of theft and fraud offences that would remove particularized provisions, such as section 352, from the *Criminal Code*.[38] Even if the substantive offence is retained, the warrant provision afforded by section 353 serves no useful purpose; its subject-matter would be comprehended by our general legislative recommendations as well as existing powers incidental to arrest.

Accordingly, the Commission recommends the repeal of section 353 of the *Criminal Code*.

(d) Subsection 299(3)

Subsection 299(3) of the *Criminal Code* empowers a peace officer, who suspects, on reasonable grounds, that any lumber belonging to any person is kept or detained unlawfully in any place, to conduct a search without warrant of that place.

This provision is rarely used at the present time. Moreover, the registration of timber marks appears itself to be declining. The Commission, therefore, recommends that this special provision for warrantless search be repealed.

(e) Section 403

Subsection 403(2) of the *Criminal Code* empowers a peace officer who finds cocks in a cock-pit, or on premises where a cock-pit is located, to seize them and take them before a justice.

This subsection is used very infrequently at the present time. Whatever utility the provision ever had has probably been superseded by provincial cruelty-to-animals legislation.[39] Accordingly, the Commission recommends that section 403 of the *Criminal Code* be repealed.

38. Law Reform Commission of Canada, *Theft and Fraud*, [Report 12] (Ottawa: Supply and Services, 1979).
39. See, for example, *The Prevention of Cruelty to Animals Act*, R.S.B.C. 1979, c. 335.

(f) *Section 10 of the* Narcotic Control Act *and section 37 of the* Food and Drugs Act

Section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act* define statutory provisions governing the search for, and seizure of, narcotics, controlled drugs and restricted drugs, that are virtually identical except in the specification of the contraband involved. These statutory provisions are characterized by certain exceptional features which depart significantly from our proposed search and seizure regime.

Such exceptional features include the warrantless power of search and seizure which is accorded by the provisions of the *Narcotic Control Act* and the *Food and Drugs Act* in respect of premises other than dwelling-houses.

The Commission has presented a policy that non-consensual warrantless entry into privately occupied places, whether residential or not, should only be authorized when human life or safety is in jeopardy. This policy is based on both principled and pragmatic objections — the individual's strong interest in maintaining the inviolability of his private domain against unjustified intrusions and the perception that a general exception to the warrant requirement founded on the desirability of preventing the loss or destruction of objects of seizure would make the requirement itself meaningless.

While narcotic and drug offences may be viewed as serious, they do not justify a departure from our generalized warrant requirement. In situations in which obtaining a conventional warrant is impracticable, the possibility remains of obtaining a telephonic search warrant or seizing the prohibited substance incidental to an arrest.

In the case of authority to search a dwelling-house, the provisions of the *Narcotic Control Act* and the *Food and Drugs Act* make the warrant merely an alternative to a writ of assistance. The Working Paper 30 recommendation to abolish the writ of assistance is the subject of a separate Report, entitled *Writs of Assistance and Telewarrants*.[40] It is sufficient for present purposes to state that the writ of assistance is not an acceptable alternative to the warrant requirement. It is granted neither "judicially" nor with reference to any particular intrusion. Consequently, it represents a serious derogation from the procedural norms that characterize the warrant.

Another exceptional feature of these statutory provisions is that the seizure of evidence of an offence cannot be authorized in a *Narcotic Control Act* or *Food and Drugs Act* warrant. The authority to enter and search premises is dependent upon the belief that the contraband itself, and not merely evidence of a relevant offence, is on the premises to be searched. However, once inside the door the peace officer may seize a wide variety of things, including items of merely evidentiary value. This inconsistency between the grounds for entering a place and powers of execution once entry has been made has distinct and undesirable consequences. First, it undermines the control represented by the warrant, since it leaves the peace officer with wide discretion as to the ambit of his

40. See *supra*, note 6.

intrusion. Second, it invites manipulation: a peace officer may make an unfounded allegation of conspiracy to traffic in order to invoke the powers under section 443 of the *Criminal Code* to seize documentary evidence in premises where no contraband is believed to exist.

The general rules of search and seizure, which we have developed, would avoid such undesirable consequences by allowing the warrant itself to authorize and define the scope of intrusion, including the seizure of evidence of an offence. For those contingencies that cannot be addressed by the warrant, such as the discovery of unanticipated objects of seizure, the "plain view" doctrine provides a fair and balanced approach.

Finally, the powers of search and seizure accorded by section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act* permit the search without authorization, either by warrant or as an incident of arrest, of "any person" found in a place searched. This discretion admits the possibility that the power of personal search will be used against individuals not because of what they are believed to have done, but because of their personal characteristics, membership in minority groups, conformity with police profiles of drug users or carriers, or other inappropriate considerations.[41] As in the case of all objects of seizure, we believe that a person, who is found in a place or vehicle specified in a search warrant, should only be searched for narcotics or drugs when there are reasonable grounds to believe that he is carrying or concealing them, pursuant to our proposed paragraph 24(*b*).

The Commission is of the view that these departures from our proposed legislative provisions respecting police powers of search and seizure are not justified. Accordingly, the special search and seizure provisions under section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act* should be abolished.

Removal of Regulatory Provisions from the *Criminal Code*

RECOMMENDATION THREE

That the special provisions set out in sections 101, 160, 281.3 and 420 of the* Criminal Code *should be regarded as regulatory, removed from the* Criminal Code, *and incorporated into regulatory legislation.

41. The discretion these provisions seem to accord to peace officers to search persons without reasonable grounds pertaining to their individual complicity in a narcotic or drug offence would now appear to be limited by the enjoinder against unreasonable search and seizure in section 8 of the Charter. See, *e.g.*, *R.* v. *Stevens* (1983), 7 C.C.C. (3d) 260 (N.S. C.A.); *R.* v. *Collins* (1983), 5 C.C.C. (3d) 141 (B.C. C.A.).

