CRIMINAL LAW

post-seizure procedures

ng Paper 39

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POST-SEIZURE PROCEDURES

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Catalogue No. J32-1/39-1985
ISBN 0-662-53460-3

Law Reform Commission
of Canada

Working Paper 39

POST-SEIZURE PROCEDURES

1985

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Acknowledgments

The Commission was greatly assisted in the preparation of this Working Paper by Professor Robert Solomon of the University of Western Ontario. A great deal of initial work was carried out by Julius Melnitzer and Christopher Bentley who prepared an extensive unpublished Study Paper dealing with the disposition of seized property. The Commission is also indebted to the contributions made to the finalization of this Paper by various individuals and representatives of a number of groups and organizations with whom we met during our ongoing consultation process. We are grateful for their suggestions which often led to positive improvements.

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I.

Introduction

A. Scope

In the course of their duties, law enforcement officials sometimes appropriate things connected to offences which they are investigating or prosecuting. This process of appropriation may be regarded as consisting of four essential stages: first, the authorization of a search and seizure; second, the execution of those powers; third, the detention of the things seized for lawful state purposes; and fourth, the disposition of the things seized.

In 1983, the Law Reform Commission of Canada issued its Working Paper 30 entitled *Police Powers — Search and Seizure in Criminal Law Enforcement*[1] (hereinafter referred to as the *Search and Seizure* Working Paper). This Working Paper was the subject of extensive consultation and debate and formed the basis of the Commission's *Report on Search and Seizure*.[2] In that Report, the Commission examined the first two stages of the appropriation process, namely authorization and execution, and proposed that they be subjected to a thorough consolidation, rationalization and reform. The third and fourth stages, which involve a scheme for custody orders and procedures governing disposition of things seized, are the subject of the present Working Paper.

These last two stages of the appropriation process occur after a seizure of things has been carried out. "Seizure" is not defined in the present *Criminal Code*. In attempting to establish the parameters within which the proposed post-seizure procedures would operate, we have adopted the conceptual notion of seizure developed in the *Search and Seizure* Working Paper. For our purposes therefore, a seizure will be regarded as an acquisition of an object made pursuant to a power to perform an intrusion.[3]

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1. Law Reform Commission of Canada, *Police Powers — Search and Seizure in Criminal Law Enforcement*, [Working Paper 30] (Ottawa: Supply and Services, 1983).
2. Law Reform Commission of Canada, *Report on Search and Seizure*, [Report 24] (Ottawa: Supply and Services, 1984).
3. The definition of "seizure" is discussed in the *Search and Seizure* Working Paper, *supra*, note 1, Part I, paras. 9-27.

In the present Paper, we have also adopted the major proposals developed in the *Search and Seizure* Working Paper and refined in the *Report on Search and Seizure*. As one of the central recommendations of that Report, the Commission proposed that the disparate array of powers governing authorization and execution of searches and seizures relating to criminal investigations and prosecutions be replaced by a single, comprehensive regime. To be truly comprehensive, the Commission believes, such a regime should not be limited to *Criminal Code*[4] searches and seizures, but should embrace all federal crime-related search and seizure powers, including those presently provided under the *Narcotic Control Act*[5] and the *Food and Drugs Act*.[6] This argument applies equally to detention and disposition of things seized and therefore this Paper will not be limited to disposition of things seized under the *Criminal Code*; it will deal with them in relation to all federal crime-related search, seizure and disposition powers.[7]

B. Types of Property Not Covered by Proposed Scheme

This Paper is not concerned with the disposition of things which are seized for purposes unrelated to criminal investigations or prosecutions. For this reason, found property would not be subject to the proposed scheme of post-seizure procedures. Whether found by police or by an individual citizen and turned over to police, found property will not generally have come under police control for purposes relating to a criminal case.

Likewise, things which have been seized from a person in custody to protect that person's own property, to prevent his escape or to preserve order in the custodial setting have been exempted from the scheme. For example, property may be removed from a prisoner who has been placed in a police lock-up. The prisoner's wallet and jewellery might be removed to protect his personal property from other inmates. Other items such as shoe-laces or nail-files might be removed in order to protect the well-being of the prisoner and other inmates or to keep anything which could pose a danger to the prison authorities out of the prisoner's hands. Things seized for such limited custodial purposes should be returned to the prisoner, or to someone authorized to receive them on his behalf, as soon as possible upon his release where no charges are laid and it is not alleged that the things are objects of seizure.

A third class of property exempted from the operation of the proposed scheme is substances or samples seized from an individual by means of a procedure to which the

4. This and all references to the *Criminal Code* pertain to R.S.C. 1970, c. C-34, as amended.
5. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10.
6. *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 37.
7. In referring to search and seizure powers under the *Narcotic Control Act* and the *Food and Drugs Act* as "crime-related," we do not dispute the constitutional basis of the decision in *R. v. Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.). Our position in this respect is outlined in the *Search and Seizure* Working Paper, *supra*, note 1, Part I, para. 98.

Commission's recommendations contained in Working Paper 34 on *Investigative Tests*[8] would apply. By reason of their very special nature, the Commission does not consider that samples or substances removed from individuals by means of investigative test procedures should be the subject of the general scheme of custody orders and restoration proceedings proposed here.

Fourthly, the proposed scheme would not cover subjects of *in rem* procedures which the Commission has recommended be removed from the *Criminal Code*. The Commission considers that the special *in rem* procedures applicable to weapons (section 101), hate propaganda (subsection 281.3(2)) and crime comics and obscene publications (subsection 160(2)) are essentially regulatory schemes which, for reasons outlined in the *Report on Search and Seizure*, would be more appropriately incorporated into federal regulatory legislation.[9] The disposition of things seized under these provisions should correspondingly be set out in regulations.

C. Overview of Scheme

Subject to the exceptions discussed in the preceding section, the present Working Paper develops a scheme of procedures to apply to all things seized in crime-related investigations. Unlike the framework which presently exists under the *Criminal Code*, the application of the scheme is not dependent upon whether the things were seized pursuant to a search warrant. Accountability mechanisms for warrantless seizures are incorporated in the form of inventories to be available to specified persons affected by the seizure and post-seizure reports to be taken before a justice.

Under the scheme, judicial control is to be asserted over all things seized by means of custody orders made by a justice on the basis of the post-seizure reports and returned warrants. Exceptions to the general procedures are provided for things for which solicitor-client privilege is claimed, things of a dangerous nature, such as weapons and explosives, and for perishables.

Also included in the scheme are procedures to govern access to things detained under a custody order, and provisions to limit the duration of the custody order.

One of the premises upon which the recommendations are based is that provisions for detention and disposition should be consistent with the state purpose which justified seizure. Adopting the classifications of legitimate objects of seizure set out in proposed

8. Law Reform Commission of Canada, *Investigative Tests*, [Working Paper 34] (Ottawa: Supply and Services, 1984).
9. The reasons underlying our recommendation that section 101 and subsections 281.3(2) and 160(2) of the *Criminal Code* be incorporated into federal regulatory legislation are outlined in the *Report on Search and Seizure*, *supra*, note 2, Part One, Recommendation Three and pp. 52-54.

section 3 of the *Report on Search and Seizure*, the present Paper sets out a framework, which is summarized below, to govern detention and disposition of seized things:

(1) *evidence of an offence* should be seized and detained for use in criminal investigations and prosecutions; when no longer legitimately detained for this purpose, such as when an order for restoration or exclusion of evidence has been granted or where criminal proceedings have been completed, the evidence should be returned to the person establishing a clear entitlement to possession;

(2) *takings of an offence*[10] should be seized and detained in order to facilitate their return to the person demonstrating a proprietary interest (subject to any evidentiary purposes for which the things may be required);

(3) *absolute contraband* (things, funds and information the possession of which, without more, constitutes an offence), should be seized to enforce the prohibition against possession and forfeited, either before or after trial, to the state. *Conditional contraband* (things, funds and information that are illegal to possess only for a particular purpose), should be seized where grounds exist for believing that the possessor has the requisite illegal purpose in mind, and should be detained until a determination is made at trial as to whether the things were illegally possessed in the circumstances. If the person who possessed the things prior to the seizure is convicted of possessing the things for an illegal purpose, the things should be forfeited or otherwise disposed of as an aspect of sentencing. In the event of a converse finding, the things should be disposed of in the same manner as evidence or takings.

Among the major features of our scheme are procedures for the restoration of things seized and detained under a custody order. Applications may be made to a judge by a person clearly entitled to possession, for an order restoring the seized property. In determining whether a restoration order should be granted, the judge would be required to consider several enumerated factors including the existence of alternatives to detaining the actual things for use as evidence. In an effort to facilitate the early return of property to the person entitled to possession and thus minimize interference with interests of persons affected, the restoration order scheme has been partly designed to encourage the use of evidentiary alternatives wherever possible. Where evidentiary alternatives are used, we develop a mechanism to confirm that the alternative mode of proof would be admissible in place of the original. In addition, where the detention of seized articles by the Crown is challenged in the context of a restoration application and the applicant has satisfied the court that he or she is clearly entitled to possession, the onus would fall upon the Crown to establish to the satisfaction of the court that there exist legitimate reasons why the property should not be restored.

10. The term "takings of an offence" according to proposed subsection 3(2) of the *Report on Search and Seizure*, *supra*, note 2, Part One, means "property taken illegally, and includes property into or for which property taken illegally has been converted."

D. Intrusive Nature of Search, Seizure and Detention

A great deal of jurisprudence, academic interest, and practical concern has arisen with respect to the authorization and execution of search and seizure powers. "Reasonableness" standards have developed through the common law over the past three centuries and now comprise an essential element in many of the significant statutory powers and common law principles governing authorization and execution of search and seizure.[11] Yet, when detention of things seized is considered, it is apparent that the practical and theoretical concerns of this aspect of the appropriation process have not generated much academic interest nor any significant body of jurisprudence.

Clearly, the detention of things seized may represent an intrusion upon a person's property and privacy interests. This is true when purely evidentiary items such as documents are seized and detained for use at trial. This is also the case when "takings" of an offence, such as stolen property, are not immediately returned to the lawful possessor but are detained for evidentiary purposes. In these instances, the lawful possessor is deprived of his right to use and enjoy his property. The inconvenience occasioned by the deprivation of his property may be substantial. According to our conception of the appropriation process, this deprivation ends when the things seized are ultimately disposed of. At this point in time, the lawful possessor reacquires his goods from the state.

The Commission recognizes that appropriation powers are necessary tools in meeting the demands of criminal law enforcement. Having regard, however, to the inherently intrusive nature of such powers, the interest of the state in enforcing the criminal law must be carefully balanced against the rights of individuals to privacy and to be free to use and control their own property. Where the demands of law enforcement are legitimate, it is reasonable that individual property rights be subordinated to the state's interest and that the individual property holder suffer some deprivation.[12] On the other hand, where these demands are not legitimate, the property holder's interests must prevail. A balancing of competing interests is central to issues concerning detention, and the Commission believes that this balance is best ensured by the application of standards of reasonableness. The reasonableness standard imposes elements of judiciality upon the appropriation process in order to prevent the exercise of power from being arbitrary and to open it to a measure of judicial review.[13] It is essential that the lawfulness and propriety of what has been done at all stages be open to review and that the police and Crown be obliged to account for their actions.

11. Discussed in the *Search and Seizure* Working Paper, *supra*, note 1, Part I, paras. 101-113, and in the *Report on Search and Seizure*, *supra*, note 2, p. 6. See also, Lee Paikin, "The Standard of 'Reasonableness' in the Law of Search and Seizure," *Criminal Procedure in Canada: Studies*, edited by Vincent M. Del Buono (Toronto: Butterworths, 1982), pp. 93-124.

12. For a general discussion of the competing interests involved in justifying appropriation powers, see the *Search and Seizure* Working Paper, *supra*, note 1, Part I, paras. 49-51.

13. Paikin, *supra*, note 11, pp. 94-97.

The importance of reasonableness as a standard is reaffirmed and strengthened by its inclusion in the Constitution. Section 8 of the *Canadian Charter of Rights and Freedoms*[14] guarantees the right of everyone to be secure against unreasonable search or seizure. In one of the earliest interpretations of section 8, the New Brunswick Court of Queen's Bench stated that:

> [i]nfringement of the accused's right against unreasonable search or seizure ... continues ... until the things seized are returned to him. The taint continues on the things seized and is converted from an almost abstract infringement as of the date of seizure to a very real or practical infringement when the tainted articles are offered in evidence.[15]

Clearly, detention of things seized constitutes an infringement of the Charter when the authorization or execution of the initial intrusion is unreasonable. Moreover, the Commission believes that the unreasonable detention of things seized under an otherwise lawfully authorized and executed search and seizure may also, in some instances, constitute an infringement of the Charter.

For these reasons, the Commission feels it most timely and indeed urgently necessary that legislative provisions governing detention and disposition based on a reasonableness standard be enacted in Canadian law as part of the *Criminal Code*.

E. Reasons for Requiring Detention of Seized Things

In an effort to put competing interests in proper perspective, it is necessary to examine why such a high value has been placed on detaining things seized for use as evidence rather than relying on alternatives which would allow earlier restoration to people entitled to possession.

The interest of the Crown in gathering and preserving potential evidence of an accused's guilt is well established. The ''potential evidence'' rationale for the detention of seized property was expressed in the case of *Dillon* v. *O'Brien and Davis*[16] as follows:

> ... [T]he interest of the State in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of [this] evidence, without which a trial would be no more than an empty form.[17]

14. The *Canadian Charter of Rights and Freedoms* is Part I of the *Constitution Act, 1982*, c. 11 (U.K.).
15. *R.* v. *Davidson* (1982), 40 N.B.R. (2d) 702 (Q.B.), p. 707.
16. (1887), 16 Cox C.C. 245 (Ex. Ct.)(Ireland).
17. *Ibid.*, p. 250.

At common law it was considered the duty of constables to detain and produce in court all things which could constitute evidence of a crime. Once produced in court the things had to be detained until the conclusion of the proceedings.[18] Detention was seen as a means of preventing the destruction of the evidence by the accused.[19] Cautious prosecutors could justify retention of literally all things seized or articles recovered on this basis.

Strict application of this principle has been limited in more recent cases[20] and the nature of the things seized has become relevant in determining whether they are required to be detained for use as evidence in court. For example, the production at trial of perishable goods and things whose ''exhibition would be inconvenient or offensive'' is no longer considered compulsory.[21]

Notwithstanding the usefulness and convenience to the prosecution in having the things seized brought before the court, certain types of property are almost never produced in court. Motor vehicle cases are a good example of the fact that it is possible to prosecute successfully certain offences without producing the subject of the offence at trial.[22] Most cases of motor vehicle theft are successfully prosecuted without the presence of the actual motor vehicle in the court room, and often even without the detention of the motor vehicle for purposes of possible examination by the trier of fact outside the court room.[23] Courts instead accept photographic, affidavit or other evidence as to the identity and nature of such things. Practically speaking, in other types of cases, the risk of not producing the item will be taken very rarely. The decision as to whether an item should be detained often becomes a tactical one and the prosecutor must take into account the risk of acquittal owing to failure to detain the potential evidence for use at trial.

Allied to the ''potential evidence'' rationale for detaining things seized is the notion that relevant things must themselves be produced at trial in order to satisfy the requirements of the ''best evidence'' rule. Basically, the rule stands for the proposition that the terms or contents of a document must be proved by the production of the original document itself.[24] The rule is based on the belief that production of the original reduces opportunity for fraud as well as the possibility of accidental error or omission.[25] However, it is generally recognized that the strict application of this rule has been substantially eroded

18. *R.* v. *Lushington; Ex parte Otto*, [1894] 1 Q.B. 420.
19. *Supra*, note 16.
20. See for example, *Hocking* v. *Ahlquist Bros., Limited*, [1944] 1 K.B. 120; *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (Ont. Prov. Ct.).
21. *Phipson on Evidence*, 11th ed. (London: Sweet and Maxwell, 1970), pp. 6-7.
22. See for example, *R.* v. *Van Hees* (1957), 27 C.R. 14 (Ont. C.A.).
23. David Pomerant, *Retention of Stolen Goods As Exhibits at Trial*, unpublished paper prepared for the Law Reform Commission of Canada (1972), p. 7.
24. *Phipson on Evidence*, 12th ed. (London: Sweet and Maxwell, 1976), p. 58.
25. *Report of the Federal-Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982), p. 379.

by recent developments in the law.[26] The reasons why the ''best evidence rule'' should not, in itself, provide a valid justification for the continued detention of seized articles is expanded upon in the commentary corresponding to Recommendation 9.

F. Help to Victims

In attempting to balance the interest of the state in gathering and preserving evidence for use in criminal investigations and trials against the right of a person to be free from intrusions upon property and privacy rights, particular attention should be paid to the interests of victims of crime. The consideration of the victim's rights would be particularly relevant where, in addition to constituting evidence of an offence, the things seized represent ''takings'' of an offence.

While it is obviously useful for the police or prosecution to obtain things seized for purposes of investigation in such cases, the continuing loss of a victim's ability to use or control his or her own property may result in economic hardship, emotional upheaval and intense frustration with the operation of the criminal justice system.

Over the past years, the criminal justice system has come under a great deal of criticism for its alleged failure to recognize adequately the needs of victims and to provide redress for damages suffered by them.[27] The Law Reform Commission of Canada addressed this problem in 1974:

> The modern criminal process, with its concentration of social defence, rehabilitation, deterrence and incapacitation, denies the victim remedy. [...] They may suffer ... financial loss due to attendance at trial, and the possible conviction and sentence to imprisonment of the offender virtually guarantees that compensation will not be made. [...] The result is a growing mistrust in the capacity of the state to adequately protect citizens and a feeling that appropriate ''justice'' is not being meted out in the courts.[28]

26. See for example, clause 132 of Bill S-33 which would authorize the admission into evidence of duplicate copies unless the court is satisfied that there is reason to doubt the authenticity of the original or the accuracy of the copy. Similarly, copies of certain types of records are admissible under section 29 of the *Canada Evidence Act*. Proposed amendments to section 446 of the *Criminal Code* contained in Bill C-19 would also authorize the admission of copies. See also, *R.* v. *Galarce* (1983), 35 C.R. (3d) 268 (Sask. Q.B.) which quotes the following passage with approval from page 152 of the English case of *Kajala* v. *Noble* (1982), 75 Cr. App. R. 149 (Div. Ct):

    > The old rule, that a party must produce the best evidence ... and that any less good evidence is to be excluded, has gone by the board long ago ... Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.

27. See for example, *Report of the Federal-Provincial Task Force on Justice for Victims of Crime* (Ottawa: Supply and Services, 1983) (hereinafter cited as the *Victim's Task Force Report*); Law Reform Commission of Canada, *Studies on Sentencing* (Ottawa: Supply and Services, 1974), pp. 47-49; *The Criminal Law in Canadian Society* (Ottawa: Supply and Services, 1982), pp. 29-31.

28. *Studies on Sentencing*, *supra*, note 27, p. 49.

The plight of victims of crime came under close scrutiny by the 1981 Federal-Provincial Task Force on Justice for Victims of Crime. In its comprehensive report,[29] issued in May of 1983, the Task Force recognized that the criminal justice system, which was designed to deal with public wrongs, has ''relegated the victim to a very minor role and left victims with a conviction that they are being used only as a means by which to punish the offender.''[30] Even though the operation of the system is largely dependent upon victims to report crimes and act as witnesses, little is done to inspire such co-operation.[31] Victims are often inadequately compensated for their loss and they are required to bear a financial or emotional burden while their property is out of their control.