Comment

Sections 160 and 281.3 of the *Criminal Code* contain special warrant provisions for the seizure of copies of obscene publications, crime comics and hate propaganda, which are kept for sale or distribution. Following seizure of the offensive materials, a summons is issued to the occupier of the premises from which the materials were confiscated requiring him to show cause why these materials should not be forfeited to the Crown. These provisions are often described as *in rem* proceedings, because the issue to be adjudicated at the show-cause hearing is not the culpability of the possessor of the seized materials, but the status of the materials seized as obscene publications, crime comics or hate propaganda, as the case may be.

These warrant provisions depart significantly from section 443 of the *Criminal Code* by authorizing seizure of all allegedly offensive materials and not merely samples that may serve as evidence upon the show-cause hearing. Thus, these provisions have a predominantly preventive aspect, ensuring that the materials in issue will not enter public circulation while their legal status is being determined.

The Commission recognizes that it is legitimate to seize items to prevent the repetition or continuation of an offence. In the case of *in rem* proceedings, however, no charge need be laid against the possessor of the publications confiscated under either section 160 or section 281.3 of the *Criminal Code*. The *in rem* procedure provides a regulatory mechanism that allows for an initial intrusion and seizure of allegedly offensive materials, a summary adjudication of the issue as to their legal status and a disposition outside the conventional route of a criminal prosecution.

The Commission is of the view, therefore, that these provisions constitute regulatory schemes, the objective of which is to protect the public by preventing the sale or distribution of offensive materials. The *Criminal Code*, on the other hand, is a penal statute, the predominant purpose of which is to define criminal prohibitions and effect their enforcement by means of criminal prosecution. The proposed legislation set out in Recommendation One of this Report attempts to consolidate, rationalize and reform the laws relating to police powers of search and seizure in criminal law enforcement. The special warrant provisions of sections 160 and 281.3 of the *Criminal Code* effect significant departures from the provisions of our search and seizure regime for objectives which lie outside the purview of this regime. Accordingly, the Commission has concluded that these provisions should be recognized explicitly as preventive, regulatory schemes which should be removed from the *Criminal Code* and incorporated into regulatory legislation.

The question arises as to when such an initiative should occur. We envisage that our proposed legislative scheme will ultimately be incorporated in a comprehensive code of criminal procedure. The enactment of such a code may entail the removal of many provisions from the present *Criminal Code*, which also belong in regulatory legislation, but which are beyond the purview of the present Report. We recognize that it may be inefficient to remove provisions such as sections 160 and 281.3 on a piecemeal basis. The better course may be to transfer all such provisions to regulatory legislation at such time as a new and comprehensive code of criminal procedure is enacted.

The powers of search and seizure provided in section 101 of the *Criminal Code* are also manifestly preventive. This section empowers a peace officer to search for and seize any weapon in the possession of a person if there are reasonable grounds to believe that it is not desirable in the interests of the safety of that person, or of any other person, that that person should have a weapon in his possession. Upon an application for an order for the disposition of the articles seized, an *in rem* proceeding is commenced to determine whether, in the interests of safety, the person from whom the articles were seized should have a weapon in his possession. Upon making a negative finding, the magistrate presiding at the hearing may order the articles disposed of on fair and reasonable terms and/or prohibit the possession of a weapon by the person for up to five years.

These provisions effect a significant departure from our regime of crime-related search and seizure powers. The powers of search and seizure which section 101 provides are triggered not by the perception that an offence has been initiated, but by an assessment of the interests of safety. Moreover, it is not a prerequisite to intrusion under this section that a person be believed to be in possession of a weapon; it need only be believed that, in the interests of safety, he ought not to possess a weapon.

It is apparent, therefore, that section 101 has a predominantly preventive and regulatory aspect, endeavouring to prevent injury, whether or not the commission of a crime is involved, by ensuring that weapons are not possessed by persons who should not be in possession of them. This concern, which is founded on comparatively modern principles of public health and safety legislation, rather than the traditional objectives of criminal law, 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 of the *Criminal Code*.

In Working Paper 30, we did not recommend the removal of section 101 from the *Criminal Code* and its incorporation into regulatory legislation because we felt that this would result in a fragmentation of regulatory provisions respecting the use of firearms. Instead, we directed our recommendations to ensuring that the regulatory powers provided by section 101 are not distorted into a general mandate to conduct discretionary searches of suspected criminals.

As a result of submissions made to the Commission during its consultations on this issue, the Commission is persuaded that section 101 of the *Criminal Code* does not belong in an elaboration of general rules of crime-related search and seizure. Accordingly, it should be removed from the *Code* and incorporated into regulatory legislation.

The Commission's reasons for this recommendation are the following. First, our Working Paper recommendation to retain section 101, with certain modifications, within the *Criminal Code* was plainly inconsistent with the approach taken by the Commission with respect to the special warrant provisions relating to obscene publications, crime comics and hate propaganda, set out in sections 160 and 281.3 of the *Criminal Code*. Like sections 160 and 281.3, section 101 is a regulatory scheme for the protection of the public and, as such, should be incorporated into regulatory legislation.

Second, the Commission believes that section 101 is plainly severable from the offence provisions of the *Criminal Code* relating to the use of firearms and other offensive weapons, in the same way that the regulatory schemes created by sections 160 and 281.3 are not intrinsically bound up with the offence provisions relating to obscene publications, crime comics and hate propaganda. Although we recognize that the provisions of section 101, like sections 160 and 281.3, are properly the subject of regulatory legislation, removing section 101 from the *Criminal Code* at the present time threatens to fragment *Criminal Code* provisions respecting the use of firearms, many of which are regulatory in nature. We recommend, therefore, that the timing of the removal of section 101 must await other legislative initiatives which deal with the entirety of regulatory firearms legislation. As in the case of sections 160 and 281.3, it may well be that such initiatives should occur in conjunction with the enactment of a new and comprehensive code of criminal procedure.

Subsection 420(2) of the *Criminal Code* affords a statutory power of seizure without warrant of any paper or instrument with which possession offences relating to currency under the *Criminal Code* may be committed. The power conferred by this provision is solely one of seizure. The basis of the seizure, however, is not simply that the relevant items are illegal to possess and ought, therefore, to be forfeited to the state; rather, subsection 420(1) declares that ownership of the specified items resides in Her Majesty. It is apparent, therefore, that the ostensible legal status of the seizure and disposition of the items seized becomes one of the state vindicating a property right. Indeed, parliamentary debates occurring upon the provision's introduction in 1925 indicate that its purpose was to ensure that, regardless of whether or not the possessor of the paper or instruments was convicted, they would remain under state control.

The Commission is of the view that this statutory power of seizure departs from our legislative recommendations in two basic respects. First, there is a manifestly regulatory aspect to section 420, which does not belong in an elaboration of general rules of search and seizure. Second, the provision confers a special discretion upon peace officers in order to protect the integrity of Her Majesty's currency. Such discretion contradicts the thrust of our legislative recommendations, which embody a preference for controlled intrusions over discretionary ones. The Commission believes that, at least insofar as crime-related investigation is concerned, the seizure of counterfeit money and counterfeiting instruments should be subject to the same procedural rules that govern the seizure of other items possessed in circumstances constituting an offence or comprising evidence of crime. Accordingly, the Commission recommends that the special statutory power of seizure accorded by section 420 of the *Criminal Code* should be removed from the *Criminal Code* and transferred to regulatory legislation at such time that a comprehensive code of criminal procedure is enacted.

PART TWO: Recommendations for Administrative Action and Miscellaneous Recommendations

There are three areas, discussed in Working Paper 30 on police powers of search and seizure, which we think require reform, but not in the form of legislative enactment. These areas concern the qualifications and independence of officials empowered to issue search warrants; the use of Crown or private police counsel on search warrant applications; and initiatives to monitor compliance with the legal requirements for search warrant documents.

We have also taken this opportunity to address two additional matters: the institution of sealing and application procedures for the invocation of solicitor-client privilege, and the issue of police powers to conduct intelligence probes.

RECOMMENDATION FOUR

***The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. New provincial initiatives should be undertaken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the* Criminal Code.**

Comment

Most crime-related warrant regimes name a "justice" as issuer of search warrants.[42] Under section 2 of the *Criminal Code*, a "justice" includes a magistrate as well as a justice of the peace.[43] Under some provincial enactments, superior court judges have been granted *ex officio* status as justices. The results of the search warrant survey conducted by Commission staff indicate that, in practice, issuance duties appear to be shared by justices, magistrates and judges of the various provincial courts.

The empirical evidence available from this survey also suggests that the issuers of search warrants, at least under sections 443 and 181 of the *Criminal Code* and the

42. The only exceptions to this rule are found in sections 101, 160 and 281.3 of the *Criminal Code*.
43. See, for example, *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 24(3).

provisions of the *Narcotic Control Act* and the *Food and Drugs Act*, are failing to maintain the legal standards governing the performance of their duties. It has been suggested on occasion that justices of the peace do not have the impartiality or competence necessary to discharge properly their significant judicial responsibilities and that, therefore, the responsibilities for search warrant issuance ought to be shifted to provincial court judges.[44]

The Commission is of the view that giving provincial court judges exclusive jurisdiction to issue search warrants would not improve the validity of search warrant issuance significantly. Although it is true that many justices of the peace have minimal legal training and are closely associated with the police officials who make applications to them, it is instructive that Vancouver, the city with the best validity record as indicated by our warrant survey, utilized only justices of the peace in adjudicating warrant applications. Accordingly, the Commission believes that rather than focusing upon the label or status attached to the issuing official, more attention must be given to the qualification of the official for his assigned function and the appropriateness of the administrative structure surrounding him.

It is, moreover, arbitrary and narrow to view the adjudicative functions of justices in terms of search warrants alone. A justice has other functions, such as presiding over show-cause hearings and preliminary inquiries, that can have even more serious consequences for the individual than the issuance of a search warrant. To view the warrant issuing powers of the justice of the peace in isolation from his other judicial functions is to miss the essential issue: Is the office as currently constituted a proper repository of significant judicial responsibilities?

The Commission recognizes that the problems of the offices of the issuers of search warrants differ from locale to locale. Moreover, constitutional jurisdiction over provincial court judges, magistrates and justices resides at the provincial level. For these reasons, the Commission directs this proposal to the provincial level of government. Some provincial initiatives have already been taken to examine the office of justice of the peace.[45] We urge that all provinces undertake the initiatives necessary to ensure that the officials responsible for issuing search warrants are properly qualified and sufficiently independent to discharge their significant judicial responsibility.

RECOMMENDATION FIVE

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.

Comment

At present, there is no formal requirement that Crown counsel be involved in the application for a search warrant. Generally speaking, Crown counsel are called upon to help the police prepare warrant documents only in complex commercial crime investigations. The documents prepared in such cases tend to be comprehensive and detailed. This suggests that the quality of the applications, and hence the warrant system in general, would be improved if legal counsel played an increased role in the procedure. Increased involvement of Crown counsel in the warrant application process would be consistent also with the Attorney General's role as administrator of criminal justice.