While Canadian police spend considerable time and effort in attempting to recover stolen property, given the daily demands placed upon the human resources of our police departments and the difficulties inherent in tracing and identifying goods, it is not surprising that the bulk of stolen property is never recovered.[32] In those instances where stolen property *is* recovered by police, the victim is naturally anxious to have the property returned to him or her. However, since seized items may be retained under present law whenever required for investigatory purposes or for trial, a victim is often disappointed and frustrated to discover that the recovered property will not be restored until after the conclusion of the proceedings. In many cases the victim feels doubly victimized: ''once by the offence and once more by the process.''[33]

One of the recommendations of the Task Force on Justice for Victims of Crime was that the *Criminal Code* be amended to impose a duty on police and court officials to return a victim's property as soon as possible. In order to encourage prompt return, it was suggested that a maximum period of detention be imposed and that an extension of this period be authorized only where the property is still required to be retained as evidence.[34] In addition, a recommendation was made that a procedure be endorsed for

29. *Victim's Task Force Report*, *supra*, note 27.

30. *Ibid.*, p. 5.

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32. Property recovery statistics of the Ottawa Police Force for 1983, for example, indicate that although over $5,000,000 worth of stolen property was recovered and returned to its owner, this represented only 26.6 per cent of the total value of property reported stolen. Ottawa Police, *Annual Report 1983*, p. 8.

33. *Victim's Task Force Report*, *supra*, note 27, p. 4.

34. The Task Force's recommendation that the *Criminal Code* be amended to set out a maximum period of detention has been adopted in Bill C-19. The proposed amendment to section 446 of the *Code*, as set out in clause 108 of the Bill, provides, in part:

    (2) Nothing shall be detained under the authority of *paragraph (1)(b)* for a period of more than three months after *the day* of the seizure unless, before the expiration of that period,

    (*a*) a justice, on *the making of a summary* application *to him after three* clear days notice thereof to the person from whom the thing detained was *seized*, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and he so orders; or

    (*b*) proceedings are instituted in which the thing detained may be required.

    (3) More than one order for further detention may be made under *paragraph (2)(a)* but the cumulative period of detention shall not exceed one year from *the day* of the seizure unless before the expiration of that year,

by recent developments in the law.[26] The reasons why the "best evidence rule" should not, in itself, provide a valid justification for the continued detention of seized articles is expanded upon in the commentary corresponding to Recommendation 9.

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One of the recommendations of the Task Force on Justice for Victims of Crime was that the *Criminal Code* be amended to impose a duty on police and court officials to return a victim's property as soon as possible. In order to encourage prompt return, it was suggested that a maximum period of detention be imposed and that an extension of this period be authorized only where the property is still required to be retained as evidence.[34] In addition, a recommendation was made that a procedure be endorsed for

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    (3) More than one order for further detention may be made under *paragraph (2)(a)* but the cumulative period of detention shall not exceed one year from *the day* of the seizure unless before the expiration of that year,

photographing stolen property for use as evidence so that early property return to victims could be accomplished.

The procedures proposed in this Paper are designed, in part, as a response to this call for reform. A primary thrust of the restoration application scheme has been a desire to provide an effective and accessible remedy for victims of crime. A primary objective of disposition legislation must be the restoration of the "takings" of an offence to the person lawfully entitled to possession. The state's role should be, in effect, to act as an intermediary in a restitutionary transaction, legitimately asserting and exercising control over stolen property in order to restore it effectively to the person entitled to possession. Restoration should be made as quickly as possible in order to avoid unnecessary interference with the rights and interests of those affected.

The Commission recognizes the strong interest of the state in promoting the detection, apprehension and conviction of criminal offenders. However, the public interest in prosecuting criminals must be met with the proper balance of consideration for the interests of victims of crime. The Commission considers that the adoption of the procedures for the restoration of things seized outlined in the pages following will help to strike a more appropriate balance between these competing interests without sacrificing prosecutorial efficiency or impairing the Crown's ability to secure convictions.

G. Costs and Benefits to Police

In addition to the benefits which the scheme will afford to victims of crime, the operation of the proposed procedures will also have substantial benefits for police. The requirement that inventories of seized things be prepared and made available to specified persons affected by the seizure combined with increased judicial control imposed on all things seized will result in heightened visibility in the seizure and detention process. These measures will ensure increased accountability and promote more efficient and effective property management. By encouraging the early return of seized property in appropriate cases and promoting a more extensive use of alternative forms of evidence, the scheme is aimed at reducing the burden on police forces to warehouse and protect vast quantities of seized things.

(*a*) a judge of a superior court of criminal jurisdiction or a judge as defined in section 482, on the *making of a summary* application *to him after three* clear days notice thereof to the person from whom the thing detained was *seized*, is satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and he so orders; or

(*b*) proceedings are instituted in which the thing detained may be required.

Police are acutely aware of the difficulties and expenses thrust upon victims of crime by the detention of their property for use in court despite its having been recovered. They are also aware that the frustration suffered by victims, which is a product of the delays in the system and legal constraints placed upon police who deal with recovered property, casts police in an unfavourable light.[35] The earlier return of seized property to victims would thus have a positive effect on relations between the police and the public and heighten public confidence and respect for the operation of the criminal justice system.

We are aware, of course, that some of our proposals may entail certain costs to the police, both in terms of manpower and expenditures of financial resources. In particular, the paperwork entailed in some of our accountability mechanisms may be regarded by some as considerable. We note, however, that many Canadian police forces have existing occurrence report systems which could accommodate our proposals without undue upheaval. Ultimately, however, we believe that these costs are justified by the benefits that will accrue to the criminal justice system by the operation of the proposed scheme.

35. Under the current *Criminal Code* provisions, the police have no authority to return recovered property to victims. As a result, the police are caught in the middle and become targets of criticism of victims who are angry and frustrated by the operation of the system. "[W]hat the victim may interpret to be a lack of co-operation by the police is often simply due to the fact that the law requires the police to abide by certain procedures." *Victim's Task Force Report*, *supra*, note 27, p. 41.

II.

Post-Seizure Control

RECOMMENDATION

1. A comprehensive regime of post-seizure procedures should apply in general to all things seized in crime-related investigations regardless of the mode of authorization of the seizure.

A. The Need for a Comprehensive Regime

This recommendation is one of the most fundamental and important, for it addresses the major defects of the present law governing post-seizure procedures: lack of comprehensiveness and misplaced emphasis on the mode of authorization of the seizure.

(1) Lack of Comprehensiveness

The present *Criminal Code* regime of procedures for dealing with things seized is marked by many inconsistencies and a striking lack of comprehensiveness. Most notable is the fact that, in general, post-seizure procedures embrace only things seized pursuant to a search warrant and ignore things seized without warrant. Under existing law things seized pursuant to a search warrant issued by a justice under section 443, the general search warrant provision of the *Criminal Code*, are to be returned before a justice to be dealt with by him according to law. Section 446 provides for detention orders, restoration procedures and applications for examination of things seized. Moreover, section 446 imposes duties on a justice to take reasonable care in preserving things seized. However, it should be emphasized that the judicial control and procedural safeguards of section 446 at present are limited in their application to things seized under the authority of a section 443 search warrant or under section 445 (things seized in addition to those mentioned in the warrant).

In addition to the regime set out in section 443, there is a small number of special warrants, for specific offences or particular things, each with its own corresponding regime of procedures for disposition. Moreover, there are several *Criminal Code* provisions which authorize the seizure of particular things without warrant and which provide their own post-seizure procedures.[36] Outside the *Criminal Code* but within the ambit of matters we consider "crime-related" are the *Narcotic Control Act* and the *Food and Drugs Act*. Both of these statutes contain provisions which relate to the appropriation process and, specifically, to the disposition of things seized. The post-seizure procedures attached to these various provisions do not provide as many safeguards as are provided by section 446 for things seized pursuant to general *Criminal Code* search warrants.

In addition to this diverse group of situations covered by various statutory provisions, there are situations which may arise following a peace officer's exercise of a common law power of seizure. For example, there are no statutory provisions requiring that things seized without warrant, for example pursuant to a consent search or incidental to arrest, be accounted for, brought before a judicial official or subjected to any safeguards or controls. Post-seizure procedures and ultimate disposition of the things seized without warrant depend largely on the vastly divergent administrative policies and practices of the individual police forces effecting seizures. Although recent cases have indicated a willingness on the part of the courts to monitor such practices, either in exercising their inherent jurisdiction or when the constitutional provisions of sections 8 and 24 of the Charter are invoked,[37] the absence of statutory procedures to regulate post-seizure procedures in such cases is notable.

(2) The Misplaced Emphasis on the Mode of Authorization of the Seizure

The discussion of the lack of comprehensiveness of the present regime of post-seizure procedures serves to draw attention to another of its major deficiencies: the misplaced emphasis on the mode of authorization of the seizure in determining what happens to a thing upon seizure, and to a large extent the eventual disposition of the thing. Disposition is not governed by the purpose of the seizure, but rather is often determined by whether things were seized with or without a warrant. The mode of authorization of the seizure should be irrelevant in determining what happens to a thing once it has been lawfully seized. Instead, the organization of the disposition procedures should be determined by the purposes for which seizures are authorized.

36. Special disposition provisions are included in the *Criminal Code* for weapons, ss. 99-101 (for seizure with and without warrant); obscene publications and crime comics, s. 160; hate propaganda, s. 281.3; things related to gaming and betting, s. 181; precious metals, s. 353; cocks in a cock-pit, s. 403(2); counterfeit money, s. 420; and in the *Narcotic Control Act*, s. 10 and the *Food and Drugs Act*, s. 37 for things related to narcotics and drug offences.

37. See for example, *Re Gillis and The Queen* (1982), 1 C.C.C. (3d) 545 (Qué. S.C.); *Re Trudeau and The Queen* (1982), 1 C.C.C. (3d) 342 (Qué. S.C.); *Capostinsky* v. *Olsen* (1981), 27 B.C.L.R. 97 (B.C. S.C.); *Re Butler and Butler and Solicitor General of Canada* (1981), 61 C.C.C. (2d) 512 (B.C. S.C.); *Batsos* v. *City of Laval* (1983), 9 C.C.C. (3d) 438 (Qué. S.C.).

In moving away from an emphasis on the mode of authorization, we are following a trend which has already been noticeable in recent case-law. In *Butler*,[38] a pre-Charter case, the British Columbia Supreme Court, exercising its inherent jurisdiction, ordered the return of items seized without warrant from the petitioners upon their arrest. In *Batsos*,[39] the Québec Supreme Court, acting under subsection 24(1) of the Charter, ordered the return of objects seized from the applicant without a warrant. We believe that the constitutional and judicial initiatives to break down the distinctions between post-seizure procedures applicable to seizures with and without warrant should be carried into the legislative field as well.

In this connection, it is relevant to note that clause 107 of the *Criminal Law Reform Act, 1984* (Bill C-19), introduced in Parliament in February 1984, would appear to reflect concurrence with our view that post-seizure controls should be imposed on warrantless as well as warranted searches and seizures. Proposed amendments to section 446 coupled with a new section 445.4 would extend duties imposed on a peace officer making a seizure pursuant to a section 443 search warrant to seizures made "otherwise in the execution of his duties under this or any other Act of Parliament." We agree with the thrust of this legislative initiative, but believe that a general regime of post-seizure procedures ought to cover seizures made under common law authority as well.

B. Judicial Control

(1) The Need for Accountability Mechanisms and Judicial Control over Things Seized

It is crucial that all things seized be accounted for before an independent body that will ensure that they are subjected to safeguards and controls. Procedures are necessary to encourage peace officers effecting seizures to report all things seized to a judicial official.

Our position stems from our preference for active judicial participation in matters involving state intrusion upon the rights of the individual, a preference which is not restricted to the search and seizure stage but which extends post-seizure to all things seized, regardless of whether seized pursuant to a warranted or warrantless search and seizure. In the *Report on Search and Seizure*, we stated that if search and seizure powers are meaningfully to comply with the *Canadian Charter of Rights and Freedoms*, the grounds for their exercise must, as a rule, be determined to be reasonable by a judicial officer, adjudicating before the event and upon particularly sworn information, but that

38. *Supra*, note 37.

39. *Supra*, note 37.

resort to warrantless powers of search should be available in circumstances of recognized exigency or informed consent. However, the stipulation that in certain circumstances the police should be exempt from the imperative of prior judicial authorization to permit them to search and seize carries no obvious reason why they would also be exempt from the same *ex post facto* reporting requirements that pertain to warranted searches. That is, the exemption from prior judicial authorization to intrude need not entail an exemption from judicial accountability for things seized in the course of the intrusion.

The present law's preoccupation with the mode of authorization of searches and seizures creates serious problems of accountability, both in law and practice. As to the legal position, the discrepancies which exist in those procedural requirements applied to things seized with a warrant and those seized without a warrant result in varying degrees of police accountability and judicial control. Seizures made pursuant to a section 443 search warrant require prior judicial authorization. Upon seizure, judicial control is imposed by the requirement that the things seized pursuant to a section 443 warrant or under section 445 be returned before a judicial official and subjected to defined procedures. Arguably, the present procedures may be considered as much administrative as judicial, yet in theory they do impose measures on the police regarding the necessity for the return of the things before a justice as well as for the safekeeping of such things upon detention being ordered. All things seized pursuant to such warrants are theoretically under judicial control. However, there are no legal provisions requiring that things seized without a warrant be brought before a judicial official or that any accountability measures such as the preparation of lists or inventories of things seized be complied with.

While reporting requirements are presently imposed by section 443, are these measures respected in practice? The results of the Law Reform Commission's 1978 surveys of search and seizure practices indicate that it is not uncommon for peace officers to be unaware that they are obliged by section 443 to carry things seized pursuant to warrant before the issuing justice.[40] Nor do the issuing justices in some jurisdictions insist upon compliance with the return requirements of section 443. In consequence, these justices may find themselves in the very awkward position of not knowing whether their warrants have been executed, what (if anything) was nominally in their custody, or at what point the three-month limitation on their power to detain things seized began and ended. Social scientists involved in the study of police investigation and detective work have observed that even though the *Criminal Code* states that police officers may be required to bring seized material before a justice, this was not regularly done.[41]

The failure of some police officers to comply with the terms of section 443 by neglecting to bring things seized under a warrant before a justice of the peace has been roundly denounced by the Ontario Court of Appeal:

> The conduct of the Crown officers in retaining the things seized, in their own custody instead of bringing them before a justice of the peace, ... and in keeping possession of them ... was vigorously attacked ... . It is impossible to justify what was done by the officers of the Crown after taking possession of the property of individual appellants under search warrant. It is not only unwarranted; it was in direct disobedience to the expressed direction of the warrant, and was nothing less than a high-handed trespass upon the property rights of those whose papers and documents were under seizure. It is gravely disturbing at a time when respect for the law much needs to be fostered to find it treated with contempt by officers employed to defend it and to secure obedience to it.[42]

40. The survey's strategy, methodology and results have been presented in consultation documents prepared for five of the seven cities surveyed.

41. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 153.

This failure to comply with the procedural obligations contained in the *Code* designed to impose judicial control over things seized pursuant to warrant, coupled with the absence of similar procedural obligations where things are seized without warrant gives rise to serious questions about the ability of the present regime to ensure adequate accountability.

Mechanisms to ensure compliance with procedures designed to provide post-seizure control follow. These procedures are aimed at protecting the interests of people affected by searches and seizures and ensuring that peace officers make returns before a judicial official for all things seized. The Commission recognizes that, just as there are problems in enforcing compliance with the return requirements set out in section 443, there may be potential problems of non-compliance with the proposed scheme. We believe, however, that by making post-seizure procedures more logical, certain and of universal application, the dangers of non-compliance will be minimized.

(2) Lists of Things Seized

RECOMMENDATION

2. To ensure the return of all things seized before a judicial official, the following accountability mechanisms should be imposed:

(1) Inventories of things seized should be prepared by the peace officers effecting seizure in all cases. A copy of the inventory should be given on request to the person who has been searched or whose place or vehicle has been searched. Where the 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, the person with a proprietary interest should be provided with an inventory without the necessity of a request. The inventory should describe the things seized with reasonable particularity.

The intrusion represented by the appropriation of things in criminal cases has a significant impact on the rights and interests of various people, including those whose things are seized and those against whom things seized may be offered in evidence. Such people have a direct interest in information relevant to whether or not the search or seizure was lawfully executed, whether property has been seized, and if so where their things

42. *R. v. Container Materials Ltd.*, [1941] 76 C.C.C. 18 (Ont. C.A.), p. 51.

are being held, whether they may have access to them and the necessary steps they must take to get things back.

To ensure that the interests of such people are protected, it is crucial that mechanisms and procedures operate in such a way that searches and seizures may be challenged and all things seized properly accounted for. People affected should be entitled to receive reasonably complete and accurate information concerning all aspects of the appropriation process.

Providing persons affected with an inventory of things seized serves two important functions. First, it informs persons affected — those who have been searched or whose place or vehicle has been searched, or those with a proprietary interest in things seized — of what has been seized. The term "proprietary interest" in this context is intended to include, not only rights of ownership, but possessory and equitable interests as well.[43] The inventory should list the things seized with reasonable particularity and should indicate where the things seized are being held. This enables persons affected to locate things seized and to take any action they may feel is reasonable, such as seeking access, applying for restoration or challenging the seizure. Second, providing persons affected with inventories of things seized serves the additional function of operating as an accountability mechanism. Those with inventories can check to ensure that all things seized have been included in the list.

An inventory requirement was recognized at common law as being applicable to the seizure of stolen goods. A requirement that an exact inventory be made and a copy delivered was noted in *Entick* v. *Carrington*[44] in 1765. The *Criminal Code*, which makes no provision for inventories of things seized, has not incorporated this rule.

The American *Federal Rules of Criminal Procedure*[45] impose a statutory requirement that a person from whom or from whose premises property is taken be given not only a copy of the warrant but also a receipt. An inventory of things seized is to be made in the presence of the applicant for the search warrant and of the person from whose possession or premises the property was taken. If neither is present, the inventory is to be prepared in the presence of at least one credible person. The inventory is to be returned promptly, along with the warrant, to a federal magistrate who is required, upon request, to deliver a copy of the inventory to the person from whom or from whose premises the property was taken as well as to the applicant for the search warrant.