This does not mean, however, that the Crown ought to monitor all applications for a warrant to search. Such a requirement would complicate the process and could be expected to make applications for warrants impractical in certain cases, thus encouraging the police to perform warrantless searches. Moreover, search with warrant is basically an investigative rather than a "prosecutorial" function. The participation of the Crown in initiating the process, therefore, should not be mandatory. Rather, administrative arrangements under which Crown counsel would monitor difficult warrant applications should be established.

To affirm the judiciality of the issuer, however, Crown counsel's role at search warrant hearings should be restricted to that of a submitter. The Crown should not act as an adviser to the issuer, since the maintenance of a judicial standard can only be assured by the independence and diligence of the issuers themselves.

RECOMMENDATION SIX

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.

Comment

It is the view of the Commission that regulatory mechanisms to monitor and encourage police compliance with the rules of search and seizure need to be established. Specifically, the Commission suggests that panels of representatives from the judiciary and the criminal Bar could be established with continuing mandates to examine periodically and evaluate the regularity and legality of search warrant documents, selected on a random basis, in particular Canadian jurisdictions. Since the analysis would focus on patterns of

44. See, for example, the conclusions of the Alberta Board of Review, *Administration of Justice in the Provincial Courts of Alberta* (1975), p. 18.

45. *Ibid.* See also the Ontario Royal Commission of Inquiry into Civil Rights, *Report Number One* (Toronto: Queen's Printer, 1968).

practice within the police and judicial organizations as a whole, rather than on cases of individual misconduct, any risk of prejudice to either a concerned individual or the investigation against him would be negligible. The findings of such panels could be made the subject of consultations with the individual police forces and court officials so as to bolster their internal enforcement mechanisms, which work to prevent procedural violations rather than addressing them after the fact. The findings could also be made available to the public to indicate the extent of compliance with legal standards.

The provinces have jurisdiction over the administration of justice.[46] Accordingly, the Commission believes that these monitoring panels should be established on a provincial or local level. By institutionalizing such panels at these levels, the aim of building external enforcement mechanisms onto existing internal structures within police and judicial organizations in a manner that reinforces internal systems of discipline will be better served.

RECOMMENDATION SEVEN

Sealing and application procedures for the invocation of solicitor-client privilege, which extend to materials in the possession of the client as well as the solicitor, should be instituted. The Crown should not be permitted access to the documents at issue in the application.

Comment

The Commission recognizes that the privilege protecting from disclosure communications between solicitor and client is a fundamental right and a vital part of the right to counsel.

The right to communicate in confidence with one's legal adviser was originally formulated as a rule of evidence. Accordingly, the right to confidentiality could be raised only at the trial or preliminary inquiry at which the confidential communications were to be adduced in evidence.[47] Some recent case-law has, however, adopted a more expansive approach, which would permit a claim to confidentiality to be raised at the investigative stage.[48]

The issue as to when a claim to solicitor-client privilege may be asserted has now been decisively settled by the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski*.[49] The decision in this case, which was reported subsequent to the publication of Working

46. The *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(14) (U.K.).
47. *R.* v. *Colvin; Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), p. 11.
48. *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70 (F.C.A.), pp. 78-79.
49. *Descoteaux* v. *Mierzwinski and Attorney-General of Québec* (1982), 70 C.C.C. (2d) 385 (S.C.C.).

Paper 30, explicitly recognizes that the privilege protecting from disclosure confidential communications between a solicitor and client is both an evidentiary rule and a substantive right, which is vested in the client and can only be waived at his instance. The substantive right, which is of broader application than the evidentiary rule, permits the confidentiality of communications between a solicitor and client to be asserted in any circumstances where such communications are likely to be disclosed without the client's consent.

A special sealing and application procedure for the invocation of solicitor-client privilege in regard to documents seized while in the possession of a lawyer was set out in Bill C-19, *Criminal Law Reform Act, 1984*.[50] This procedure, which accords with the position taken by the Supreme Court of Canada as to when a claim to solicitor-client privilege may be asserted, permits a lawyer from whom documents are seized to claim that a named client of his has a solicitor-client privilege in respect of the documents, which protects them from disclosure. If the claim is made at the time of seizure, the peace officer affecting the seizure must seal the documents in a package without examining them and turn them over to a "custodian." The Attorney General, or the client, or the lawyer on behalf of the client, then has fourteen days within which to bring an application for a hearing at which the issue of privilege is determined by a Superior Court judge.

The Commission is of the view that, subject to two qualifications, the institution of this procedure would be a sound and progressive step. Our first qualification concerns the fact that the procedure, as conceived in Bill C-19, restricts the documents covered by the privilege to those in the possession of a solicitor. Clearly, documents in the possession of a client may also be subject to solicitor-client privilege if the substantive conditions precedent to the existence of the client's right to confidentiality otherwise exist. The Commission is of the view that the sealing and application procedure should apply to all confidential documents regardless of their location. Accordingly, we recommend that the protection accorded by this procedure should expressly extend to materials in the possession of the client as well as the solicitor.

Our second qualification concerns the question of Crown access to the documents at issue in an application to determine a claim to solicitor-client privilege. In Working Paper 30 , we recommended that, upon an application to determine a claim of solicitor-client privilege, counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application. The intent of this recommendation was to allow both counsel adequately to prepare their submissions on the issue of confidentiality. In order to ensure that the Crown did not benefit from access to the documents in the event that they were adjudged privileged, we further recommended that counsel for the Crown on the application should be precluded from further participation in the investigation or prosecution of the case and that he should be enjoined from disclosing the contents of the sealed package.

The decision of the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski* and the objections to Crown access voiced by many commentators on Working Paper 30

50. Bill C-19, *supra*, note 9, clause 106.

during consultations with them have persuaded the Commission that Crown access to documents for which solicitor-client privilege is claimed is inadvisable.

Granting counsel for the Crown access to confidential documents for the purpose of the application procedure breaches what has now been explicitly recognized by the Supreme Court of Canada as a person's substantive right to communicate in confidence with his legal adviser.

Many commentators on Working Paper 30 also argued that granting the Crown access to confidential communications passing between a solicitor and his client would diminish the public's faith in the administration of justice and create a potential for abuse, notwithstanding the stipulations specified in the Working Paper to prevent the Crown from benefitting from this access were the judge to find the documents protected by solicitor-client privilege.

For these reasons, the Commission has determined to withdraw its recommendation that counsel for the Crown should have a specific statutory right of access to the documents at issue in an application to determine a claim to solicitor-client privilege.

Our present recommendation is confined to documents in respect to which a claim of solicitor-client privilege is raised and does not address claims to other varieties of "privilege." The Commission restricted its focus in this manner for two reasons. First, the confidentiality of communications passing between a solicitor and his client is a recognized privilege which has, by virtue of the decision of the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski*, been accorded special status as not only an evidentiary rule but also a substantive right, which can be raised at the investigative stage. Second, on a more practical level, the Commission believes that, in the context of the exercise of police powers of search and seizure, the privilege which is raised most frequently is the unique privilege of solicitor-client confidentiality.

It was suggested by some representatives of the press, during our consultations with them, that a sealing and application procedure, similar to that which we propose for the invocation of solicitor-client privilege, should be followed when a search warrant against an institution of the press is executed, in order to permit the relevancy of the items seized to the determination of the issues before the court to be challenged prior to trial. Our recommendation for the institution of a sealing and application procedure with regard to documents in respect of which a claim of solicitor-client privilege is raised, merely attempts to provide a procedural mechanism for the invocation of a recognized privilege. At the present time, however, the law in Canada does not recognize any privilege *per se* which would prevent peace officers from searching for and seizing materials in the possession of members of the press. Accordingly, we are not prepared to extend to the matter of press searches the sealing and application procedure, which we recommend for the invocation of solicitor-client privilege.

The Commission recognizes however, that whenever a search warrant is sought against an institution of the press, the courts must endeavour to achieve a delicate balance. On the one hand are the interests of a free press; on the other are those of the administration

of justice, which are served through the acquisition of available evidence. Finding an appropriate balance becomes particularly important when the institution in question is not a suspected party, but merely a holder of things or information, which are allegedly relevant to the investigation or prosecution of an offence.

The Commission would seek to balance these competing interests by extending to the press the same protections we have accorded other unsuspected parties in section 26 of our legislative recommendations. It is the view of the Commission that this protection, coupled with the recognition accorded freedom of the press by paragraph 2(*b*) of the *Canadian Charter of Rights and Freedoms* and the conditions for issuance of a search warrant against an institution of the press set out in the *Pacific Press Ltd.*[51] case, should provide adequate protection against unreasonable search and seizure for the press and other media.

RECOMMENDATION EIGHT

Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Such modifications should not be made in the context of police powers of search and seizure in criminal law enforcement.

Comment

In recent years, the issue of police powers to perform surreptitious intrusions, commonly referred to as "intelligence probes," has received considerable public attention as a result of the inquiries into police activities conducted by the Keable and McDonald Commissions. The objective of a surreptitious intrusion is to secure information in furtherance of an investigation without alerting the subject of the investigation to its existence. Achieving this objective usually depends in large part on the intrusion itself remaining invisible.

The Report of the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police expressed the view that, with the possible exception of searches conducted under narcotics and drugs legislation, surreptitious entries are not legally authorized under present search and seizure law. We generally concur with the conclusion of the McDonald Commission in this regard. With the exception of recent federal security legislation,[52] the only possible sources of statutory authority for surreptitious intrusions are in paragraph 10(1)(*a*) of the *Narcotic Control Act* and paragraph 37(1)(*a*) of the *Food and Drugs Act*. These provisions authorize peace officers to search

51. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.).
52. *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 21(3).

for narcotics or drugs, but do not require seizure of the prohibited substance or other relevant objects found in the premises searched. It may be argued that the discretionary language in which these powers of search and seizure are couched permits peace officers to enter premises, attempt to locate evidence of illegal activity, record it or obtain samples and leave without disturbing the *status quo*. If there is such a statutory basis for surreptitious entry in narcotic and drug investigations, our recommendation to repeal section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act* would effectively eliminate it.

At the present time, no common law power to enter and make surreptitious observation for the purpose of acquiring information has been recognized in reported Canadian case-law. As this Report is being completed, the issue of surreptitious entry in the context of the electronic surveillance provisions of the *Criminal Code* is before the Supreme Court of Canada on an appeal from a reference to the Alberta Court of Appeal.[53] One of the issues raised in this appeal is whether an authorization given by a judge under Part IV.1 of the *Criminal Code*, to intercept electronically private communications, by necessary implication authorizes surreptitious entry of the premises at which the private communications are proposed to be intercepted for the purpose of installing the interception device. The argument has been made that the authority to enter surreptitiously derives from the functional imperatives of an authorization to intercept private communications: authority to enter surreptitiously must be implied in order to carry out the intent and purpose of the legislation at issue; absent such implied authority, the purpose of obtaining an authorization to intercept private communications is thwarted.