The American Law Institute's *Model Code of Pre-Arraignment Procedure*[46] requires that the peace officer executing the search and seizure prepare a list of things seized[47] upon completion of the search. The peace officer is to prepare a receipt embodying the

43. The equivalent term in the civil law system could be "un droit réel."
44. (1765), St. Tr. 1030, p. 1067.
45. *Federal Rules of Criminal Procedure* (St. Paul, Minn.: West Publishing Co., 1981), Rule 41(*a*).
46. American Law Institute, *A Model Code of Pre-Arraignment Procedure* (Washington, 1975) (hereinafter cited as the A.L.I. *Model Code*).
47. *Ibid.*, Article 220.3(6).

list in front of the person from whose possession the things were seized or in front of the person in apparent control of the premises, and to leave the receipt with that person. The list of things seized is then to be promptly reported to a judicial official along with either a returned warrant or a post-seizure report.[48] If charges have been laid, a copy of the list is to be given to the defence. A list may also be given such public notice as a judicial official considers necessary.[49]

England, like Canada, imposes no statutory inventory requirement. In a recent case involving the warrantless search and seizure of a quantity of stolen goods, the English Court of Queen's Bench characterized as unreasonable the refusal of a peace officer to give a receipt upon seizing things.[50] The Royal Commission on Criminal Procedure has recommended that the property taken in a search be fully recorded and a receipt given.[51]

Notwithstanding the absence of a statutorily imposed requirement that inventories be prepared in Canada, inventory procedures *have* been implemented in a number of Canadian police forces.[52] Commission researchers for the search and seizure project were told by members of one force that they routinely send exhibit forms to the individual from whom things have been seized as well as to their own records department. Another force looked unfavourably on inventory procedures as an unnecessary source of paperwork. In between these views stand a number of forces which maintain that they would provide an inventory upon request. The practice in most forces is to make an inventory for administrative purposes anyway. In this light then, the imposition of a legal requirement that one be made would impose little extra burden upon the police.

The Commission believes that a statutory requirement that an inventory be available to a person whose things are seized should be adopted in Canada. The objective of informing persons affected of the specific items being taken from them enhances the visibility of the search and seizure procedure, allows persons affected a basis upon which to take any subsequent action which they may feel is reasonably justified, and provides a mechanism to ensure that all things seized are accounted for before a judicial official.

The extent of detail on the inventory should be that which is sufficient to describe the things seized with reasonable particularity. Where only a small quantity of things is seized, it should be listed in enough detail to allow it to be easily identified. In cases in which the volume of materials seized makes a meticulous list impossible or impracticable, such as when large quantities of documents are seized, the inventory should be as detailed as is reasonable.

Inventories are also dealt with in the *Report on Search and Seizure* and the procedures proposed in the present Paper are based on proposed section 16 (Recommendation One)

48. *Ibid.*, Articles 220.4(2) and 280.2(2).
49. *Ibid.*, Article 280.2(3).
50. *Wershof* v. *Commissioner of Police for the Metropolis*, [1978] 3 All E.R. 540 (Q.B.), p. 552.
51. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), p. 36.
52. *Supra*, note 1, Part II, para. 264.

of that Report. In formulating a recommendation requiring the preparation of inventories of things seized, concern was expressed that situations may arise in which a person affected, for any number of reasons, would not wish to be given an inventory.[53] Accordingly, we have proposed that the provision of an inventory to a person from whom things have been seized stem from the request of that person. In order to inform the person who has been searched or whose place or vehicle has been searched of his right to receive an inventory from the peace officer who executed the seizure, a notice to that effect should be printed on the search warrant.

(3) Reporting Requirements

RECOMMENDATION *(Cont.)*

(2) The peace officer who makes a seizure of things pursuant to a warrant should endorse the warrant with a report of facts and circumstances of execution, including an inventory of things seized; an unexecuted warrant should be endorsed with the reasons why it was not executed.

(3) The peace officer who makes a seizure of things should be required to complete a post-seizure report in cases where things are seized without warrant and where objects not mentioned in the search warrant are seized after a search with warrant.

The report should include the time and place of the search and seizure and the reason why it was made, as well as an inventory of things seized. A copy should be provided by the peace officer who completes 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 which the officer is aware.

(4) Either the endorsed warrant or the post-seizure report should be taken before a justice of the territorial jurisdiction in which the search and seizure was executed as soon as practicable.

In accordance with Recommendation 2(1), all warrants should be endorsed and returned to a justice along with an inventory of things seized. Similarly, all warrantless seizures should be reported in a post-seizure report which is to be taken before a justice along with an inventory of things seized. In this fashion, all things seized, regardless of the mode of authorization of the seizure, are to be reported to a judicial official, accompanied by a report of facts and circumstances surrounding the seizure. The report or returned warrant will function as the basis upon which a custody order with respect to the things seized may be granted. Moreover, the report or warrant will provide a relatively contemporaneous account of the search and seizure which may prove useful in case of challenge.

53. *Ibid.*, Part II, paras. 265-66.

Canadian law does not presently require that any specific post-seizure reports be prepared, even in cases where a "return" requirement is imposed. For example, subsection 443(1) of the *Criminal Code* directs a peace officer, who has acted under the authority of a search warrant, "to seize and carry" objects of seizure before a justice to be dealt with by the justice "according to law." Section 181 of the *Criminal Code* contains a similar provision. These provisions are limited to cases where things are seized pursuant to a search warrant and do not require that any specific report or information accompany the actual things seized upon their return to the justice. Similarly, no post-seizure reports are required to be prepared in cases where searches or seizures are carried out under the seizure provisions of the *Criminal Code*, such as sections 160, 281.3 and 420, which do not require that a return be made or where seizures are made under the *Narcotic Control Act* or the *Food and Drugs Act*.

The American Law Institute, in its *Model Code*, notes that in many American states, post-seizure procedures relate only to property seized pursuant to a warrant and are silent with respect to things seized without a warrant. The provisions of the *Model Code* were formulated in an effort to overcome this serious limitation by providing mechanisms to account for all things seized.[54]

Under the provisions of the *Model Code*, all warrants, even unexecuted ones, must be returned to the issuer. An unexecuted warrant is required to be returned on or before the date specified for return, together with a report of any reasons why it was unexecuted. Executed warrants must be returned as soon as possible along with the verified report of the facts and circumstances of execution, and a list of things seized.[55] In all cases where things are seized without a search warrant, a report in writing of the facts and circumstances of the seizure accompanied by a list of things seized must be brought before a judicial official.[56]

The Commission proposes the adoption of a similar scheme under Canadian law. Reports of all things seized should be made to a judicial official within a reasonable time. Justices are the judicial officials charged with the responsibility of issuing search warrants under most existing crime-related warrant regimes, and under the scheme of procedures recommended in the *Report on Search and Seizure*. On this basis, it would appear that justices are the obvious judicial officials to deal with reports of things seized and custody orders. Certain concerns as to the impartiality and competence of justices in issuing search warrants were raised in the *Report on Search and Seizure*. The Commission concluded that steps should be taken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties, and recommended that new provincial initiatives be undertaken to examine the office of justice of the peace.[57] The provinces, having jurisdiction over this matter, are once again encouraged to take these steps, so that the procedures we recommend are administered effectively in practice.

54. A.L.I. *Model Code*, *supra*, note 46, Commentary on Article 280, pp. 555-56.
55. *Ibid.*, Article 280.2(2).
56. *Ibid.*
57. *Supra*, note 2, Part Two, Recommendation Four and pp. 55-56.

Our recommendation specifies that the required reports be made to a justice of the territorial jurisdiction in which the search and seizure was executed. We do not believe that it is necessary to make the requirement any narrower. For example, no valid purpose would be served by requiring that in cases of search with warrant the things be returned to "the issuer of the warrant." Even section 443, which prescribes that things seized pursuant to a warrant be carried before a justice, does not refer exclusively to the issuer of the warrant but contains a broader reference to "the justice who issued the warrant or some other justice for the same territorial division." The Commission recognizes the fact that it is the judicial office which is important, rather than the actual judicial officer.

The Commission also recommends that a central filing system for search warrants and related documents be instituted in each territorial jurisdiction. Such a central system would facilitate retrieval of all documents relating to a particular search and seizure where public access is sought. It would also ensure that all relevant supporting documentation could be more readily accessible to the justice receiving the returns and making the custody order in cases where he or she had not been responsible for issuing the search warrant.

Keeping in mind the accountability aspects of post-seizure procedures and the need for a quick assertion of judicial control, the Commission wishes to stress the necessity of reports and warrants being brought promptly before a justice. Rather than specifying a particular time period, however, a requirement that reports be brought before a justice of the peace "as soon as practicable" takes account of the various shifts and schedules of different police forces, and will encourage a quick response.[58]

C. Custody Orders

The Commission believes the best method of assuring judicial control over things seized is by requiring the seizing authorities to apply to the justice concerned for a custody order which would govern care and control of things for as long as their detention is required or until the proper disposition can be determined through restoration applications or other proceedings.

Our proposed scheme of custody orders is responsive to the state interest in preserving evidence relevant to criminal proceedings. While things are being detained for this purpose, the scheme does not distinguish between the objects of seizure we have classified as

58. It may be noted for comparative purposes that "within three days of issuance" was the time-limit recommended for reporting a search and seizure made pursuant to a telewarrant in the Law Reform Commission of Canada Report entitled *Writs of Assistance and Telewarrants*, [Report 19] (Ottawa: Supply and Services, 1983), Recommendation 2(9). The *Criminal Law Reform Act, 1984* (Bill C-19) proposes in clause 104 that a report of the execution of a telewarrant be filed "within a period not exceeding seven days after the warrant has been issued."

takings and contraband and those which we have classified as evidence. It is at the disposition stage, after the things have served their evidentiary purpose, that distinctions are made.

In keeping with our comprehensive approach, our custody order scheme is designed, as a general rule, to provide judicial control over all things seized regardless of the mode of authorization of the seizure. This does not preclude, however, special provisions for things such as dangerous weapons, perishable goods or things which may be subject to solicitor-client privilege.

The following procedures govern the issuance of custody orders and also deal with access to things detained under custody orders, duration of custody orders, and disposition upon termination of custody orders.

RECOMMENDATION

3. All things seized should be subject to judicial control.

(1) Custody orders should be made by a justice on the basis of the inventories and reports; there should be no requirement that the actual things seized be physically before the justice. This would not, however, preclude a justice from ordering production of things either at the time of making a custody order or at any time during the duration of the order.

(2) The custody order should provide for the storage and supervision of things seized.

The custody order process that we propose would be initiated upon the endorsed warrant or post-seizure report being taken before a justice. This single procedural step meets two objectives: it provides a means of reporting the facts and circumstances of a search and seizure to a judicial official and functions as an application for the issuance of a custody order for things seized.

Recommendation 3(1) anticipates a custody order being made without the necessity of physically producing the actual things seized before the justice. This represents a departure from the terms of subsection 443(1) of the *Criminal Code* which requires that things seized pursuant to a warrant be "carried" before the justice, and subsection 446(1) which provides for detention of anything "seized under section 445 or under a warrant issued pursuant to section 443" that is "brought before a justice."

In practice it is frequently impractical, if not impossible, to carry all things seized before a justice. This is particularly true with respect to seizures of such items as automobiles or livestock, or in cases involving large-scale seizures of documents. Requiring a peace officer to file a written report is a more practical means of achieving the same objective, namely ensuring a measure of accountability in respect of all things seized.

The Commission recommends that things seized actually be produced before a justice only where he or she would like to inspect them personally. This is unlikely to be the case in a routine custody order situation. However, the discretion should be left with the justice to have things brought before him or her, or to be taken to view them, if he or she is concerned about the accuracy of the description, quantity, perishability, or any other factor that may be relevant to the making of the custody order. This discretion should remain with the justice, not only at the time of making the custody order, but at any time during the duration of the order permitting the justice to supervise and ensure that the terms of the custody order are being complied with.

Although the Commission believes that an application for a custody order should be essentially a documentary procedure, the requirement that the peace officer who effected seizure appear personally before the justice should not be eliminated. Rather, the present requirement that a search warrant be returned to a justice by the person who executed it should be expanded to require that the person executing the search and seizure, whether with or without warrant, appear before a justice with an endorsed warrant or post-seizure report, as the case may be.

The justice, in exercising his or her judicial function, may require further information about the things seized, or may wish to question the peace officer regarding the facts and circumstances described in the report. Clearly, the peace officer can be most effectively examined if he is personally present before the justice. Moreover, things seized are frequently ordered detained pursuant to section 446 in the custody of the peace officer who effected the seizure. It is anticipated that this practice will continue under the proposed custody order scheme. The peace officer can most effectively comply with his duties under the custody order if he is present when the order is made and takes effect.

(1) Nature of the Custody Order

Recommendation 3 requires that the custody of things seized be formalized by court order. Care and control of the things should be governed by the terms of the custody order granted by the justice to whom the inventory of things seized has been taken by the peace officer effecting seizure, or by another peace officer acting on his behalf. The custody order would neither establish nor extinguish any property rights in the things that would not have existed but for the order. The order would provide that the immediate personal care and control of things be entrusted to the person in whose custody they are placed. This custodian would be charged with the responsibility of storing the things under secure conditions, and protecting and preserving them until their final disposition is determined.

In practice, things seized will most likely be placed in the custody of the peace officer who effected seizure and who appeared before the justice. That peace officer will probably be aware of the circumstances of the investigation or the prosecution to which the things relate. Moreover, the peace officer will most likely have already arranged for

the things to be safeguarded in an appropriate storage place in his police department to cover the period between the seizure and the issuance of the order. The custody order would, in such cases, formalize the control already existing in the peace officer. The justice may himself or herself assume direct personal custody over things, although this will most likely occur infrequently owing to practical problems such as lack of adequate storage facilities in most court-houses. In any event, the justice would theoretically retain ultimate control through the order which provides for storage and supervision with a custodian.

RECOMMENDATION *(Cont.)*

(3) Custody orders should be made for all things seized, with the exception of things which the justice determines should be promptly released. The justice should have the discretion to order that perishables be immediately released, with or without conditions, if the identity of a person establishing a clear entitlement to possession of them can be promptly established to his satisfaction.

(4) Special sealing and application procedures for documents for which solicitor-client privilege is claimed, set out in Bill C-19 proposed in 1984, should be instituted with two new provisions — the protection accorded by these procedures should extend to materials in possession of the client as well as the solicitor and the Crown should not be permitted access to the documents at issue in the application. Upon a determination that seized documents are subject to solicitor-client privilege, they should be returned to the person from whom they were seized. If no solicitor-client privilege is found to exist, the documents should be treated in the same manner as other things seized.

(5) A peace officer effecting seizure of any firearms, weapons, or explosives of a dangerous nature, should, as soon as possible, remove them to a place of safety where they may be detained until the custody order is granted.

Recommendation 3(3) sets out the general rule that custody orders are to be made for all things seized (subject to certain specified exceptions which will be discussed below). Custody orders are not provided for in the *Narcotic Control Act* or the *Food and Drugs Act*. Subsection 446(1) of the *Criminal Code* gives a justice the discretion to order that something seized pursuant to a search warrant or under section 445 be detained. Our recommendation represents a departure from this subsection in certain respects.

In addition to expanding the scope of the detention provisions of section 446 to things seized both with and without a warrant, Recommendation 3(3) of the proposed scheme removes the discretion of the justice to whom seized things are returned to decide whether or not to make an order to govern detention of the things. Under subsection 446(1) of the *Code*, when a seized thing is returned to a justice he or she is obliged either to "detain it or order that it be detained ...." These words were interpreted in *Re Alder and The Queen*:[59]

59. (1977), 37 C.C.C. (2d) 234 (Alta. S.C.T.D.).

> [D]uring the initial three-month period of detention (if the article is detained this long under s. 446(1)) the Justice has the option of merely detaining it without any order of detention, or he may make an order of detention. This being the case, it is proper procedure for documents to be detained by a Justice without an order for detention during the initial three-month period under s. 446(1).[60]

The Commission believes that the law should require that, subject to certain narrow exceptions, the detention of all things seized be formalized by court order, made when seizures are reported to the justice. Such an order would not only govern care and control of the things, but also serve as the juridical basis for custody and detention.

Recommendations 3(3) and 3(4) provide for exceptions to the general rule that the detention of all things seized be formalized by a custody order. Certain things, such as perishables and things for which solicitor-client privilege is claimed, should be subject to exceptions because of the inherent nature of the seized things.

(2) Perishables

Under Recommendation 3(3), perishables may be immediately released if the identity of a person demonstrating a clear entitlement to possession of them can be promptly established to the satisfaction of the justice to whom their seizure is reported. In accordance with Recommendation 12, a seized thing may not be returned, however, where there is a substantial question whether it should be returned to the person from whom it was seized or a substantial question among several claimants to possession.

According to our proposed custody order scheme, the underlying concepts of accountability and judicial control require that all things seized, including perishables, are to be accounted for before a justice.[61] The justice would then be required, as a general rule, to make a custody order governing the detention of the things. We feel it necessary however, based upon the above concerns, to provide an exception from the operation of this general rule for perishables and things subject to rapid deterioration.

It should be within the justice's discretion to order the prompt release of things where the information before him or her reveals the perishable nature of things seized and the urgency of prompt return. The justice should have the discretion either to make a custody order and allow the issue of return to be dealt with through restoration procedures or, under circumstances where he or she feels the things will not survive even the amount of time necessary for regular restoration procedures, order the things returned to a person whose rightful claim to possession can be established to his or her satisfaction. The order may be unconditional or conditioned upon the things being photographed and information as to quantity, size, and so forth, recorded to ensure its introduction into evidence in any

60. *Ibid.*, p. 239.

61. The A.L.I. *Model Code*, *supra*, note 46, on the other hand, allows perishables to be returned by the peace officer effecting seizure. The seizure and return is then reported to a judicial official (Article 280.2(6)).

proceedings in which it may be required. Such an order for prompt release allows the interests of law enforcement to be served, while at the same time, it minimizes the disruption of the individual interests of those with a rightful claim to possession of perishable goods.

People engaged in the vegetable commodity industry are especially prone to the problems which result from seizure and detention of perishables. Such people feel doubly victimized when their goods are stolen; first, by the actual theft, and second, by the slowness of criminal proceedings which often result in the victim being deprived of his property until it has lost all value. The problem has been described by the Canadian Tobacco Manufacturers' Council in a report urging reform of this aspect of the law:

> Thefts of large quantities of merchandise have become commonplace. The theft of bulk merchandise in transit has become a major criminal activity carried out by truck hijacking. In addition to the quantity, the nature of the goods now involved in typical thefts has changed. Most mass-produced merchandise today is either perishable or subject to rapid depreciation. Cigarettes, a high-value product frequently stolen in enormous quantities through truck hijacking, are a vegetable commodity subject to spoilage by drying out, infestation and rot during prolonged storage under even the best of conditions.[62]

In describing the scope of the problem in the tobacco industry the report documents the size and frequency of large-scale merchandise theft in Québec. The value of goods stolen in a single hijacking incident has reached as high as seven hundred thousand dollars.[63] In a separate hijacking incident, merchandise worth two hundred and fifty thousand dollars was recovered one week after the theft but had to be destroyed after it deteriorated during detention.[64] Insurance costs and the value of goods spoiled during detention are passed on to the consumer in the form of higher prices.[65] In order to reduce such losses, people affected are urging that the law expressly recognize the problems associated with perishable goods and goods subject to rapid depreciation.

The Commission recognizes, in principle, the importance of preserving things detained for use as evidence until the conclusion of proceedings. However, no evidentiary purpose is served by physically detaining things which decompose and deteriorate even when stored under the most ideal of conditions.

(3) Materials for Which Solicitor-Client Privilege Is Claimed

An exception to the general rule may also be appropriate for materials for which solicitor-client privilege is claimed.

62. The Canadian Tobacco Manufacturers' Council, *Detention of Stolen Merchandise in Quebec*, pp. 2-3. (A brief submitted to the Authorities for the Administration of Criminal Justice in Québec and the Federal Department of Justice.)

63. *Ibid.*, p. 6. In August 1973 the MacDonald Rothman's Company was the victim of a hijacking in Québec in which goods valued at $700,000 were stolen.

64. *Ibid.*, p. 6. The theft referred to is that involving the Rothman's and Imperial Co. on June 10, 1970.

65. *Ibid.*, p. 3.

Canadian courts have, on numerous occasions, affirmed that the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship between solicitor and client.[66] Two distinct lines of argument were developed concerning the nature of solicitor-client privilege, and accordingly, when the privilege could be asserted. The more restrictive view, represented in decisions such as *Colvin, Ex parte Merrick*[67] has been that the privilege is simply evidentiary and accordingly may only be raised at trial to preclude the admission of privileged documents into evidence.[68]

The more expansive position on the other hand, would allow the privilege to be raised at the investigative stage in order to protect solicitor-client communications from becoming available to third parties. This broader standard was applied by the Supreme Court of Canada in *Solosky*,[69] a case which did not deal with the question of evidence before a court or tribunal, but with an inmate's right to confidentiality of solicitor-client correspondence.

In *Descoteaux* v. *Mierzwinski*[70] the Supreme Court of Canada readdressed the issue of solicitor-client privilege. The court concluded that although "the right to confidentiality first took the form of a rule of evidence, it is now recognized as having a much broader scope."[71] The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's permission. The solicitor-client relationship arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice. Accordingly, the solicitor-client privilege may be asserted before the preliminary inquiry or trial at which the communication is to be adduced in evidence commences.

The full protection afforded to solicitor-client privilege has a major impact on post-seizure procedures. The Commission believes that in the interests of providing the full protection of solicitor-client privilege recognized in *Descoteaux*, legislative treatment is called for. Special sealing and application procedures should be instituted to provide protection in all cases of search and seizure of documents for which solicitor-client privilege is claimed.

Such procedures were proposed in the *Criminal Law Amendment Act, 1978*[72] and have been substantially re-introduced in Bill C-19, the *Criminal Law Reform Act, 1984*. Special procedures are provided in Bill C-19 to deal with documents seized while in the possession of a lawyer, by requiring the officer making the seizure to place the documents in a sealed package without examining or copying them upon a lawyer's assertion that

66. *Solosky* v. *The Queen* (1979), 50 C.C.C. (2d) 495 (S.C.C.), p. 510, and more recently reaffirmed in *Descoteaux* v. *Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.), p. 396.
67. *R.* v. *Colvin; Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.).
68. See Rupert Cross, *Cross on Evidence*, 5th ed. (London: Butterworths, 1979), p. 282.
69. *Solosky* v. *The Queen*, *supra*, note 66.
70. *Descoteaux* v. *Mierzwinski*, *supra*, note 66.
71. *Ibid.*, p. 398.
72. *Criminal Law Amendment Act, 1978* (Bill C-21), s. 59.

the documents to be seized are privileged. The package would be placed in the hands of a suitable custodian and the lawyer or his client would have fourteen days to make an application to a judge. At the hearing of the application, the judge would be able to inspect the sealed documents and decide summarily the claim of privilege. In cases where privilege is found to exist, the custodian would be ordered to return the document to the applicant and the document would be inadmissible as evidence unless privilege was subsequently waived. If no privilege was recognized, the document would be delivered to either the police or the Crown to be dealt with in the same manner as all other things seized.[73]

The Commission has recommended in the *Report on Search and Seizure* that these sealing and application procedures be instituted with two new provisions.[74] In the Report, we pointed out two shortcomings in the proposed legislation. First, under the proposed wording of subsection 441.1(2), the only documents in which privilege may be claimed are those in the possession of a lawyer. Documents in the possession of the client may theoretically also be subject to solicitor-client privilege and the proposal is therefore overly restrictive.[75] Second, in order to give full recognition to an individual's substantive right to communicate in confidence with his legal adviser, counsel for the Crown should be denied access to the documents which form the basis of an application to determine a claim that the documents are subject to solicitor-client privilege.

The Commission therefore recommends that the sealing and application procedures set out in Bill C-19 be instituted with two new provisions — that the protection granted should extend to privileged materials in the possession of the client as well as the solicitor and that the Crown should not be permitted access to the documents at issue in the application.

(4) Firearms, Weapons and Dangerous Substances

As has been set out in the Introduction, the post-seizure procedures recommended here would not apply to weapons seized under the authority of subsections 101(1) and 101(2) of the *Criminal Code* since section 101 is an *in rem* procedure which the Commission believes should be removed from the *Code* and placed in federal regulatory legislation.[76]

It follows that special detention and disposition procedures to deal with things seized pursuant to such powers should be eliminated from the *Code* and placed in regulatory legislation as well.

73. See clause 106 of the Bill, which represents an amendment to section 444 of the *Criminal Code*.
74. See *Report on Search and Seizure*, *supra*, note 2, Part Two, Recommendation Seven.
75. *Ibid.*, Part Two, p. 59.
76. *Supra*, note 9.

As has also already been discussed in the Introduction, the proposed scheme of post-seizure procedures would similarly not apply to weapons seized from a person in custody for the limited purposes of preventing escape or preserving order in the custodial institution where no rationale for detaining the weapon remains afterwards (that is, no charges are laid and it is not alleged that the weapon is an object of seizure).[77]

With respect to seizures of weapons which *are* objects of seizure, we have proposed that powers to seize firearms which presently exist under sections 99, 100 and 443, be subsumed under the regime of general rules proposed in the *Report on Search and Seizure*. Under the search and seizure regime proposed in that Report, searches could be performed without warrant whenever human life or safety is in danger. It is therefore unlikely that any search and seizure which would be authorized under sections 99, 100 and 443, would fail to be authorized under the proposed regime.[78] Where firearms are seized under our proposal, no special post-seizure procedures are required. The general proposals being formulated here for custody orders and restoration applications are aimed at being wide enough in scope to deal with *all* things seized, including firearms, whether takings, evidence or contraband, and are designed to replace the specific provisions of sections 100, 446 and 446.1 for dealing with weapons seized under sections 99, 100 and 443.

While the same custody and restoration provisions would generally be applicable to weapons and other "objects of seizure," the Commission considers that the inherently dangerous nature of firearms, weapons and dangerous substances warrant special treatment at the custody order stage. Dangers exist for anyone involved in handling guns, including peace officers engaged in seizing, handling and storing dangerous weapons and substances. The dangers involved in such seizures may be reduced by provisions designed to encourage safe handling and storage of seized weapons. Further, section 447 of the *Criminal Code* provides for the seizure of explosives suspected to be used for an unlawful purpose and explicitly states that the person carrying out the seizure, "... shall, as soon as possible, remove to a place of safety anything that he seizes by virtue of this section ...."

Legislative provisions should be aimed at reducing the dangers involved in seizing, handling and storing all dangerous weapons and substances seized. The Commission therefore recommends that peace officers effecting seizures of dangerous things should remove them to a place of safety where they may be detained until the custody order is granted. Custody orders issued with respect to such things should contain specific provisions to ensure safe handling and storage.

77. Seized weapons which cannot be categorized as either "takings" of an offence, evidence of an offence or contraband should be returned to the person authorized to receive them, or to someone authorized to receive them on his behalf, as soon as possible after his release unless charges are laid and it is alleged that the weapon is an object of seizure.

78. *Supra*, note 1, Part II, para. 423.

D. Access

RECOMMENDATION

4. (1) As the custody order and supporting documents form part of the court record and are therefore public, they should be open to inspection by any person. Access to the documents should be subject to prohibition against publishing or broadcasting their contents until:

(*a*) a preliminary inquiry has been held in respect of a person who has been searched or whose place or vehicle has been searched, 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 custody order and supporting documents have been disclosed in judicial proceedings in respect of which publication or broadcast is not prohibited;

(*d*) an order has been made under subsection (2).

However, the issuer of the custody order should be empowered to make provision in the custody order for notice of the list of things seized to be given by publication, broadcasting or other means in cases, for example, where rightful ownership of the things seized is unknown to the authorities, provided the name and other identifying particulars of persons affected are not disclosed.

(2) Upon application by a person mentioned in paragraph (1)(*a*), or by any person with the consent of a person mentioned in paragraph (1)(*a*), a judge may order that the prohibition on broadcasting and publication imposed by subsection (1) be terminated.

(3) With respect to access to the things seized, the following rules should apply: Where access to the things seized is denied, a justice should have the discretion to order that an applicant be permitted to examine anything seized and detained where:

(*a*) the applicant establishes an interest in the things seized and detained; and

(*b*) the applicant has given three clear days notice to the Attorney General or his agent.

In the case of seized documents, the justice should be required, upon application by such a person, to order that the person receive photocopies upon payment of a reasonable fee determined in accordance with the tariff of fees fixed or approved by the Attorney General of the province.

(4) A person who considers himself aggrieved by an order made under Recommendation 4(3) should have a right of appeal from the order to the Appeal Court as defined in section 747 of the *Criminal Code*.

The question of access in the context of post-seizure procedures is twofold. First, should access be granted to court records and documents relating to the appropriation process? Second, should access be granted to the actual things seized? After addressing these questions it is necessary to define the scope of access to be granted — who should be entitled to access and should any limits be placed on access?

(1) Access to Court Records and Documents

Under the scheme which we have proposed in this Working Paper and in the *Report on Search and Seizure*, the appropriation of things with a search warrant would produce the following documents: the information on oath, the search warrant endorsed and returned to a justice along with an inventory of things seized (if applicable), and the custody order. The appropriation of things without a warrant would involve the preparation of a post-seizure report including an inventory of things seized and a custody order.

Several of the issues involved in determining whether access should be granted to the information on oath and search warrant were analyzed by the Supreme Court of Canada in *MacIntyre* v. *Attorney General of Nova Scotia*.[79] This case centered around the privacy rights of persons affected by searches and seizures. More particularly, the case considered how these rights relate to the need for openness of judicial procedures, and discussed the need to balance the degree of accessibility which can be tolerated against the need for effective enforcement of the criminal law.

Dickson J., writing for the five to four majority, concluded that a member of the public should be generally entitled to inspect the warrant and supporting information after a search warrant has been executed and the things seized are brought before a justice. The minority, on the other hand, felt that access to these documents should be limited to persons showing a direct and tangible interest in them.[80]

The Commission, in the *Report on Search and Seizure*, advanced proposals which accorded, in large part, with the majority position favouring public access to the documents. The Commission recognized, however, that the privacy interests of persons involved often conflict with the interests protected by public access and concluded that these privacy interests should be given as much protection as possible. As the Commission stated in the *Report on Search and Seizure*:

79. (1982), 40 N.R. 181 (S.C.C.).

80. These issues are discussed in the *Search and Seizure* Working Paper, *supra*, note 1, Part II, paras. 304-315, and analyzed in Lee Paikin, "*A.G.N.S.* v. *MacIntyre*: The Supreme Court of Canada Grapples with Public Access to Search Warrant Proceedings" (1982), 24 *C.L.Q.* 284.

> 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 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. 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.[81]

Accordingly, in that Report the Commission recommended that a person affected by a search or seizure with warrant should be entitled to inspect the warrant and supporting information upon oath after the execution of the warrant.[82] To protect the privacy rights of people affected, the Commission recommended that members of the public be granted access to these documents, subject to an automatic prohibition against publishing or broadcasting their contents which would apply until lifted in accordance with the provisions of Recommendation 4 proposed in this Working Paper.

A question arises as to whether the conclusions reached with respect to search warrants and informations upon oath also apply to documents relating to search and seizure without warrant and to custody orders for all things seized.

Clearly, a person who is "directly interested" in a search and seizure can inspect court documents which relate to it. This position was accepted by both sides in *MacIntyre* and by the Law Reform Commission.

Traditionally, only documents relating to search and seizure with warrant became part of the court record, since no application or recording requirements were applicable for search and seizure without warrant. The proposed post-seizure procedures require information on all searches, seizures and things seized, regardless of the mode of authorization of the seizure, to be reported to a justice. These reports serve as the basis for custody orders and also function as a relatively contemporaneous report of the circumstances surrounding the search and seizure which may prove relevant in case of challenge. Clearly then, it is desirable that all such records and reports be accessible to persons interested in challenging a search and seizure. The Commission believes, however, that access should not be restricted to persons directly affected by search or seizure.

The Commission is at the same time sensitive to the conflict between public access and the privacy rights of those directly affected by searches and seizures. As was noted in the *Search and Seizure* Working Paper, the benefits of granting access to both the public at large and to institutions such as the press may harmonize with the concerns of persons affected, but this is not necessarily so.[83] In order to protect the privacy rights of people directly affected, we advocate, as we did in relation to search warrant documents,

81. *Supra*, note 2, Part One, pp. 30-31.

82. *Ibid.*, Recommendation One, section 17.

83. *Supra*, note 1, Part II, para. 307.

that public access to post-seizure reports and custody orders be granted, subject to a prohibition against publishing or broadcasting their contents. The prohibition would remain in effect until a) the person affected is discharged at a preliminary inquiry, b) the proceedings are completed, c) the contents have been disclosed in judicial proceedings in respect of which publication or broadcast is not prohibited, or d) it is revoked upon application to a superior court judge by or with the consent of the person who has been searched or whose place or vehicle has been searched. The prohibition on publication would allow public accessibility, while at the same time protecting the privacy rights of persons affected from the possibly prejudicial effects of broadcasting or reporting.

One of the major precepts upon which the proposed scheme of post-seizure procedures rests is the need for accountability in cases where a person's rights or interests may be affected. By requiring that inventories and reports of search and seizure be prepared and taken before a justice, accountability mechanisms are imposed on agents of the state effecting seizure. The justice who then deals with things seized, in appropriate cases, is also subject to account for his or her actions. The most effective method of ensuring accountability and guarding against abuse is public visibility and accessibility. Open court rooms and access to court documents are hallmarks of our judicial system. This was recognized in relation to the search warrant process in *MacIntyre*:

> Parliament has seen fit ... to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny, but a judicial act performed at the pre-trial stage remains shrouded in secrecy.
>
> ...
>
> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law.[84]

The principles enunciated in the *MacIntyre* case apply, in Dickson J.'s words, ''at every stage.'' After the seizure has occurred, the need for openness applies to cases of warrantless search in the same fashion that it applies to cases of search with warrant. The official executing a warrantless search must be held accountable to ensure that he executed the search with proper authority and with reasonable force. The justice must deal with all things seized according to law, and must be accountable for his actions. The Commission believes that not only is public confidence in the integrity of the judicial system and administration of justice fostered by public accessibility to search and seizure documents but that such accountability operates as a safeguard against abuse.

Public access to custody orders also encourages respect for the administration of justice. Access to information regarding things seized and detained under custody orders serves to inform people, especially those from whom things have been stolen, of the recovery and whereabouts of their property. In many cases, what appears to be stolen

84. Dickson J. in *MacIntyre*, *supra*, note 79, pp. 190-1.

property is recovered and the police have little or no information as to rightful ownership or any proprietary interests in the things. This may be the result of the fact that the theft and/or description of stolen goods was not properly reported or recorded, or because the things have been recovered in a different territorial jurisdiction. In an effort to further the ''notice'' function of public accessibility of custody orders while at the same time protecting privacy rights of people affected by search and seizure, we propose that discretion be left with the justice in issuing a custody order to provide that the list of things seized be given public notice through broadcasting or publication. The A.L.I. *Model Code* provides for public notice of a list of things seized in Article 280.2(3). The prohibition against publication which we recommend would operate to protect the identity of the person from whom the things are seized. This scheme would enable a person with a rightful claim to possession of the things to come forward to apply for restoration, while at the same time protecting the privacy rights of persons affected.

(2) Access to Things Seized and Detained

In the previous section, the Commission expressed its preference for public access to all court documents and records relating to the search, seizure and detention of things. Do the same policy considerations which favour public access to court documents also support public access to the actual things seized?

Practical and legal problems that may be encountered if the public were given access to all things seized must be considered in relation to the advantages to be gained by such access. The administrative and supervisory duties of those involved in handling and storing things seized would be greatly increased if the general public was given access to such things. Problems could arise regarding the need to prove continuity of possession if the public had general access to things seized which are needed as exhibits at trial. These problems are serious and they are not outweighed by any apparent arguments in favour of general public access to things seized. The accountability concerns raised in relation to search, seizure and detention of things seized are satisfied by public access to court documents. The Commission considers therefore that access to things seized and detained should not be universally available to the general public, but should be restricted to persons with an interest in the things.

Who, as a person with an interest, should have access to things seized and detained? The *Criminal Code* in subsection 446(5) provides that an application to examine anything detained under subsection 446(1) may be made by ''a person who has an interest in what is detained.'' These words have been given both a narrow and wide interpretation by the courts. *Stewart* v. *The Queen*[85] is a decision of the Saskatchewan District Court in which an accused applied for an order under subsection 446(5) to allow her to examine certain shorthand notebooks of court reporters which contained notes regarding previous proceedings against her. The notebooks were seized and then detained under subsection 446(1).

85. (1969), 70 W.W.R. 146 (Sask. Dist. Ct.).

The applicant, who had no proprietary interest in the detained books, argued that she had an interest in examining the contents of the notebooks as they were to be offered in evidence against her. The court did not accept this argument, and on a very narrow interpretation of the word "interest" denied the accused access to the things. "Interest" in what is detained, according to *Stewart*, means proprietary interest such as "lawful ownership, mortgagee, lien holders ... or a mere but lawful right to possession."[86]

A subsequent Manitoba case, *Re Canequip Exports Ltd. and Smith*,[87] dealt with whether a Commission of Inquiry had "an interest in what is detained." The Commission had been set up by provincial statute to investigate facts and circumstances surrounding certain business relationships. Documents seized from the Canequip company for purposes of a separate police investigation were detained under subsection 446(1). The Commission of Inquiry applied under subsection 446(5) to examine the documents for the purposes of its own investigation. In granting the application the court held that the scope of the provision is not limited to applicants with a proprietary interest in detained things, or even to applicants connected with contemplated litigation, but is broad enough to include persons with a legal concern in the matters referred to in documents seized. The Commission of Inquiry, set up by statute to investigate matters to which the documents related, had a sufficient interest in what was detained to entitle it to access.

The Commission views the expansive position advanced in *Re Canequip* as a positive approach. While it is possible to conceive of legislative amendments which could reinforce this position, we have decided against such a course. Rather, in recommending that all persons with an "interest" be entitled to access to things seized and detained, we trust that our courts will continue to develop the notion of "interest" to include interests beyond those of a strictly proprietary nature. The exact scope of interests deserving of recognition in this regard is something which must be left to the courts to determine on a case-by-case basis.

The subject of an accused's access to things seized is related to the issue of pretrial discovery. Section 531 of the *Criminal Code* presently gives the accused the right to inspect anything which the prosecution intends to introduce as an exhibit and, upon payment of a fee, to receive a copy of the evidence, his own statement and the indictment. The Commission's recommendations contained in its recently released Report entitled *Disclosure by the Prosecution*[88] would augment the rights provided by section 531 by entitling the accused to request and receive photocopies of exhibits where it is practical and to receive, without charge, copies of various classes of enumerated documents relevant to the case against him.

86. *Ibid.*, p. 148.

87. (1972), 8 C.C.C. (2d) 360 (Man. Q.B.).