Whether this reasoning is persuasive in the context of electronic surveillance legislation is not for us to decide in this Report. It is clear, however, that it does not support the existence of a general power to enter surreptitiously for the purpose of gathering information in the wider context of search and seizure law. The distinction must be made that, whereas Parliament has enacted statutory procedures pursuant to which the electronic interception of private communications may be lawful, intelligence probes are not recognized explicitly in any federal legislation. While an implied power of surreptitious entry may exist for an activity sanctioned in legislation, where such a power of entry is necessary to carry out the purpose of the legislation at issue, no implied power of surreptitious entry can exist for an activity not sanctioned in legislation. Accordingly, the Commission has determined that no strong basis currently exists for a common law authority in Canada to make surreptitious entry in order to acquire information.

During our consultations upon this issue, government representatives and representatives of police groups across Canada argued that a power to conduct surreptitious intrusions would be a valuable investigative tool, especially in the fight against drug and "white-collar" crime. After carefully considering the benefits and dangers of powers to conduct surreptitious intrusions, the Commission is persuaded that, as a matter of policy, the interests of criminal law enforcement do not justify enacting these powers.

53. *Reference re an Application for an Authorization* (1983), 10 C.C.C. (3d) 1 (Alta. C.A.). See also *R. v. Lyons* (1982), 69 C.C.C. (2d) 318 (B.C. C.A.); *R. v. Dass* (1979), 47 C.C.C. (2d) 194 (Man. C.A.).

The main reason for our position is that the exercise of powers of surreptitious intrusion raises serious problems of accountability. The objective of a surreptitious intrusion may be to secure information or to confirm that an offence is in the planning stage, or is being or about to be committed, in circumstances where a search warrant cannot be obtained because there are not the requisite grounds of belief to support the issuance of a warrant. In some circumstances where a search warrant would issue, surreptitious entry without warrant may be seen as a means of ensuring that the evidence found upon the search will support a successful prosecution, without alerting the subject of the investigation. While the execution of a search pursuant to warrant is usually a physical and highly visible exercise of police powers, it is apparent that the effectiveness of a surreptitious intrusion is likely to depend upon whether it is kept secret from the individual affected for a considerable period after entry. The procedural consequences which necessarily flow from this distinction would curtail accountability by creating conditions of "low visibility" for the exercise of powers of surreptitious intrusion. Many of our legislative recommendations concerning the scope of search, announcement of entry and the provision of certain documents to the individual affected, would have to be modified if surreptitious intrusions were to be effective under a search warrant regime. Such modifications would seriously compromise the degree of protection associated with warrant procedures by creating procedural impediments to the effective review of the legality of police conduct.

Whether or not surreptitious searches with warrant might be found to be constitutional by a Canadian court, we do not recommend the institution of powers to conduct surreptitious intrusions. To permit such intrusions would seriously undermine our proposed search and seizure regime.

PART THREE: Summary of Recommendations

Proposed Legislation

RECOMMENDATION ONE

That the following provisions on search and seizure be enacted as part of the* Criminal Code*:

PART I

General Provisions

1. A peace officer may search for and seize objects of seizure when authorized to do so by warrant.

2. A peace officer may search for and seize objects of seizure without a warrant,

(*a*) with consent, pursuant to section 18;

(*b*) as an incident of an arrest, pursuant to section 19;

(*c*) in circumstances of danger to human life or safety, pursuant to section 21;

(*d*) in circumstances of arrest involving a movable vehicle when the delay necessary to obtain a warrant would result in the loss or destruction of objects of seizure, pursuant to section 22; and

(*e*) when objects of seizure are in plain view, pursuant to section 25.

3. (1) "Objects of seizure" means things, funds and information which are reasonably believed to be:

(*a*) takings of an offence;

(*b*) evidence of an offence; or

(*c*) contraband.

(2) "Takings of an offence" means property taken illegally, and includes property into or for which property taken illegally has been converted.

(3) "Contraband" means things, funds and information possessed in circumstances constituting an offence.

4. The ways in which a seizure may be made include:

(*a*) taking possession of an object of seizure;

(*b*) taking photographs or visual impressions of an object of seizure;

(*c*) obtaining records, regardless of the physical form of the records or the manner in which they are stored, where the records are objects of seizure; and

(*d*) acquiring control over funds which are objects of seizure in financial accounts.

PART II

Search and Seizure Pursuant to Warrant

5. Where a justice is satisfied, upon an application made [under section 6], that there are reasonable grounds to believe that an object of seizure is to be found upon a person or in a place or vehicle, he may issue a warrant authorizing a peace officer to search that person, place or vehicle and seize the object of seizure if it is found as a result of that search.

6. Except as otherwise authorized, an application for a search warrant by a peace officer or other person shall be in the form of an information in writing sworn under oath.

7. A peace officer or other person applying for a search warrant shall disclose on the information all previous applications made with respect to the search of the same person, place or vehicle for objects of seizure related to the same or a related transaction of which the applicant is aware.

8. A peace officer applying for a search warrant shall not be required to reveal facts disclosing the identity of a confidential informer.

9. (1) A justice receiving an application for a search warrant, if requested by a peace officer or other applicant, may

(*a*) obscure with a cypher any telephone number appearing on a search warrant or supporting information when the telephone number would be likely to reveal the existence of electronic surveillance activities if not obscured; and

(*b*) obscure with a cypher the name or characteristics of an informer appearing on a search warrant or supporting information when the safety of the informer would be jeopardized if his name or characteristics were not obscured.

(2) When a telephone number or name or characteristics of an informer have been obscured pursuant to paragraph 9(1)(*a*) or 9(1)(*b*), the justice shall attest on

the search warrant or information on which the cypher appears that the only facts which have been obscured are the digits of a telephone number, a name, or the characteristics of an informer, as the case may be.

10. (1) A justice considering an application for a search warrant may

(*a*) examine orally the peace officer or person making the application; and

(*b*) exclude persons from the search warrant hearing when the ends of justice will best be served by such an order.

(2) When a justice issues a search warrant and in doing so relies either in whole or in part upon grounds of belief disclosed in the course of oral examination under paragraph (1)(*a*), he shall require the peace officer to include such grounds in the information in writing.

11. (1) Any peace officer within the territorial jurisdiction of the issuer of a search warrant may execute the warrant.

(2) A peace officer executing a search warrant may bring into the place or vehicle to be searched any private individual whose presence he reasonably believes to be necessary to the successful execution of the warrant.

12. A justice shall issue a warrant authorizing execution by day only unless the peace officer or person applying for the warrant shows reasonable cause for allowing execution by night.

13. (1) Subject to subsection (2), a search warrant shall expire after ten days.

(2) Where a justice hearing an application to issue a warrant is satisfied that, having regard to the nature of the investigation

(*a*) an expiration period longer than ten days is reasonable, he may fix an expiration period not exceeding twenty days; or

(*b*) an expiration period shorter than ten days is reasonable, he may limit the expiration period to what is reasonable in the circumstances of the case.

14. A peace officer executing a search warrant may search only those areas within the places and vehicles or upon the person mentioned in the warrant where it is reasonable to believe that the objects specified in the warrant may be found.

15. (1) A peace officer executing a search warrant shall, before commencing the search or as soon as practicable thereafter, give a copy of the warrant

(*a*) in the case of a search of the person, to the person to be searched; or

(*b*) in the case of a search of a place or vehicle, to a person present and in apparent control of the place or vehicle to be searched.

(2) A peace officer executing a search warrant within any place or vehicle that is unoccupied at the time of the search or seizure shall upon entry, or as soon as

practicable thereafter, affix a copy of the warrant in a prominent location, within the place or vehicle.

16. (1) Where a peace officer makes a search and seizure with a warrant he shall provide, on request, an inventory of things seized in the course of the search to the person who has been searched, or whose place or vehicle has been searched.

(2) Where the peace officer who makes the search and seizure is aware of the identity of a person with a proprietary interest in the things seized, other than the person who has been searched or whose place or vehicle has been searched, he shall provide an inventory to that person.

17. (1) Any person has the right, upon request, to examine a copy of a search warrant and supporting information following execution of the warrant.

(2) No person shall publish in any newspaper or broadcast the contents of any search warrant or supporting information unless:

(*a*) a preliminary inquiry has been held in respect of a person who has been searched or whose place or vehicle has been searched with that warrant, and that person has been discharged at the preliminary inquiry;

(*b*) a person mentioned in paragraph (*a*) has been tried or committed for trial, and the trial of that person is ended;

(*c*) the contents of the search warrant or information have been disclosed in judicial proceedings in respect of which publication or broadcast is not prohibited;

(*d*) an order has been made under subsection (3).

(3) Upon application by a person mentioned in paragraph (*a*), or by any person with the consent of a person mentioned in paragraph (*a*), a judge may order that the prohibition on broadcasting and publication imposed by subsection (2) be terminated.

(4) In this section

(*a*) "newspaper" has the same meaning as in section 261 of the *Criminal Code*;

(*b*) "judge" means a judge of a superior court or judge as defined in section 482 of the *Criminal Code*.

PART III

Search and Seizure without Warrant

18. (1) A peace officer may search without warrant

(*a*) a person who consents to a search of his person, and

(*b*) a place or vehicle, with the consent of a person present and apparently competent to consent to such a search,

and may seize any objects of seizure found in the course of the search.

(2) A peace officer, before executing a search under this section, shall inform the person whose consent is sought that the person has a right to refuse to consent and to withdraw his consent at any time.

(3) Consent under this section may be given orally or in writing.

(4) The signature of a person on a document warning him of his right to refuse to consent and of his right to withdraw his consent at any time is *prima facie* proof of the consent of the person to the search.

19. (1) A peace officer may search without a warrant a person who has been arrested, where the search is reasonably prudent in the circumstances.

(2) A peace officer searching a person pursuant to subsection (1) may also search without warrant the spaces within the person's reach at the time of the arrest.

20. In addition to objects of seizure, a peace officer searching a person pursuant to section 19 may seize without warrant

(*a*) a weapon or other thing that could assist the arrested person to escape or endanger the life or safety of the arrested person, the peace officer or a member of the public; and

(*b*) anything necessary to identify the arrested person.

21. A peace officer may search for and seize an object of seizure without a warrant where the officer believes on reasonable grounds that

(*a*) an object of seizure is to be found upon 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.

22. A peace officer may search for and seize an object of seizure without a warrant when

(*a*) he has arrested a person who is in control of, or an occupant of, a movable vehicle; and

(*b*) the officer believes on reasonable grounds that:

(i) an object of seizure is to be found in the vehicle; and

(ii) the delay necessary to obtain a warrant would result in the loss or destruction of the object of seizure.

23. (1) A peace officer shall complete a post-seizure report

(*a*) where things are seized without warrant; and

(*b*) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to section 25.

(2) The post-seizure report shall include

(*a*) the time and place of the seizure;

(*b*) the reason for the seizure; and

(*c*) an inventory of things seized.

(3) A peace officer who completes a post-seizure report shall provide a copy of the report to the person who has been searched, or whose place or vehicle has been searched, and to persons with a proprietary interest in the things seized of whom the officer is aware.

PART IV

Search of the Person

24. A person may be searched

(*a*) if named in a search warrant;

(*b*) if found in a place or vehicle specified in a search warrant, if the peace officer believes on reasonable grounds that the person to be searched is carrying or concealing an object of seizure specified in the warrant; or

(*c*) pursuant to the powers of search without warrant set out in sections 18, 19 and 21.