88. Law Reform Commission of Canada, *Disclosure by the Prosecution*, [Report 22] (Ottawa: Supply and Services, 1984).

A further issue concerns the proper *scope* of access to be accorded a person with an interest or concern in things seized. Access can range from a mere visual examination to the release of things for scientific testing or analysis.[89]

A person with an interest should, as a minimum, be entitled to examine visually the things seized. This would be sufficient to allow someone to identify an object as his or her own. However, access should not be limited to a mere visual examination. Provision should also be made for photocopying or photographing things such as business records and other documents to allow retention of their contents. As was recognized by Borins, Co. Ct. J., in *Re Sutherland and The Queen*:[90]

> To reach a contrary conclusion would do violence to the right of access by those having an interest in what is seized ... by unduly restricting the right to examine to a visual examination which, though helpful, fails to recognize that the contents and complexity of documents seized would, in most cases, be beyond the natural retentive powers of the average person. While modern technology, through various electronic devices has, perhaps, taken a step toward making the human memory obsolete, it has also provided a convenient mode to aid in the proper examination of documents.[91]

Subsection 446(5) of the present *Criminal Code* allows a person with an interest in what is detained following a seizure under a search warrant to apply "to examine anything so detained." The *Sutherland* case, based on the above reasoning, concluded that the word "examine" should not be interpreted as limiting the applicant to a mere visual inspection of documents, but should be interpreted so as to include making photocopies of any documents detained.

Subsection 446(5) was recently dealt with by the Newfoundland Supreme Court in *Re Labrador Tool Supply Limited*,[92] which concerned an application by the Crown for *certiorari* to quash two orders made under this subsection requiring the Crown to provide photocopies of documents detained. The issue was whether subsection 446(5), in authorizing the court to permit a person with an interest in anything seized by warrant to examine the property detained, includes the authority or jurisdiction also to order the Crown to provide the party from whom the property was taken with photocopies. Steele J. concluded that the Crown could not be compelled under subsection 446(5) to provide copies of records and documents seized.

> It may very well be that a party from whom records have been seized should have the right to obtain photocopies, presumably at its own expense, but such a right would necessitate an amendment to the section of the Code in question.[93]

89. The release of exhibits for scientific testing is authorized by section 533 of the *Criminal Code*.

90. (1978), 38 C.C.C. (2d) 252 (Ont. Co. Ct.).

91. *Ibid.*, p. 258.

92. (1982), 41 Nfld. and P.E.I.R. 126 (Nfld. S.C.).

93. *Ibid.*, p. 128.

The Commission is of the view that the *Criminal Code* should explicitly provide that access to a person with a legal interest in things seized and detained, should also entitle that person to examine visually the things and, upon request, receive photocopies.

This leads to the question of who should pay for the photocopies. Should an obligation or duty be imposed upon the seizing authorities to provide a person with a legal interest with a photocopy of any records or documents seized, or should the interested person who requests copies be obliged to cover the expense?

The Commission is of the view that an interested person should be required to bear the expense, provided that the fees are reasonable and approved by the Attorney General of the province.

(3) Procedures for Access to Things Seized and Detained

Under subsection 446(5) of the *Criminal Code*, a person with a legal interest in something that is detained may apply to a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction for an order permitting him or her to examine anything so detained. The Commission believes that procedures for access should apply to all things seized, regardless of the mode of authorization of the seizure. In order to promote efficiency, the Commission considers that a formal application for access should not have to be brought in all cases where access is sought. Rather, a judicial hearing should be available to a person who claims an interest in the things seized in cases where access has been denied.

The Commission believes that a justice, the judicial official entrusted with issuance of the custody order, is also capable of determining questions of access to things seized. This represents a departure from present law, which calls for an application to be made to a judge of a superior court or of a court of criminal jurisdiction. Present law also makes no provision for an appeal of a decision made under subsection 446(5) in relation to access to things seized.[94] The Commission believes that a right of appeal should be provided for decisions made with respect to access to things seized in the same manner as for appeals on other matters with respect to things seized, as presently set out in subsection 446(7). We therefore recommend that a person who considers himself aggrieved by an order made with respect to access to things seized should have a right of appeal from the order to the appeal court, as defined in section 747.

94. *R.* v. *Stewart*, [1970] 3 C.C.C. 428 (Sask. C.A.).

E. Duration of Custody Orders

RECOMMENDATION

5. (1) Where no criminal proceedings have been instituted the custody order should terminate at the earliest of the following:

(*a*) when three months have passed from the date of seizure,

(*b*) when the prosecution finds no need for detaining the things, or

(*c*) when another order respecting the thing seized is made by a court of competent jurisdiction.

(2) Before the expiration of the three-month period the issuing official should be empowered, upon application by the prosecution, to extend the custody order for a period not exceeding three months where he is satisfied that having regard to the nature of the investigation, the further detention of the things is reasonably necessary.

(3) Where criminal proceedings have been instituted and the thing is detained for use as evidence, the custody order should terminate at the earliest of the following:

(*a*) when another order respecting the seized thing is made by a court of competent jurisdiction,

(*b*) when criminal proceedings are completed, or

(*c*) when the prosecution finds no need for detaining the thing in custody for evidentiary purposes.

(1) Issues of Detention and Disposition

Before discussing our recommendation relating to the duration of custody orders in detail, it is useful to put this and subsequent recommendations concerning disposition in perspective. In particular, it is useful to explain how these recommendations relate to the different classifications of "objects of seizure."

Earlier in this Working Paper, we identified three classifications of "objects of seizure" which criminal law enforcers should be empowered to appropriate: evidence of an offence, "takings" of an offence and contraband. These classifications reflect and serve three distinct purposes: the acquisition of things of evidentiary value for use in investigations and trials, the restoration of things unlawfully taken from a victim of crime to that victim, and the enforcement of prohibitions against possession of certain substances by removing them from the possessor. Of these three purposes, it is important to note that the evidentiary purpose is relatively temporary in nature, in the sense that it is exhausted when the investigation and trial are over. The other two purposes are relatively

final since they contemplate the permanent removal of things from the person who was in possession at the time of the seizure.

At the custody order stage the distinctions between these classifications of "objects of seizure" are unimportant. Our custody order scheme does not distinguish between "objects of seizure" which we have classified as takings and contraband and those which we have classified as evidence. However, once the evidentiary rationale for the detention is satisfied and the focus of attention shifts to the question of the disposition, the possible status of the things seized as "takings" or contraband becomes extremely relevant. Should the things be returned to a private owner or forfeited to the state? If they are not forfeited, who should be the proper recipient of the things?

Although the purposes aligned with the various classifications of objects of seizure are distinct, it does not necessarily follow that these classifications are mutually exclusive. A thing seized may belong to more than one classification. For example, a sawed-off shotgun may both afford evidence of a firearms offence contrary to section 88 of the *Criminal Code* and represent contraband. A stolen coat could represent an example of "takings" as well as potential evidence against the thief. In such cases, the character of the thing as potential evidence could invoke detention for a certain period before the question of the appropriate disposition of the item arises.

Our recommendation concerning the duration of custody orders reflects what we perceive to be an adequate recognition of the state's interest in detaining things for evidentiary purposes, and hence delaying their ultimate disposition. Serving these purposes does not entail allowing the state to subject the things seized to indefinite detention. Rather, the duration of the detention authorized by the custody order must be limited to what is reasonable. Our position in this regard is informed by the recognition that, except with respect to contraband, which cannot be lawfully possessed by anyone, detention for evidentiary purposes will almost always compromise the interests of a private individual in the thing detained.

(2) Where No Proceedings Have Been Instituted

Persons with a valid claim to possession should be entitled to the return of their things within a reasonable time once the purpose for the seizure and detention has been met. Moreover, things should be restored or otherwise disposed of in cases where the purpose of seizure cannot be satisfied within a reasonable period of time such as, for example, where things have been seized as evidence, but no proceedings have been instituted. As was stated in *Re Smerchanski and The Queen*:[95]

> But where, however, material is seized in respect of matters under investigation only ... then, surely, there must be a time when the aggrieved owner of what has been seized may claim what is, after all, no less than his own.[96]

95. (1979), 46 C.C.C. (2d) 54 (Man. Q.B.).

96. *Ibid.*, p. 57.

Under existing law, subsection 446(1) of the *Criminal Code* imposes a limit on the length of detention of things seized pursuant to a section 443 warrant or under section 445.[97] Nothing is to be detained for more than three months from the date of seizure, unless, before the expiration of that period, proceedings have been instituted in which the thing detained may be required or a justice has, on application by the Crown, extended the deadline to a further specified date. The three-month time-limit was added to the *Criminal Code* in 1955 as a savings clause to limit the period during which things could reasonably be detained before the commencement of proceedings.[98]

The Commission considers three months to be an adequate time, in the vast majority of cases, to allow the authorities to bring an investigation to the stage of instituting proceedings. Moreover, although undoubtedly inconvenient, it is not unreasonable to require a person with a rightful claim to possession of objects of seizure to part with them for three months in the interests of enforcement of the criminal law.

Although the custody order is to be of three months duration where no proceedings have been instituted (with the possibility of an extension in appropriate cases, as discussed below), under our proposed scheme, a person with a rightful claim to possession of the things would be entitled to make an application for restoration within that period. A restoration order may be granted notwithstanding that a custody order is in effect. The provisions of subsections 446(1) and 446(3), which provide for detention and restoration respectively, have been interpreted as operating independently of each other.[99] The Commission adopts the position of the present law. In effect, a restoration order made while the custody order is valid would terminate the custody order.

The Commission believes that the three-month custody period represents an appropriate balance of the competing interests involved in most cases. At the same time, the Commission recognizes that, in practice, certain types of criminal investigations may be extremely complex and time-consuming. The nature of the offence or the amount of evidence collected may demand an investigation of more than three months before proceedings can be instituted. At present, paragraph 446(1)(*a*) of the *Criminal Code* allows for an extension of unspecified duration where a justice is satisfied that, having regard to the nature of the investigation, further detention of the things is warranted.

While the Commission recognizes the necessity for an extension to the initial custody period in some cases based upon the nature of the investigation, we consider that it is desirable to stipulate that the extension must be sought during the initial three-month custody period and to limit the duration of the extension to a period not exceeding three months. Theoretically, before the expiry of the extension, the prosecution would be free to apply for a successive extension but would again have to satisfy the issuing official that the further detention of the seized things is reasonably necessary in the circumstances. It is hoped that such a provision would encourage the prosecution to proceed as efficiently

97. Neither the *Narcotic Control Act* nor the *Food and Drugs Act* imposes time-limits on the detention of seized things except in cases where restoration applications are brought.

98. *Hansard*, 1954, p. 2830.

99. *Re Flite Investments Ltd. and The Queen* (1977), 36 C.C.C. (2d) 380 (Ont. Prov. Ct.).

as possible with the investigation of cases and would promote prompt restoration by requiring the prosecution to justify, on a regular basis, the continued detention of things before charges are laid. Our proposal, which would allow for successive extensions of periods not exceeding three months, differs substantially from the position set forth in earlier drafts of this Paper and responds to concerns expressed to us by police representatives and various Crown counsel. Our recommendation may be compared with proposed subsections 446(2) and (3) contained in clause 108 of Bill C-19. The Bill C-19 provisions authorize the granting of extension periods of unspecified duration with the proviso that the cumulative period of detention not exceed one year.

(3) Where Proceedings Are Instituted

In recognition of the state's interest in preserving evidence relevant to criminal proceedings, the Commission proposes that the custody order remain in effect for as long as the things are required to be detained as evidence. The custody order should remain in effect until another order respecting the things is made, or, until the prosecution finds no need for detaining the things, or, if neither of these apply, until all proceedings are completed.

Our proposals, though different in form, are similar in substance to Article 280.2(4) of the A.L.I. *Model Code* which authorizes the detention of seized things for as long as the issuing official finds necessary

> (a) for the production of such things for offering evidence in any court; or
>
> (b) in order to hear and determine motions for return or restoration of the seized things, pursuant to Section SS 280.3.

Under existing law, where proceedings are instituted in which the detained thing may be required, subsection 446(1) provides for detention and safe keeping until the conclusion of any investigation or until the thing is required to be produced for the purposes of a preliminary inquiry or trial. If the accused is committed for trial the justice is required by subsection 446(2) to forward anything detained to the clerk of the trial court to be detained by him and disposed of as the court directs.

F. Disposition upon Termination of the Custody Order

RECOMMENDATION

6. (1) Where a custody order terminates in accordance with Recommendation 5(1)(*c*), by an order of a court of competent jurisdiction, the disposition of the thing should be in accordance with the terms of the order.

(2) Where a custody order terminates in accordance with Recommendation 5 and no restoration order has been made, the disposition of things which are not contraband should be as follows:

(*a*) If civil proceedings are pending regarding claims to ownership or possession of the things seized, the things should be transferred to the custody of the court before which the civil proceedings are pending, to be disposed of as that court orders.

(*b*) If there are no conflicting claims to ownership or possession of the things seized, the things should be restored to the person demonstrating a lawful proprietary interest in the things.

(*c*) If there are conflicting claims to ownership or possession of the things seized but no civil proceedings are pending, the things should be ordered returned to the person from whom they were seized provided that possession of the things by that person is lawful.

(*d*) If there are no claims to the things seized they should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

Discussion to this point has focused upon the need for procedures which will ensure that things seized are controlled and accounted for while detained, and upon the nature, operation and duration of the scheme of custody orders governing detention. Once the seized things have served their evidentiary purpose, the relevant question becomes: What should be the proper disposition of the things upon termination of the custody order?

One of the underlying principles upon which the Commission bases its recommendations is that disposition of things seized must be consistent with the purpose for which the things were seized. Our recommendations in this regard were developed before Bill C-19 was introduced into Parliament. A number of provisions of Bill C-19 would alter the law respecting disposition in many ways which depart from our proposals. We have in mind in particular the forfeiture order provisions of the proposed section 668.2, which would cover things or property used in the commission of an indictable offence, things or property intended to be used for the purpose of committing an indictable offence or escaping afterwards and things or property obtained, derived or realized directly or indirectly as a result of the commission of the offence.

It is apparent that the conflicts between the Bill C-19 proposals and our own recommendations pertain to more than post-seizure procedures. They reflect differin views as to what objects of seizure can be legitimately subjected to the appropriation process and the purposes which appropriation powers ought to serve. For example, in our *Report on Search and Seizure*, we took the view that the fact that things were "instruments of crime" or used in the commission of an offence did not, in itself, afford the state a basis for seizing them.[100] While recognizing the impact which Bill C-19 would have on our proposals, if enacted, we adhere to the premises developed in the *Report on Search and*

100. *Supra*, note 2, Part One, p. 14.

Seizure. We are basing our recommendations in the present Working Paper on the legitimate purposes of seizure accepted in that Report. Accordingly, we proceed from the recognition of three classifications of legitimate "objects of seizure," namely, takings of an offence, evidence of an offence and contraband.

As was mentioned earlier, the rationale for appropriating things which are evidence but which are neither contraband nor takings is satisfied when, at the end of an investigation or the conclusion of a prosecution, the things are no longer required to further a criminal investigation or to serve as material evidence of guilt at trial. At this point, things which have been seized solely for evidentiary purposes should be returned to the person from whom they were seized. Clearly, persons dispossessed of their property, and whose property rights have been subordinated to the overriding public interest in the enforcement of the criminal law, should be entitled to the return of their things as soon as they have served the purpose for which they were seized and detained.

"Takings" should also be returned to private hands as soon as possible. Indeed the basic reason why the state is justified in seizing takings is to restore them to their lawful owner. The state, in effect, acts as an intermediary in a restitutionary transaction. So long as the state retains takings which it has seized, it subjects the lawful possessor or owner to double deprivation. The lawful owner or possessor is deprived of his or her things by the offender and by the subsequent use of the things by the criminal justice system.[101] On the other hand, private interests are generally not involved in the disposition of contraband. Indeed, contraband is seized in order to deprive its possessor of something which the law forbids him to possess. The very fact that a thing is contraband implies that it should be confiscated by the state.

Simply stated, the basic rules of disposition should be as follows: evidence should be restored to the person from whom it was seized, takings should be restored to a person demonstrating a rightful claim to possession, and contraband should be forfeited.

(1) Takings and Evidence

(a) Procedures to Determine Disposition

What should finally happen to things seized depends on a combination of factors: the nature of the things, the purpose of seizure and detention, and the circumstances existing when things need no longer be detained under the custody order, such as whether there are competing claims to possession. Disposition in a particular case may be determined by a court of competent jurisdiction through various procedures: through restoration applications, forfeiture proceedings, or as part of the sentencing process.

101. The subject of victim's rights is more fully discussed on pp. 8-10 of the Introduction to this Paper and throughout our discussion of the restoration process.

In the case of things which are evidence and/or takings, disposition may be determined by a court of competent jurisdiction through restoration orders granted to restore the things to a person demonstrating a claim to possession. The nature of restoration orders and procedures by which they may be granted will be considered in greater detail in the next section. Where no restoration order has been applied for or granted, Recommendation 6(2) of our scheme sets out the various possible dispositions of such things. This recommendation would govern disposition once the things seized are no longer required as evidence or when, owing to the expiry of time, such detention could no longer be justified.

In straightforward cases, the disposition of evidence should simply be made in accordance with the principle that the pre-seizure *status quo* should be restored. Accordingly, where there are no other claims to ownership or possession, and the person from whom the things have been seized is available and can demonstrate to a judicial official a lawful claim to possession, the things should be restored to that person. Similarly, in the case of takings, disposition provisions should ensure that things are restored to a person demonstrating a claim to ownership or possession. In most cases, such a person would be the victim of the crime.

In cases resulting in conviction, the sentencing process may be used to restore takings to their proper owner. The present *Criminal Code* provides for restoration in the form of an order for restitution of property.[102] Subsection 655(1) applies where an accused is convicted of an indictable offence in relation to property obtained by the commission of an offence where at the time of trial the property in question is before the court or has been detained so that it can be immediately restored to the person entitled to it.

Restitution in the broad sense refers to a sanction permitting the return of goods obtained by crime, or payment of money by the offender for the purpose of making good the damage to the victim.[103] It should not be confused with compensation, which refers to contributions or payments made by the state to a victim.

Notwithstanding the fact that the compensation and restitution provisions of the *Criminal Code* were upheld by the Supreme Court of Canada in *R.* v. *Zelensky*[104] as falling within the proper scope of the federal government's criminal law power, problems remain which must be addressed. The Law Reform Commission has reviewed the law relating to sentencing in general, pointed out its defects, and made recommendations for fundamental reform.[105] In relation to restitution, the Commission has noted that there is nothing in the *Criminal Code* to suggest that restitution should be seen as a sanction in its own right and that there exists nothing to tie it to a theory of sentencing or criminal law.[106]

102. *Criminal Code*, s. 655.
103. Law Reform Commission of Canada, *Restitution and Compensation*, [Working Paper 5] (Ottawa: Information Canada, 1974), p. 8.
104. (1978), 41 C.C.C. (2d) 97 (S.C.C.).
105. Law Reform Commission of Canada, *Guidelines — Dispositions and Sentences in the Criminal Process*, [Report 2] (Ottawa: Information Canada, 1976).
106. *Supra*, note 103, p. 9.

The *Criminal Code* provisions which provide for restitution by the offender to the victim are found throughout the *Code*, do not relate clearly to each other, and apply to different offences. They are also confusing since they contain various misleading references to restoration and compensation as well as to restitution. The Commission concluded that it is more rational to make restitution central to sentencing theory and practice and to supplement it with a compensation scheme for victims of crime. Many of the Commission's recommendations have been adopted in Bill C-19, the *Criminal Law Reform Act, 1984*.[107]

In these recent legislative proposals, all of the reparative provisions have been consolidated under one sanction that can be imposed alone or in conjunction with another sanction. Unlike certain existing restitution provisions, the proposed provisions would not require an application by the victim of the offence, but could be imposed by the court on its own motion in appropriate cases.