PART V

Rules Applicable to All Searches and Seizures

25. Subject to section 23, where a peace officer in the course of a lawful search or otherwise lawfully situated discovers objects of seizure in plain view, he may seize them without warrant.

26. (1) Subject to paragraph (2)(*b*), a peace officer authorized to search a place or vehicle of a party believed to be in possession of objects of seizure who is not suspected of being implicated in the offence to which the search relates shall, before conducting the search himself, request that the party produce the specified objects.

(2) The peace officer may conduct the search himself where

(*a*) the party refuses to comply with his request within a reasonable time; or

(*b*) there is reasonable ground to believe that a request will result in the loss or destruction of the specified objects.

27. (1) A peace officer, before undertaking a search of private premises, shall make a demand to enter the premises unless the peace officer has reasonable grounds to believe that compliance with this requirement would result in the loss

or destruction of objects of seizure or would endanger the life or safety of the officer or another person.

(2) A peace officer may make a forcible entry into private premises

(*a*) if a demand to enter is unnecessary under subsection (1); or

(*b*) if an occupant of the premises does not comply with a demand made pursuant to subsection (1) within a reasonable time.

PART VI

Search for and Rescue of Persons Illegally Detained

28. (1) When authorized to do so by warrant or without a warrant where there is danger to human life or safety, peace officers may search for and rescue a person detained in circumstances constituting an offence.

(2) The provisions of sections 5 to 17, 23 and 25 to 27 apply, *mutatis mutandis*, to searches and rescues under subsection (1).

Repeal and Transition

RECOMMENDATION TWO

That, upon enactment of the provisions proposed in Recommendation One, the following sections of the Criminal Code, *the* Narcotic Control Act *and the* Food and Drugs Act *be repealed in whole or in part:*

(a) Section 443 of the *Criminal Code*, except as it relates to the practice of "backing" warrants for execution in another territorial division, and section 444 of the *Criminal Code*;

(b) Section 181 of the *Criminal Code* — bawdy- and gaming house powers;

(c) Section 353 of the *Criminal Code* — precious metals warrants;

(d) Subsection 299(3) of the *Criminal Code* — powers to search for stolen timber;

(e) Section 403 of the *Criminal Code* — powers to seize cocks in a cock-pit;

(f) Section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act* — powers relating to narcotics and drugs.

Removal of Regulatory Provisions from the *Criminal Code*

RECOMMENDATION THREE

That the special provisions set out in sections 101, 160 and 281.3 and 420 of the* Criminal Code *should be regarded as regulatory, removed from the* Criminal Code, *and incorporated into regulatory legislation.

Recommendations for Administrative Action and Miscellaneous Recommendations

RECOMMENDATION FOUR

***The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. New provincial initiatives should be undertaken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the* Criminal Code.**

RECOMMENDATION FIVE

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.

RECOMMENDATION SIX

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.

RECOMMENDATION SEVEN

Sealing and application procedures for the invocation of solicitor-client privilege, which extend to materials in the possession of the client as well as the solicitor, should be instituted. The Crown should not be permitted access to the documents at issue in the application.

RECOMMENDATION EIGHT

Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Such modifications should not be made in the context of police powers of search and seizure in criminal law enforcement.

CONTINUED

1 OF 2

Appendix A

Information to Obtain a Warrant to Search

CANADA,
PROVINCE OF .....
Territorial Division .....

This is the information of .....,
(Name)
.....
(Occupation)
of.....,
(Address)
hereinafter called the informant, taken before me.

The informant says that he/she has reasonable grounds to believe and does believe that there is [OR are] upon the following person or in the following place or vehicle:

(Specify the person, place or vehicle to be searched.)

the following things, funds or information:

(Describe the things, funds or information which are the objects of seizure.)

which there are reasonable grounds to believe are evidence of an offence, namely [OR are takings of an offence, namely] [OR are contraband, being possessed in circumstances constituting an offence, namely]:

(Describe the offence in respect of which search is to be made.)

The informant's grounds for so believing are:

(Specify grounds of belief.)

The informant further says that he/she has personal knowledge of the following previous applications for a warrant to search this person, place, or vehicle for objects of seizure related to the transaction under investigation or a related transaction.

(Specify previous applications, if any.)

The informant therefore prays that a warrant be issued to search this person, place or vehicle for these things, funds or information.

SWORN BEFORE ME at
the.....of.....
in the.....of.....
this .....day of.....19.....

....
A Justice in and for Informant

Appendix B

Warrant to Search

CANADA,
PROVINCE OF .....
Territorial Division .....

To the peace officers in ....,
(Territorial Division)
and the Province of.....

It appears upon the oath of.....
(Name)
of.....,
(Address)

that there is [OR are] upon the following person or in the following place or vehicle:

(Specify the person, place or vehicle to be searched.)

the following things, funds or information:

(Describe the things, funds or information which are the objects of seizure.)

which there are reasonable grounds to believe are evidence of an offence, namely [OR are takings of an offence, namely] [OR are contraband, being possessed in circumstances constituting an offence, namely]:

(Describe the offence in respect of which the search is to be made.)

This warrant therefore authorizes you to search this person or enter and search this place or vehicle for these things, funds or information.

This warrant may be executed between the hours of ..... and .....
(As the issuer may direct.)

This warrant expires on .....
(State date of expiry.)

DATED this..... *day of* ..... *A.D*, ... *at* .....

.....
A Justice in and for

To the person who has been searched or whose place or vehicle has been searched:

If you wish to know the basis upon which this warrant was issued, you may obtain a copy of the information upon oath from the clerk of the court at.....
.....
(Address)

You may also obtain from the peace officer who executed this warrant an inventory of the things, funds or information, if any, that were seized in this search.

END