The Commission supports these legislative initiatives which promote the restoration of takings to the person demonstrating a valid claim to possession. It is hoped that these measures will serve as a more effective and efficient means of redressing the plight of victims of crime.

(b) *Disposition Where There Are Conflicting Claims to Things Seized and Civil Proceedings Are Pending*

In the case of takings of an offence or evidence, where a custody order terminates and there are civil proceedings pending in which ownership or possession of the seized things is being contested, the things should be transferred to the custody of the court before which the civil proceedings are pending.

Proper procedures will have to be developed, in consultation with the provinces, to ensure that the criminal and civil processes dovetail. Concerns which may be raised include questions surrounding the transfer and interim custody of things, pending a hearing before a civil court.

(c) *Disposition Where There Are No Conflicting Claims*

Where there are no conflicting claims to ownership or possession of the things, they should be restored to the person demonstrating a lawful proprietary interest in the things.

(d) *Disposition Where There Are Conflicting Claims and No Civil Proceedings Are Pending*

Great potential for constitutional conflict arises where there are conflicting or competing claims to ownership or possession of things seized. The criminal courts' powers must

107. See the *Criminal Law Reform Act, 1984* (Bill C-19), s. 665, clause 206.

be carefully circumscribed so as not to usurp, imitate or duplicate the role of the civil courts. This rule must be observed at all stages, whether the court is hearing a pretrial restoration application or granting a restitution order as an aspect of sentencing. Accordingly, where there are conflicting claims to seized things the criminal court must not make determinations of property rights.

In order to ensure that the criminal courts are precluded from adjudicating property disputes, the Commission considers that where there are conflicting claims to ownership or possession, the seized things should be ordered returned to the person from whom they were seized. The rival claimants would naturally be free to launch civil proceedings to dispute ownership or possession of the things by the individual in whose favour a restoration order has been made.

(e) *Disposition Where There Are No Claims to Things Seized*

In certain situations, rather than having several competing claims to ownership or possession of takings or evidence, there may be no one claiming a possessory or proprietary interest.

The whereabouts of the person from whom things were seized may be unknown, or the authorities may never have been aware of anyone with a proprietary interest. When things may no longer be detained for any purpose related to enforcement of the criminal law and when they are not claimed, they are essentially abandoned property and their disposition becomes strictly a property question. The Commission recognizes the constitutional dimensions of such situations and is of the view that the disposition of property is essentially a provincial matter.

Most provinces have legislation governing the operation of police forces which may either specifically provide for disposition of stolen or abandoned goods in the custody of the police, or which may give power to a specified body to make regulations in this regard.[108] For example, section 18 of the *Ontario Police Act*[109] specifically provides for the sale of stolen or abandoned property. The *New Brunswick Police Act*,[110] on the other hand, empowers the Lieutenant-Governor in Council to make regulations providing for a procedure for the disposition of personal property found or coming into the possession of the police.

The provincial legislation in general applies to things which have been stolen (in the absence of criminal proceedings), found by the police or abandoned. We believe that

108. *Police Act*, R.S.O. 1980, c. 381, s. 18; *Police Act*, R.S.Q. 1977, c. P-13, s. 10; *Police Act*, S.N.S. 1974, c. 9, s. 37; *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9, s. 24; *The Police Act*, R.S.S. 1978, c. P-15, s. 10; *Police Act*, R.S.A. 1980, c. P-12, ss. 43-44; *The Royal Newfoundland Constabulary Act*, S.N. 1981, c. 79, s. 28; *Police Act*, R.S.B.C. 1979, c. 331, s. 56; *Police Act*, S.N.B. 1977, c. P-9.2, s. 7; *The Provincial Police Act*, R.S.M. 1970, c. P150, s. 8; *Police Act*, S.P.E.I. 1977, c. 28, s. 9.

109. R.S.O. 1980, c. 381.

110. S.N.B. 1977, c. P-9.2, s. 38(g).

provincial legislation can adequately deal with the ultimate disposition of things seized as evidence or takings, where the proper owner has not been ascertained, where the person from whom things were seized is unavailable, or where no claims arise for any other reason. The question is no longer one of criminal procedure, but one within the provincial jurisdiction over property. Accordingly, we recommend that, in cases where there are no claimants to things that can no longer be detained, they should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

(2) Contraband

RECOMMENDATION *(Cont.)*

(3) Where a custody order terminates in accordance with Recommendation 5, *absolute contraband* (things, funds and information the possession of which, without more, constitutes an offence) should be forfeited to the state to enforce the prohibition against possession. *Conditional contraband* (things, funds and information that are illegal to possess only for a particular purpose) should be disposed of in accordance with Recommendation 6(2) unless the person who possessed the things prior to the seizure is convicted of possessing the things in circumstances which rendered them conditional contraband.

Contraband may be broadly defined as "objects possessed in circumstances constituting an offence."[111] The law prohibits possession of contraband based either on assertions of ownership by the state, as in the case of counterfeiting provisions, or dangers that attend possession of such things as certain drugs, weapons, and burglary tools.[112] This definition may be subdivided into two classifications: absolute contraband and conditional contraband. The term "absolute contraband" applies to objects which cannot be possessed lawfully for any purpose and would include counterfeit money,[113] and certain narcotics[114] and weapons.[115] Things that are illegal to possess only for a particular purpose may be labelled "conditional contraband." For example, it is not an offence to be in possession of tools, but possession becomes an offence where the tools are suitable for house-breaking and are possessed under suspicious circumstances.[116] Similarly, narcotics[117] and controlled drugs[118] possessed for the purpose of trafficking, obscene publications

111. *Supra*, note 1, Part II, paras. 82-87.
112. *Ibid.*, para. 82.
113. *Criminal Code*, s. 420(1).
114. *Narcotic Control Act*, s. 3(1).
115. *Criminal Code*, ss. 88 and 89.
116. *Criminal Code*, s. 309(1).
117. *Narcotic Control Act*, s. 4(2).
118. *Food and Drugs Act*, s. 41.

possessed for the purpose of publication or distribution[119] are examples of conditional contraband. The status of the thing as contraband is conditional upon the possessor's illegal intent being proved.

Present provisions governing the disposition of contraband are deficient in many respects. They are scattered randomly throughout the *Criminal Code* and other statutes, most notably the *Narcotic Control Act* and the *Food and Drugs Act*. They do not provide complete or unified procedures, lack a coherent rationale and tend to confuse civil and criminal forfeiture.[120]

Disposition of things possessed in circumstances constituting an offence under the *Narcotic Control Act* as well as other things such as instruments of the offence are governed by subsections 10(7), (8) and (9) of the Act.

Subsection 10(7) provides for "delivery" of things seized to the Minister (designated to be the Minister of National Health and Welfare) in cases where no restoration order is granted. The Minister is empowered to make "such disposition thereof as he thinks fit." No express reference is made to "forfeiture" in this section. In *Smith* v. *The Queen*,[121] the Federal Court interpreted the Minister's powers under this subsection as being merely custodial, no title to property having passed to the Crown. This interpretation leaves it open for a person to apply for restoration through the civil courts even if he did not make use of the restoration provisions in the *Narcotic Control Act*.

Subsection 10(8) specifically provides for forfeiture of narcotics and other things "used in any manner in connection with the offence" where there has been a conviction. Such things are to be forfeited to Her Majesty to be disposed of as the Minister of Health and Welfare directs. The subsection does not specify where, or before which court, proof is to be made in regard to whether the things were "used in any manner in connection with the offence."

Under subsection 10(9), forfeiture of a conveyance which has been proved "to have been used in any manner in connection with the offence" may be ordered where a person has been convicted of an offence under section 4 or 5. It is not clear from subsection 10(9) at exactly which stage of the proceedings forfeiture of the conveyance is to be ordered.

Subparagraph 446(3)(*b*)(ii), the closest thing to a general forfeiture provision in the *Criminal Code*, provides:

> (3) Where a justice is satisfied that anything that has been seized under section 445 or under a warrant issued pursuant to section 443 will not be required for any purpose mentioned in subsection (1) or (2), he may,

119. *Criminal Code*, s. 159(1).
120. The forfeiture scheme proposed in Bill C-19 responds to many of these defects. The Bill C-19 proposal is discussed in a different context, *supra*, pp. 43-44.
121. (1975), 27 C.C.C. (2d) 252 (Fed. Ct. T.D.).

(*a*) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or

(*b*) if possession of it by the person from whom it was seized is unlawful,

(i) order it to be returned to the lawful owner or to the person who is entitled to possession of it, or

(ii) order it to be forfeited or otherwise dealt with in accordance with law, where the lawful owner or the person who is entitled to possession of it is not known.

In addition to this provision the *Criminal Code* contains a surprisingly large number of forfeiture provisions which are "mainly piecemeal attempts to deal (in a very specific manner) with a particular type of property."[122] Provisions govern forfeiture of illegally possessed weapons,[123] any evidence seized in relation to keeping a common gaming house,[124] hate propaganda,[125] precious metals,[126] birds kept for the purpose of cock fights,[127] counterfeit money,[128] and explosives.[129]

The Commission recommends that the detention and disposition provisions which serve criminal law enforcement interests in relation to contraband be consolidated, rationalized and reformed in order to provide fair and efficient procedures to enforce any prohibitions against possession.

Absolute contraband, objects illegal to possess in any circumstances, should be detained after seizure if required for evidentiary purposes. When this evidentiary purpose is served, the contraband should be forfeited to the state. Forfeiture should be automatic in the sense that it should not depend on a conviction or a determination in regard to any circumstances surrounding possession.

The possession of conditional contraband, on the other hand, is not in itself a criminal offence. However, as the examples of controlled drugs, burglary tools and obscene publications show, things innocent in themselves may be possessed in circumstances constituting an offence where the possessor has the requisite illegal purpose in mind. Whether things in fact have been possessed illegally in a particular case is a matter which requires a determination at trial. When a trial results in a conviction, the contraband nature of the things has been determined, and they should be forfeited. On the other hand, if either the possessor is acquitted at trial, or the custody order terminates without trial proceedings having been initiated, the contraband nature of the things has not been established, and they should be disposed of in the same manner as evidence and takings according to the rules set out in Recommendation 6(2).

122. *The Business of Crime, An Evaluation of the American R.I.C.O. Statutes from a Canadian Perspective* (Victoria: British Columbia Attorney General, 1980).
123. *Criminal Code*, s. 100(3).
124. *Criminal Code*, s. 181(3).
125. *Criminal Code*, s. 281.3(3).
126. *Criminal Code*, s. 353(2).
127. *Criminal Code*, s. 403(2).
128. *Criminal Code*, s. 420(2).
129. *Criminal Code*, s. 447(2).

The Commission has recommended in the *Report on Search and Seizure* that *all* items which may be illegal to possess should be subject to seizure, not just those which may be required as evidence.[130] The reasoning behind this recommendation was explained in the *Search and Seizure* Working Paper:

> Plainly, it would be legitimate to seize those items or that quantity of substance which serve an evidentiary purpose. But what about the rest? It might be argued that since it is not *per se* illegal for these items to be possessed privately, the state has no basis for acquiring control over them. In the *Nimbus News* case,[131] for example, it was observed that conviction of an offence of possession of obscene matter for the purpose of distribution would not in itself make continued possession of the magazines unlawful.[132] The logic of this position would dictate that items such as obscene publications or controlled drugs be left with their possessor unless required at trial. Yet the shortcoming of such a conclusion is obvious: it countenances the possibility that the unseized items will be distributed or used in precisely the illegal manner apprehended when the search was authorized.[133]

In addressing the issue in the context of *detention* of the seized items, the Commission recognizes that property interests may be adversely affected, but is of the view that things that are alleged to be conditional contraband should be able to be detained until a determination is made at trial as to whether the things were illegal to possess in the circumstances in order to prevent the continuation or repetition of the offence.

130. *Supra*, note 2, Part One, pp. 13-14.
131. *R. v. Nimbus News Dealers and Distributors Ltd.*, *supra*, note 20.
132. *Ibid.*, p. 322.
133. *Supra*, note 1, Part II, para. 85.

III.

Restoration Applications

A. Introduction

(1) The Need for Restoration Proceedings

Legislation authorizing the search, seizure, detention and disposition of evidence assists the state in carrying out its responsibility to investigate and prosecute violations of the criminal law. The invasion of privacy and dispossession of property inherent in a search and seizure is justified by the state as being necessary to secure material evidence of a person's guilt for use at trial or to further a criminal investigation. In this sense, the public interest is served by detecting, apprehending and convicting criminal offenders.

However, in helping the state to carry out its duty to enforce the law, legislation authorizing the appropriation of things may conflict with fundamental individual interests. Persons with a proprietary interest in things seized are often required to bear the consequences which result from their loss of ability to use or control the things. They may suffer many inconveniences and bear financial and emotional burdens which are due to detention of things for use as evidence.

The restoration procedures proposed in this Paper may be viewed as a framework within which the competing state and individual interests affected by searches, seizures and detention of things seized may be weighed and an appropriate balance achieved.

(2) The Present Law and the Need for Reform

Under the existing provisions of the *Criminal Code* things seized pursuant to a search warrant issued by a justice under section 443 or without a warrant under section 445, are to be returned before a justice to be dealt with by him according to law. Under the terms of section 446, when things seized are returned before a justice, he is required to

which a restoration application may be based are limited under our regime so as to focus upon the reasonableness of the continued detention of the seized things by the state.

We recognize that the restoration of seized property may often be an appropriate remedy in other contexts. For example, where things have been seized in a manner which violates an accused's constitutional right to be free from unreasonable search or seizure, subsection 24(1) of the Charter may provide such a remedy.[135] However, procedures to challenge the legality and constitutionality of search and seizure have been reserved for treatment in the course of the Commission's ongoing work in the area of pretrial criminal remedies.

In deferring these issues, we are aware that they are closely related to the question of the reasonableness of detention. However, the matter of restoration of things detained after an illegal search or seizure is also connected with the issue of the exclusion of evidence. This area is too broad and controversial to be embraced by the present Working Paper. Accordingly, we have decided to limit our present proposals to the question of the reasonableness of the detention, and anticipate the integration of these proposals with the ones we have deferred when our work on pretrial criminal remedies is complete.

B. Restoration Applications

(1) Who May Apply

RECOMMENDATION

7. A person from whom things have been seized or from whose place or vehicle things have been seized, or any person asserting a claim to possession of the things seized should have the right to apply to a judge to have the things restored to him or her.

The intrusive dispossession represented by the seizure and detention of property by the state may affect the legal and proprietary interests of a number of people. In recognition of this fact, Recommendation 7 is intended to provide standing to invoke the courts' restorative powers to all persons whose proprietary interests have been affected by a search and seizure.

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135. This has been recognized in a number of post-Charter cases. See for example, *Re Gillis and The Queen*, *supra*, note 37; *R.* v. *Taylor* (1983), 25 Sask. R. 145 (Q.B.); *Re Trudeau and The Queen*, *supra*, note 37.

Clearly, the person from whose place, body or vehicle the things were seized must be entitled to apply to the court for restoration of the seized things. No one is more directly affected by the invasion of privacy and consequential dispossession of property than the person from whom the objects were taken. In many cases, the person from whose place, body or vehicle the things were seized will be a defendant or suspect in criminal proceedings. However, in other cases, persons who are neither accused of, nor implicated in, any criminal conduct will be subjected to search and seizure procedures. For example, in an investigation of the allegedly fraudulent activities of A, documents and records may be seized from B, C and D on the basis that they are required for potential use as evidence against A.

In addition to the person who was the subject of the search and seizure, and from whose immediate possession the things were taken, Recommendation 7 recognizes the rights of possible third parties asserting claims to rightful possession of the things and therefore grants standing to such persons to apply to have their property restored.

Recommendation 7 of the proposed scheme is quite similar in nature to Article 280.3(1) of the A.L.I. *Model Code* which provides:

> (1) *Who May File*. Upon the return of a search warrant or within 30 days thereafter, or within 30 days after actual notice of a seizure or notice by publication, whichever is earlier, or at such later date as the court in its discretion may allow:
>
> (a) the individual from whose person, property, or premises things have been seized may move the court to whom the warrant was returned, the arraigning magistrate, or the court having jurisdiction of the offence in question, as the case may be, to return things seized, pursuant to warrant or otherwise, to the person or premises from which they were seized; and
>
> (b) any other person asserting a claim to rightful possession of the things seized may move the court having jurisdiction of the matter to restore the things seized to such person.

The definitions of standing found in the *Model Code* and Recommendation 7 of the proposed scheme represent a significant departure from existing Canadian practice under section 446 of the *Criminal Code*. In *Beach* v. *Attorney General of Canada*[136] the Alberta Court of Appeal considered the issue of standing with respect to an application under subsection 446(3) for the return of seized goods and concluded that the only persons entitled to apply to have property returned are the lawful owner and the person from whom the goods were seized. In contrast, Recommendation 7 affords standing to persons with possessory interests in seized things falling short of actual ownership.

136. (1978), 13 A.R. 505 (C.A.).

(2) Notice

RECOMMENDATION

8. The judge should be empowered to hear an application under Recommendation 7 after being satisfied that seven clear days written notice has been given by the applicant to:

(*a*) the prosecution;

(*b*) any person who has brought a competing application for restoration of the things seized; and

(*c*) any person with a proprietary interest of which the applicant is aware.

The notice provisions set out in Recommendation 8 are designed to avoid a multiplicity of proceedings by attempting to ensure that all interested parties are given notice of the restoration application so that a determination as to the most appropriate disposition of the things seized can be more fairly, effectively and efficiently made.

While the responsibility for satisfying the notice requirements falls upon the applicant, compliance with the terms of Recommendation 8 does not impose a particularly heavy burden. Primarily, the prosecution must be notified. Clearly the prosecution has a very strong interest in the disposition of the property and must be afforded the opportunity to submit representations regarding the need for the continued detention of the things.

If there are any other persons claiming a possessory right to the things by way of a competing application for restoration of the property, they too should be entitled to notice. In addition, the applicant should be required to give notice to any person with a proprietary interest in the things *of which he is aware*. The applicant should not be required to search out and notify *everyone* who may have some form of proprietary interest in the things, but it is only reasonable that notice be given where the applicant is aware of a person's interest in the subject property.

Satisfactory compliance with Recommendation 8 should operate as a condition precedent to the commencement of a restoration hearing. Prior to the commencement of the hearing, the parties should be required to establish to the satisfaction of the court that notice has been provided as prescribed in Recommendation 8.

(3) Grounds

RECOMMENDATION

9. (1) Upon application by a person specified in Recommendation 7, a judge should be empowered to make a restoration order as provided in Recommendation 10 if he is satisfied that the applicant has established that he or she is clearly

entitled to possession, unless the prosecution shows that the things seized are reasonably required to be detained for evidentiary or other purposes. The judge should have regard to:

(*a*) **the nature of the things;**

(*b*) **any alternatives to detaining the things for use as evidence;**

(*c*) **any representations on behalf of the defence regarding the need for the continued detention of the things for evidentiary or other purposes; and**

(*d*) **any other consideration relevant to the disposition of the seized things.**

(2) In determining whether an applicant is clearly entitled to possession of the seized things, the judge should be required to consider evidence of the applicant's entitlement to possession of the things seized and any conflicting claims shown to exist with respect to the things.

(3) Notwithstanding that continued detention might not be reasonably justified for evidentiary purposes, restoration orders should not be made for absolute contraband. Nor should they be made for conditional contraband so long as grounds exist for believing that the person possessing the things prior to the seizure had possessed them in circumstances which rendered them conditional contraband.

Under Recommendation 9, the reasonableness of the continued detention of the things seized may be challenged. The recommendation strives to ensure as much as possible that things detained are restored to the person entitled to possession if the things are not required to be detained as evidence or if their evidentiary value can be preserved by alternate means.

Before making a restoration order, according to our scheme, the judge would be required to deal with the threshold question of whether the applicant is *clearly entitled* to lawful possession of the things seized. This question would require the judge to consider two distinct factors: the nature of the proprietary or possessory rights of the applicant and the existence of any prohibition against possession of the thing (that is, its status as contraband). In making this determination, the judge would take into consideration any evidence of the applicant's entitlement to possession of the things as well as any conflicting claims shown to exist with respect to the things.

Where the things seized are absolute contraband, the applicant would be unable to show a clear entitlement to possession since absolute contraband, by its very nature, is something which is illegal to possess. Absolute contraband would not be returnable but would be forfeited to the state to enforce the prohibition against possession. Similarly, an applicant would be unable to establish a clear entitlement to conditional contraband until after a determination is made at trial that the things were not possessed for an illegal purpose. It could be argued that the owner of conditional contraband, the possession of which is not *per se* unlawful, has a sufficient interest in the property to be accorded the same rights as other people affected by the seizure and detention of their property. As one American commentator has observed:

> Though the owner may regain the property upon successfully defending the action at trial, the delay in its return is often months, and sometimes over a year. Deprived of the property, the owner may be wholly unable to secure a substitute. In addition to the loss of use, the owner may sustain an economic loss if the property depreciates in value during the pendency of the trial.[137]

While this argument does have a certain degree of merit, we have taken the view that the detention of conditional contraband until after a determination is made at trial as to whether things were illegally possessed is justified by the need to prevent the continuation or repetition of the offence in the circumstances. Conditional contraband would therefore effectively never be returnable before trial. An applicant would not be precluded from bringing a post-trial restoration application for the return of conditional contraband following a judicial finding that the things were *not* illegally possessed in the circumstances. In the event of a converse finding, the things could be forfeited as an aspect of sentencing.

As was discussed previously, in conjunction with disposition upon termination of custody orders, if conflicting or competing claims are shown to exist, a restoration order would not be appropriate since the adjudication of property disputes falls clearly outside the parameters of the federal government's criminal law power. The fact that competing claims to possession of the things are more properly resolved in the context of a civil action is recognized by Recommendation 12 which provides that the restoration order should not be granted where there is a substantial question whether they should be restored to the person from whom they were seized, or there exists a substantial question among several claimants to rightful possession.

(a) Claims Regarding Need for Continued Detention of Things

While police authorities should not be hindered in their investigations of crimes, it is also true that individual rights and liberties should not be abrogated or infringed unless there is a lawful reason for doing so.[138] The state's power to seize and detain property must be tempered by considerations of reasonableness and accountability.[139] Having regard to the intrusive dispossession of property involved in searches and seizures and the substantial consequential effects on individual rights, the onus must fall clearly upon the Crown, the dispossessing party, to establish that there exists a legitimate justification for the continued detention of the things. This general principle is already well established in the case-law. In *Leitman* v. *Mackey*[140] the accused was arrested on gaming charges and a large sum of money found in his pocket was seized and retained by police. In ordering that the money be returned, the Ontario High Court stated:

137. Kenneth Kandaras, "Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing" (1980), 34 *Southwestern Law Journal* 925, p. 932.

138. *Ghani* v. *Jones*, [1969] 3 All E.R. 1700 (C.A.), p. 1706.

139. As the court in *Leitman* v. *Mackey*, [1963] 2 C.C.C. 356 (Ont. H.C.), explained at p. 360, the potential consequences of not placing strict limitations on the Crown's power to detain seized things could "... lead to substantial injustice and infringement of the rights of a citizen to his private property. It would, *ipso facto*, revert us to the laws of the fifteenth century when all the chattels and properties of an accused person would be seized on his arrest for any crime."

140. *Ibid.*

> [T]he onus that arises ... of establishing that a chattel seized is of evidentiary value in the criminal proceedings is on the Crown and not on the person apprehended.[141]

The nature of the onus should require the Crown to establish, on a balance of probabilities, that the property forms the subject-matter of an offence or is otherwise reasonably necessary to be detained as evidence.[142] As one judge explained the requisite relationship between the crime alleged and the property seized, a person should not have his watch seized when arrested for speeding and held until the disposition of the case.[143] The police or Crown should not be entitled to detain things as a matter of convenience or on speculation only. A simple assertion by the Crown, however sincere, that the things are required for evidentiary purposes should not be enough. Rather, the Crown should be obliged to provide some valid reason why the things cannot be returned.[144]

The state's decision to hold a seized item must reasonably be related to the needs of investigation or trial. The balancing of the competing interests between individual property rights and the duty of the state to detain evidence was illustrated by an American court in *United States* v. *Premises Known as 608 Taylor Avenue*[145] using the following example:

> [A]ssume that investigators are called to the scene of a bank robbery. Witnesses indicate that a robber ran out of the bank, fell against the parked car of an innocent bystander, and then fled down the street. The government may seize the car in order to lift fingerprints from it. Nevertheless, we do not believe that the prosecutor may in all cases insist on holding the car itself as evidence to be presented to a jury. The full evidentiary value of the seized property might be fully preserved when investigators photograph the fingerprints. The innocent bystander's interest in the use of his automobile would then clearly outweigh any incidental benefits to the prosecution in allowing the jury to view the car from which the prints were taken.[146]

While it is not possible to define with precision exactly when the detention of an object *will* be legitimately required for evidentiary purposes, recent authorities have determined that the fact that the objects seized may be material to possible future proceedings in another country[147] or may be utilized in the cross-examination of the accused at trial[148] are not adequate bases upon which to justify their continued detention. Nor is it legitimate to detain things as a means of preventing the person from whom they were seized from leaving the country pending the completion of police inquiries.[149]

141. *Ibid.*
142. *R.* v. *Birnstihl* (Jan. 26, 1983, Ont. S.C., unreported).
143. *Leitman* v. *Mackey*, *supra*, note 139, p. 359.
144. This proposition was accepted in *Major* v. *Attorney General of British Columbia*, [1982] 4 W.W.R. 359 (B.C. S.C.) where Esson J. stated at p. 362: "[t]he general proposition that the right to detain seized articles depends upon being able to show that they are required for the purposes of evidence is part of the law of Canada."
145. 584 F. (2d) 1297 (1978).
146. *Ibid.*, p. 1304.
147. *Re Butler and Butler and Solicitor General of Canada*, *supra*, note 37, p. 520.
148. *Ibid.*, p. 519.
149. *Ghani* v. *Jones*, *supra*, note 138, p. 1705.

In instances where the Crown *is* able to satisfy the court that the detained articles constitute material evidence but, in considering the various other factors enumerated in Recommendation 9, the judge determines that existing alternatives to detaining the things as evidence are practical and appropriate in the circumstances, consideration of the adverse effects on property rights of the applicant should outweigh any consideration of convenience to the Crown.

(b) The Nature of the Things

Although some physical characteristics of seized things, such as perishability, will have been considered at the custody order stage, in many cases the nature of the things seized will also be an important factor in determining whether a restoration order should be made. Usually, the judge's consideration of the nature of the things will focus upon readily apparent physical characteristics. Size is one such characteristic which obviously should be taken into account. If the size of the things seized makes it impossible or impractical that they be retained, and provided that their evidentiary value can be preserved in some other way, a restoration order may be appropriate.

This does not really constitute a departure from existing practice. As has been pointed out in the Introduction, certain types of property are almost never detained by the prosecution for production in court. The vast majority of motor vehicle thefts are successfully prosecuted without the necessity of detaining the vehicle for use at trial.

The perishable nature of the things may also render it desirable to order that they be promptly restored to the person entitled to possession. Where circumstances are not considered exigent enough to warrant immediate release under Recommendation 3(3) of the custody order scheme,[150] perishability could still be a cogent factor in a pretrial restoration proceeding. Similar considerations should also apply where the value of the seized things is linked to their fashionable nature. The post-trial restoration to a businessman of a truckload of fashionable dresses hijacked *en route* to retail stores some two years earlier is not a very satisfactory remedy. During the time it has taken the slowly moving wheels of justice to prosecute the offender successfully, the economic value of the victim's property, which was promptly recovered by police two days after the hijacking, will have been irretrievably lost. The restoration scheme proposed in this Paper will address this problem by providing the victim of crime with an accessible route for seeking redress.

Another physical characteristic of the things which may be taken into account on a restoration application is the homogeneous nature of the goods. Where the things seized comprise quantities of duplicative or homogeneous goods, there is no valid policy reason for failing to release the bulk of the goods to the person entitled to possession, unless they are contraband. The bulk may be photographed and a representative sample of the

150. See discussion corresponding to Recommendation 3(3), *supra*, pp. 26-27.

goods may be detained for evidentiary purposes. Where a representative sample is detained and evidence may be adduced to establish what proportion of the bulk is represented by the sample, it is not reasonable that the entire bulk be detained.

Situations may also arise where considerations relating to the nature of the goods which are not readily apparent and which are quite distinct from the physical qualities of the things seized may render it desirable that the things be restored. For example, the nature of the things may be such that the applicant requires them for the running of his business. The things seized may be records, documents or ledgers essential to the applicant's bookkeeping practices, and the inability to trace accounts receivable may place the applicant in a precarious financial position. This type of information should be considered by the judge.

(c) Alternatives to Detaining the Things

Where alternatives to detaining the things seized can reasonably be said to exist, this should be considered a very cogent factor pointing to the conclusion that the things are not themselves required to be detained.

In present practice, photographic evidence is routinely used where it is impossible or impractical to bring the exhibit into court. There does not appear to be any valid reason, in law, why the application of this practice could not be extended far beyond the strict confines within which it is now used. Generally speaking, the law has failed to adapt and take advantage of modern advances in technology. Modern video equipment as well as improved photographic and duplicative techniques could be used to full advantage to record and preserve the evidentiary value of seized things with accuracy and reliability.

It is not suggested that the Crown be required to utilize alternate forms of evidence in *all* cases. The Commission recognizes that the detention of the seized property for evidentiary or other legitimate purposes will often be practical, necessary and desirable. The Commission's view is simply that where alternatives to detaining the things for use as evidence may reasonably be said to exist, this should be taken into account. Arguments based solely on convenience to the Crown should not be determinative.

This basic proposition was accepted by Lord Denning in *Ghani* v. *Jones*.[151] In His Lordship's view, the police must not keep a seized article for any longer than is reasonably necessary to complete their investigation or to preserve the thing for evidence. "If a copy will suffice, it should be made and the original returned."[152] This reasoning is particularly attractive in its potential application to cases where currency is being detained as evidence but the charges facing the accused do not expose him or her to the possibility that the cash may be forfeited to the state. As one American court has suggested:

151. *Supra*, note 138.
152. *Ibid.*, p. 1705.

> If the government's sole interest in retaining the currency is for its use as evidence, the court should consider whether this purpose would be equally well served by ... alternatives to holding the money itself.[153]

Where the state can prove its case by means other than detaining the seized property, it is only fair and reasonable that it be called upon to do so. In this way, interference with the property rights of the person affected by the seizure is minimized.

As was outlined in the Introduction, several justifications have been traditionally advanced to support the detention of property by the Crown. Of these, perhaps the strongest justification is the widely held belief that the things seized must themselves be produced at trial in order to satisfy the requirements of the best evidence rule.

However, in light of technological advances and a line of relatively recent cases, the Commission believes that the best evidence rule does not provide a valid bar to the tendering of photographs and records made by other technological means into evidence. In *Garton* v. *Hunter*,[154] Lord Denning stated that the best evidence rule had "gone by the board long ago." In his view:

> The only remaining instance of it that I know is that if an original document is available in one's hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence.[155]

Lord Denning's statement was quoted with approval in *Kajala* v. *Noble*,[156] by Ackner L.J. who went on to state that "... the old rule is limited and confined to written documents in the strict sense of the term."[157]

In Canada, the recent case of *R.* v. *Galarce*[158] has dealt squarely with the application of the best evidence rule and the use of photographic evidence of stolen goods in a criminal trial. The accused was charged with theft under $200. He had been caught shoplifting and was apprehended by the store security officer. At the store, a photograph was taken of the package which the accused had removed from the shelf. The photograph was filed as an exhibit at the trial and the security officer's *viva voce* testimony was offered to explain the sequence of events. The trial judge dismissed the case on the ground *inter alia* that the Crown had failed to "put in the best evidence." On Crown appeal, Gerein J. allowed the appeal and stated that the trial judge had erred in acquitting the accused on the basis that the package itself was not produced. Gerein J. quoted with approval certain passages from the *Garton* and *Kajala* cases and concluded that there is no absolute requirement that the stolen item be produced.

153. *United States* v. *Premises Known as 608 Taylor Avenue*, *supra*, note 145, p. 1304.
154. [1969] 1 All E.R. 451 (C.A.).
155. *Ibid.*, p. 453.
156. (1982), 75 Cr. Ap. R. 149.
157. *Ibid.*, p. 152.
158. (1983), 26 Sask. R. 122 (Q.B.).

Although the notion underlying the best evidence rule is sound, the application of the rule has failed to keep abreast of advances in modern technology. This has been recognized by the Federal-Provincial Task Force on Uniform Rules of Evidence which has recommended that the definition of what is an original must "keep up with the times."[159] Modern technology can guarantee a high degree of accuracy in producing duplicates.[160]

The Law Reform Commission of Canada's *Evidence Code*[161] defines a duplicate as:

> ... a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique that accurately reproduces the original; ...[162]

The Federal-Provincial Task Force recommended that a duplicate which meets the requirements of this definition should be admissible to the same extent as an original, unless the judge is satisfied that there is reason to doubt the authenticity of the original or the accuracy of the duplicate.[163]

The Law Reform Commission's definition of "duplicate" has been incorporated, with small variations in wording, into Bill S-33 which is the draft of the proposed Uniform Evidence Act. Section 132 of the Bill gives effect to the Task Force's recommendation and provides:

> **132.** A duplicate is admissible to the same extent as an original unless the court is satisfied that there is reason to doubt the authenticity of the original or the accuracy of the duplicate.

Recognition of the reliability of modern technology in producing duplicates of documents should lead to the admission of duplicates into evidence, thus allowing the originals to be restored to the person entitled to possession. This is vitally important in the case of business records upon which the functioning of a business or agency may depend. Copies of records kept by financial institutions are admissible under section 29 of the *Canada Evidence Act*.[164] In *R.* v. *McMullen*,[165] section 29 was interpreted as being designed to "facilitate the admission of certain banking records in order to keep them in use in the banks and to minimize the dislocation of removing the records."[166]

159. *Supra*, note 25, p. 380.

160. This was recognized in *R.* v. *McMullen* (1978), 42 C.C.C. (2d) 67 (Ont. H.C.J.) wherein Mr. Justice Linden stated at page 69 that "sophisticated xeroxing equipment can produce copies that can hardly be distinguished from the original."

161. Law Reform Commission of Canada, *Report on Evidence*, [Report 1] (Ottawa: Supply and Services, 1975).

162. *Ibid.*, s. 81(*a*).

163. *Supra*, note 25, Recommendation 29.15(b), p. 402.

164. R.S.C. 1970, c. E-10, as amended.

165. (1978), 42 C.C.C. (2d) 67 (Ont. H.C.J.); affirmed (1979), 47 C.C.C. (2d) 499 (Ont. C.A.).

166. *Ibid.*, p. 68.

The Commission recognizes that the absence of clearly articulated rules governing the acceptability and admissibility of technologically recorded evidence discourages efforts to innovate policies of property disposition. This deficiency is discussed more fully in the commentary corresponding to Recommendation 11. The Commission believes that by requiring the court on restoration applications to consider possible alternatives to detaining the things seized and by providing a schematic framework in Recommendation 11 to ensure that the evidentiary value of such alternative evidence is preserved, the criminal justice system will be better able to respond to the concerns of victims of crime and effect prompt return of property. From a practical and economic standpoint, the increased use of alternate forms of evidence will reduce the burdens on police department property rooms to warehouse and safeguard seized property.

(d) Other Considerations

In recognition of the fact that the potentially endless variety of circumstances which may arise cannot be addressed within a rigid framework, Recommendation 9(1)(*d*) constitutes a "catch-all" classification to supplement the more precise considerations enumerated in Recommendation 9(1)(*a*) through (*c*). Under this heading then, the judge may have regard to any fact or circumstance which is relevant to the disposition to be made.

(4) Order

RECOMMENDATION

10. (1) Where he is satisfied that the applicant or another person is clearly entitled to possession of the things seized and that the grounds set out in Recommendation 9 have been met, the judge should be required to order that the things be restored to that person.

(2) Restoration under such an order should be made as soon as reasonably possible.

(3) A judge making an order under Recommendation 10(1) should be empowered to stipulate that such order be absolute or made subject to specified conditions and on such terms as appear to the judge necessary or advisable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

Recommendation 10 may be regarded as the operative recommendation of the restoration application framework. This recommendation empowers a judge, upon being satisfied that the requirements of Recommendation 9 have been met, to order that things seized be restored to the person clearly entitled to possession. Recommendation 10(2) requires that the actual restoration of the property be carried out as soon as is reasonably possible.

The restoration order should be able to be made either absolute, subject only to a right of appeal under Recommendation 14, or made subject to terms and conditions. The power to make conditional restoration orders would endow the disposition process with a greater degree of flexibility and would allow for a more effective means of arriving at an appropriate balance between the state's interest in detaining the things as evidence and an individual's right to use and enjoy his property.

It is contemplated that the conditions most often imposed on a person in whose favour a conditional order is made would be aimed towards preventing the alteration of the restored property for a specified period of time in order to safeguard the things for possible future use.

A similar type of conditional restoration has been instituted as part of an innovative property disposition scheme developed by the Edmonton police force. Under the Edmonton scheme, victims of property offences can sometimes be reunited with their recovered property after it has been tagged and photographed by police. Upon receiving the property, the recipient is instructed not to dispose of it or alter its physical characteristics in any way until after the criminal proceedings involving the property are concluded. The recipient is also required to sign a release form which provides that he or she may be compelled to "... produce these items if they are required by the Court in the future as evidence in any criminal proceedings in connection with its original loss."[167]

Restoration orders imposing similar types of conditions would go a long way towards alleviating the plight of victims of property offences while at the same time preserving the Crown's right to requisition the property in the event that it unforeseeably becomes necessary to produce the thing at trial.

It is recognized that orders made conditional upon a person's undertaking not to dispose of specific property for even a limited period of time would constitute something of an interference with an individual's property rights. However, the restoration of an individual's property under a conditional order represents much less of an interference than the prolonged detention of property for an undefined period. Any such interference with property rights is unlikely to present any constitutional problems in light of the broad spectrum of forfeiture, compensation and restitution provisions of the *Code* which have been upheld in constitutional challenges. Having regard to the perceived trend of the Supreme Court of Canada to uphold the constitutionality of federal criminal legislation on the basis of the "aspect doctrine,"[168] the conditions contemplated by Recommendation 10 would likely be a valid adjunct to the federal criminal law power.

It is also recognized that inherent in the use of conditional orders is the danger that the person to whom an object is returned may violate the terms of the order and effectively deprive the state of the ability to use the object as evidence. However, an individual who

167. For a discussion of the Edmonton program, see *Victim's Task Force Report*, *supra*, note 27, pp. 168-70.

168. See generally, J. MacPherson, "The Constitutionality of the Compensation and Restitution Provisions of the Criminal Code — The Picture After *Regina* v. *Zelensky*" (1979), 11 *Ottawa Law Rev.* 713.

breached the terms of a restoration order, conditional or otherwise, would be exposed to the possibility of a criminal prosecution under section 116 of the *Criminal Code*[169] and would be liable to imprisonment for two years. It may be advisable to print a warning of the possible consequences of breaching the terms of a court order on the back of any release which the recipient of the property is required to sign.

In any event, it is contemplated that problems arising from the actions of parties to whom property has been restored would be minimized by the fact that restoration orders, whether conditional or absolute, would only be made after judicial consideration of the factors enumerated in Recommendation 9. If the prosecution were able to show that the things were required to be retained as evidence, the order would presumably be denied. Conditional orders are intended only to facilitate the return of property in a limited variety of situations, such as where the property is of marginal evidentiary utility or where the evidence has been preserved by alternate means but there exists a remote possibility that the need may arise to tender the actual items at trial.

In cases where the Crown might be hesitant to part with "potential evidence," conditional orders could help alleviate prosecutors' fears that unless all potential evidence is retained, their ability to prosecute cases successfully will be seriously curtailed. Under a conditional order, the articles in question would not be totally beyond the prosecutor's reach, but would theoretically be available for use should the need to produce the items subsequently arise.

(5) Accurate Record to Be Made

RECOMMENDATION

11. Where an order for restoration of things seized is made under Recommendation 10(1), the judge should be empowered to order further that an accurate record of the things seized be made by affidavit or by photograph, videotape or other means, and that in any proceedings subsequent to the making of such further order

(*a*) such record is admissible in place of the original, and

(*b*) no weight may be attached to the absence of the original.

The operation of Recommendation 11 is designed to meet three primary objectives. First, to facilitate the prompt return of seized property to the person entitled to possession wherever possible. Where the Crown is able to preserve the evidentiary value of seized items by alternate means to detaining them, it is both fair and reasonable that the property be required to be returned to the individual entitled to possession. Second, to reduce the

169. Section 116 of the *Criminal Code* makes it an offence to disobey "a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order .... "

administrative and supervisory obligations of police departments and court offices to store vast quantities of seized things. Third, to encourage the use and acceptance of alternate forms of evidence by lawyers and the courts in appropriate cases by providing a framework to govern the admissibility of such alternate forms and the evidentiary weight to be attached thereto.

The Commission recognizes the real and very valid concern on the part of Crown agents that their ability to obtain convictions will be impaired if seized property is required to be returned. However, the Commission wishes to stress that, under the proposed scheme, a careful adjudication would have to take place before the making of an order for the restoration of seized things requiring that the evidentiary value of the things be retained by alternate means. The provision for preserving the evidence by alternate means would be dependent upon a judicial determination that, having regard to the circumstances, the nature of the things, any alternatives to detaining the things and any submissions by the prosecution or defence with respect to the need for their continued detention, it is appropriate that the things seized be restored. Where the circumstances are such that the evidence could not reasonably be preserved by alternate means, or where the Crown otherwise persuades the court that the things seized should be retained, the circumstances would not be appropriate for the making of a restoration order.

The Commission also recognizes that the absence of clear principles governing the admissibility of technologically produced evidentiary records has instilled a reluctance on the part of members of the Bench and Bar alike to depart from previous experience and past preference and utilize alternate forms of evidence. In the past, alternate forms of evidence have been used mainly where dictated by practical necessity. The procedure proposed in Recommendation 11 is designed to fill this void and encourage the use of alternate forms of evidence wherever possible by providing that a record of the things seized made pursuant to a restoration order be admissible in place of the original and that no weight may be attached to the absence of the original.

Viewed in its proper context, Recommendation 11 does not contemplate a complete departure from existing practice. In some cases at present, stolen property is identified by means of registration or serial numbers without the necessity of producing the article itself at trial. Photographs are already widely used to introduce evidence of physical damage to vehicles and to identify large items such as stolen cars, boats and trucks. Similarly, copies of entries made in books or records kept by a financial institution are admissible under section 29 of the *Canada Evidence Act*[170] and, *prima facie*, have the same probative force as the original. In some jurisdictions, such as Edmonton, police forces have instituted innovative procedures to allow for the prompt return of stolen goods to local businessmen. Upon the police being called to a store to deal with a shoplifter apprehended by a store employee, a photograph is taken of the shoplifter, the goods and sometimes the store employee. The officer records the facts including a brief description of the article, the retail value and any distinguishing characteristics of the goods. After the goods are photographed and all the relevant information is recorded, the goods can be returned to the shelf.

170. R.S.C. 1970, c. E-10.

The reliability of technologically duplicated copies has been recognized in the recently introduced *Criminal Law Reform Act, 1984* which is more commonly referred to as Bill C-19. As part of the proposed revisions to section 446 of the *Code*, set out in clause 108, subsections (13) and (14) would provide, in effect, that where a seized document is ordered returned, the Attorney General may make and retain a copy of the document. Any copy so made would be admissible in evidence and, in the absence of evidence to the contrary, would have the same probative force as the original document.

Although the Bill C-19 proposal is much more limited in scope than the Commission's recommendation with respect to the use and admissibility of alternate forms of evidence, proposed subsection 446(14) is a reflection of the growing awareness of the practical advantages of admitting duplicates of originals into evidence.

The Commission believes that the use of alternate forms of evidence would be particularly appropriate in cases involving charges such as theft and possession of stolen property, where it is often possible to effect the prompt return of property to the person entitled to possession. It is contemplated that the framework set out in Recommendation 11 will have the effect of encouraging the expanded use of alternate forms of evidence. This will have beneficial results for both victims of crime and for the police. The length of time that a victim is deprived of the use of his or her property should be reduced thus minimizing attendant costs and frustration to the victim. For the police, the scheme should operate to reduce costs and responsibilities for property management while at the same time improving relations with victims and the community at large.

(6) No Order Where Competing Claims

RECOMMENDATION

12. The judge should not be empowered to make a restoration order where it appears that the thing should be restored but there is a substantial question whether it should be restored to the person from whom it was seized, or substantial question among several claimants to possession.

Recommendation 12 reflects the fundamental principle that the criminal courts should not duplicate, imitate or encroach upon the role of the civil courts. Under the proposed disposition procedure, the court would not be engaged in making quasi-civil determinations of property ownership. Rather, the scope of the court's inquiry would be restricted to the appropriateness of the detention of the seized things by the state. As a corollary of a court's finding that the detention of the things is not reasonably justified in the circumstances, the court should be empowered to order that they be returned to the person clearly entitled to possession.

Recommendation 12 limits the jurisdiction of the court by providing that no restoration order should be made where there exists a substantial question as to whether the

things should be restored to the person from whom they were seized or a substantial question among several claimants to possession.

This approach differs slightly from that set out in Article 280.3(5) of the A.L.I. *Model Code* which provides:

> If, upon consideration of a motion or motions for return or restoration of seized things, it appears that the things should be returned or restored, but there is a substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants to rightful possession, the court hearing the matter may, in its discretion, return the things to the person from whose possession they were seized, or impound the things seized and remit the several claimants to appropriate civil process for determination of the claims.

The *Model Code*'s commentary on this provision recognizes that cases will infrequently arise where, although the state has no lawful claim to possession of the things seized, it is unclear who does have a rightful claim. However, unlike the American Law Institute, we do not believe that there should be any discretion to make a restoration order in such cases. The criminal courts are not an appropriate forum for the determination of property rights between rival claimants.

Under the provisions of Recommendation 12, where no clear entitlement to possession of the seized things is made out, the court would retain possession and the things would be disposed of upon termination of the custody order in accordance with Recommendation 6.

(7) No Property Rights Affected by Order

RECOMMENDATION

13. An order for restoration to a person from whom things were seized or to a person with a claim to possession should neither establish nor extinguish any property rights in the things that would not have existed but for the order.

Recommendation 13 reinforces the fact that a judge, in making a restoration order, is not making a determination of title or ownership. The restoration order should neither establish nor extinguish any property rights in the things which are the subject of the order. The restoration order is intended simply to return the things to the custody of the person who was entitled to possession before the seizure or, in other words, to restore the pre-seizure *status quo*.

In order to emphasize that the restoration order is not tantamount to a final determination of ownership of the things, the person to whom the things are released after the making of a restoration order might be required to acknowledge this in writing and undertake to surrender possession in the event that ownership or possession is contested

in other court proceedings. Such an acknowledgment could easily be printed on any receipt required to be signed upon return of the things to the person in whose favour the order was made.

(8) Appeals

RECOMMENDATION

14. A person who considers himself aggrieved by an order granting or denying restoration of things seized should have a right of appeal from the order to the appeal court as defined in section 747 of the *Criminal Code*.

Like the notion of standing expressed in Recommendation 7, the appeal provision of the restoration scheme recognizes that the dispossesion of property resulting from the exercise of search and seizure powers may affect the legal and proprietary interests of a number of different people. For this reason, any "person who considers himself aggrieved" by a restoration order may launch an appeal from that order. The wording of Recommendation 14 closely follows the wording of subsection 446(7) of the *Criminal Code* which is the appeal provision of the existing restoration order scheme. Theoretically, anyone detrimentally affected by a restoration order, whether or not he or she actually participated in the original hearing, should be entitled to appeal. In this sense, the broad appeal provision acts as a means of disputing the end result of the hearing as well as seeking redress for defects in the process itself. For example, a person asserting a claim to possession of the things seized who, for some reason, was not provided with notice of the hearing would have standing to appeal.

It is contemplated that in order to come within the scope of the appeal provisions and to qualify as a person "aggrieved," potential appellants, other than Crown agents, would be required to show that they have an interest in the subject property sufficient to give them standing to bring a restoration application under Recommendation 7. If the potential appellant does not have a legal or proprietary interest recognized by Recommendation 7, he or she should not be entitled to launch an appeal.

Summary of Recommendations

1. A comprehensive regime of post-seizure procedures should apply in general to all things seized in crime-related investigations regardless of the mode of authorization of the seizure.

2. To ensure the return of all things seized before a judicial official, the following accountability mechanisms should be imposed:

(1) Inventories of things seized should be prepared by the peace officers effecting seizure in all cases. A copy of the inventory should be given on request to the person who has been searched or whose place or vehicle has been searched. Where the 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, the person with a proprietary interest should be provided with an inventory without the necessity of a request. The inventory should describe the things seized with reasonable particularity.

(2) The peace officer who makes a seizure of things pursuant to a warrant should endorse the warrant with a report of facts and circumstances of execution, including an inventory of things seized; an unexecuted warrant should be endorsed with the reasons why it was not executed.

(3) The peace officer who makes a seizure of things should be required to complete a post-seizure report in cases where things are seized without warrant and where objects not mentioned in the search warrant are seized after a search with warrant.

The report should include the time and place of the search and seizure and the reason why it was made, as well as an inventory of things seized. A copy should be provided by the peace officer who completes 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 which the officer is aware.

(4) Either the endorsed warrant or the post-seizure report should be taken before a justice of the territorial jurisdiction in which the search and seizure was executed as soon as practicable.

3. All things seized should be subject to judicial control.

(1) Custody orders should be made by a justice on the basis of the inventories and reports; there should be no requirement that the actual things seized be physically before the justice. This would not, however, preclude a justice from ordering

production of things either at the time of making a custody order or at any time during the duration of the order.

(2) The custody order should provide for the storage and supervision of things seized.

(3) Custody orders should be made for all things seized, with the exception of things which the justice determines should be promptly released. The justice should have the discretion to order that perishables be immediately released, with or without conditions, if the identity of a person establishing a clear entitlement to possession of them can be promptly established to his satisfaction.

(4) Special sealing and application procedures for documents for which solicitor-client privilege is claimed, set out in Bill C-19 proposed in 1984, should be instituted with two new provisions — the protection accorded by these procedures should extend to materials in possession of the client as well as the solicitor and the Crown should not be permitted access to the documents at issue in the application. Upon a determination that seized documents are subject to solicitor-client privilege, they should be returned to the person from whom they were seized. If no solicitor-client privilege is found to exist, the documents should be treated in the same manner as other things seized.

(5) A peace officer effecting seizure of any firearms, weapons, or explosives of a dangerous nature, should, as soon as possible, remove them to a place of safety where they may be detained until the custody order is granted.

4. (1) As the custody order and supporting documents form part of the court record and are therefore public, they should be open to inspection by any person. Access to the documents should be subject to prohibition against publishing or broadcasting their contents until:

(*a*) a preliminary inquiry has been held in respect of a person who has been searched or whose place or vehicle has been searched, 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 custody order and supporting documents have been disclosed in judicial proceedings in respect of which publication or broadcast is not prohibited;

(*d*) an order has been made under subsection (2).

However, the issuer of the custody order should be empowered to make provision in the custody order for notice of the list of things seized to be given by publication, broadcasting or other means in cases, for example, where rightful ownership of the things seized is unknown to the authorities, provided the name and other identifying particulars of persons affected are not disclosed.

(2) Upon application by a person mentioned in paragraph (1)(*a*), or by any person with the consent of a person mentioned in paragraph (1)(*a*), a judge may order that the prohibition on broadcasting and publication imposed by subsection (1) be terminated.

(3) With respect to access to the things seized, the following rules should apply: Where access to the things seized is denied, a justice should have the discretion to order that an applicant be permitted to examine anything seized and detained where:

(*a*) the applicant establishes an interest in the things seized and detained; and

(*b*) the applicant has given three clear days notice to the Attorney General or his agent.

In the case of seized documents, the justice should be required, upon application by such a person, to order that the person receive photocopies upon payment of a reasonable fee determined in accordance with the tariff of fees fixed or approved by the Attorney General of the province.

(4) A person who considers himself aggrieved by an order made under Recommendation 4(3) should have a right of appeal from the order to the Appeal Court as defined in section 747 of the *Criminal Code*.

5. (1) Where no criminal proceedings have been instituted the custody order should terminate at the earliest of the following:

(*a*) when three months have passed from the date of seizure,

(*b*) when the prosecution finds no need for detaining the things, or

(*c*) when another order respecting the thing seized is made by a court of competent jurisdiction.

(2) Before the expiration of the three-month period the issuing official should be empowered, upon application by the prosecution, to extend the custody order for a period not exceeding three months where he is satisfied that having regard to the nature of the investigation, the further detention of the things is reasonably necessary.

(3) Where criminal proceedings have been instituted and the thing is detained for use as evidence, the custody order should terminate at the earliest of the following:

(*a*) when another order respecting the seized thing is made by a court of competent jurisdiction,

(*b*) when criminal proceedings are completed, or

(*c*) when the prosecution finds no need for detaining the thing in custody for evidentiary purposes.

6. (1) Where a custody order terminates in accordance with Recommendation 5(1)(*c*), by an order of a court of competent jurisdiction, the disposition of the thing should be in accordance with the terms of the order.

(2) Where a custody order terminates in accordance with Recommendation 5 and no restoration order has been made, the disposition of things which are not contraband should be as follows:

(*a*) If civil proceedings are pending regarding claims to ownership or possession of the things seized, the things should be transferred to the custody of the court

before which the civil proceedings are pending, to be disposed of as that court orders.

(*b*) If there are no conflicting claims to ownership or possession of the things seized, the things should be restored to the person demonstrating a lawful proprietary interest in the things.

(*c*) If there are conflicting claims to ownership or possession of the things seized but no civil proceedings are pending, the things should be ordered returned to the person from whom they were seized provided that possession of the things by that person is lawful.

(*d*) If there are no claims to the things seized they should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

(3) Where a custody order terminates in accordance with Recommendation 5, *absolute contraband* (things, funds and information the possession of which, without more, constitutes an offence) should be forfeited to the state to enforce the prohibition against possession. *Conditional contraband* (things, funds and information that are illegal to possess only for a particular purpose) should be disposed of in accordance with Recommendation 6(2) unless the person who possessed the things prior to the seizure is convicted of possessing the things in circumstances which rendered them conditional contraband.

7. A person from whom things have been seized or from whose place or vehicle things have been seized, or any person asserting a claim to possession of the things seized should have the right to apply to a judge to have the things restored to him or her.

8. The judge should be empowered to hear an application under Recommendation 7 after being satisfied that seven clear days written notice has been given by the applicant to:

(*a*) the prosecution;

(*b*) any person who has brought a competing application for restoration of the things seized; and

(*c*) any person with a proprietary interest of which the applicant is aware.

9. (1) Upon application by a person specified in Recommendation 7, a judge should be empowered to make a restoration order as provided in Recommendation 10 if he is satisfied that the applicant has established that he or she is clearly entitled to possession, unless the prosecution shows that the things seized are reasonably required to be detained for evidentiary or other purposes. The judge should have regard to:

(*a*) the nature of the things;

(*b*) any alternatives to detaining the things for use as evidence;

(*c*) any representations on behalf of the defence regarding the need for the continued detention of the things for evidentiary or other purposes; and

(*d*) any other consideration relevant to the disposition of the seized things.

(2) In determining whether an applicant is clearly entitled to possession of the seized things, the judge should be required to consider evidence of the applicant's entitlement to possession of the things seized and any conflicting claims shown to exist with respect to the things.

(3) Notwithstanding that continued detention might not be reasonably justified for evidentiary purposes, restoration orders should not be made for absolute contraband. Nor should they be made for conditional contraband so long as grounds exist for believing that the person possessing the things prior to the seizure had possessed them in circumstances which rendered them conditional contraband.

10. (1) Where he is satisfied that the applicant or another person is clearly entitled to possession of the things seized and that the grounds set out in Recommendation 9 have been met, the judge should be required to order that the things be restored to that person.

(2) Restoration under such an order should be made as soon as reasonably possible.

(3) A judge making an order under Recommendation 10(1) should be empowered to stipulate that such order be absolute or made subject to specified conditions and on such terms as appear to the judge necessary or advisable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

11. Where an order for restoration of things seized is made under Recommendation 10(1), the judge should be empowered to order further that an accurate record of the things seized be made by affidavit or by photograph, videotape or other means, and that in any proceedings subsequent to the making of such further order

(*a*) such record is admissible in place of the original, and

(*b*) no weight may be attached to the absence of the original.

12. The judge should not be empowered to make a restoration order where it appears that the thing should be restored but there is a substantial question whether it should be restored to the person from whom it was seized, or substantial question among several claimants to possession.

13. An order for restoration to a person from whom things were seized or to a person with a claim to possession should neither establish nor extinguish any property rights in the things that would not have existed but for the order.

14. A person who considers himself aggrieved by an order granting or denying restoration of things seized should have a right of appeal from the order to the appeal court as defined in section 747 of the *Criminal Code*.

END