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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

REPORT

recodifying criminal procedure

Volume One

Title I

33

Canada

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and Attorney General of Canada,
Ottawa, Canada

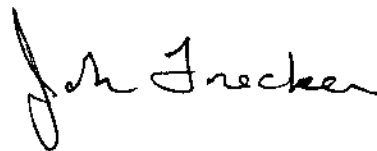
Dear Ms. Campbell:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report undertaken by the Commission on criminal procedure.

Yours respectfully,

A handwritten signature in black ink, reading "Gilles Létourneau". The script is fluid and cursive, with the first name "Gilles" and last name "Létourneau" clearly distinguishable.

Gilles Létourneau
President

A handwritten signature in black ink, reading "John Frecker". The script is bold and cursive, with the first name "John" and last name "Frecker" clearly distinguishable.

John Frecker
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INTRODUCTION

We envision a criminal process governed by rules, simply and clearly expressed, which seeks fairness, yet promotes efficiency; which practises restraint and is accountable, yet protects society; and which encourages the active involvement and participation of the citizen. These basic attributes are the essence of our principles.

*Our Criminal Procedure*¹

This report presents the first title of the first volume of the Law Reform Commission of Canada's proposed Code of Criminal Procedure. It is to be a code characterized by simplicity, consistency and coherence and earmarked by fidelity to seven governing principles that have guided the reform exercise since the Commission's inception. Those principles, explained and illustrated in a recent Report to Parliament entitled *Our Criminal Procedure*, are:

1. *The Principle of Fairness: Procedures Should Be Fair;*
2. *The Principle of Efficiency: Procedures Should Be Efficient;*
3. *The Principle of Clarity: Procedures Should Be Clear and Understandable;*
4. *The Principle of Restraint: Where Procedures Intrude on Freedom They Should Be Used with Restraint;*
5. *The Principle of Accountability: Those Exercising Procedural Power or Authority Should Be Accountable for Its Use;*
6. *The Principle of Participation: Procedures Should Provide for the Meaningful Participation of Citizens;*
7. *The Principle of Protection: Procedures Should Enhance the Protection of Society.*²

Canada has long had a *Criminal Code*.³ But the passage of time and a process of incremental amendment have diminished its usefulness. As a result, it now has few of the virtues of a true code.

The virtues of codification are well known.⁴ Primarily they are the following.⁵

1. It introduces order and system into a mass of legal concepts and ideas and so presents the law as a homogeneous, related whole rather than as a series of isolated propositions.
2. It demands that one take stock of existing legal materials, and so forces an examination not only of the ideas existing in the state engaged in codification but also in all other civilized states.

1. Law Reform Commission of Canada [hereinafter LRC], *Our Criminal Procedure*, Report 32 (Ottawa: The Commission, 1988) at 54.

2. *Ibid.* at 23.

3. R.S.C. 1985, c. C-46.

4. See especially, a Study Paper by the Commission entitled *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976).

5. F.F. Stone, "A Primer on Codification" (1955) 29 Tul. L. Rev. 303, 307-308.

3. It works to eradicate uncertainty in the law by bringing together the law into one place or book.
4. It makes the law more accessible to the average person.
5. Those engaged in the exposition of the law are assisted by being provided with an authorized framework within which to conduct their work.

Summarized, these advantages are accessibility, comprehensibility, consistency and certainty.⁶

The virtues of codification are, in truth, the virtues of all competent legislation. The law should always seek maximum clarity, coherence and consistency.

Codification provides, in the main, an opportunity to make the criminal law clearer and more logical. Also, the method of codification minimizes the need for *ad hoc* responses to questions of social policy and reduces the possibility of introducing undue rigidity in the written form of the law. A code is not a closed system, either formally or substantively. Codification signals a continuous process of interpretation leading ultimately to greater accuracy in the statement of the law.⁷

Canada's present *Criminal Code* was first enacted in 1892. The substantive part of our *Code* is largely the work of the English codifier, Sir James Stephen. The procedural part of the *Code*, when first introduced was, in many respects, uniquely Canadian. The *Criminal Code* of Canada was a magnificent accomplishment for its time, but it no longer serves us well. As we noted in *Recodifying Criminal Law*, Report 31, the current *Code* has many defects:

It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled by the judiciary. It includes obsolete provisions. It over-extends the proper scope of the criminal law. And it fails to address some serious current problems. Moreover, it has sections which may well violate the *Canadian Charter of Rights and Freedoms*.⁸

The present *Code* is a *mélange*. Substantive, procedural and evidentiary provisions are scattered throughout, adding to its complexity and incoherence.

The Commission is committed to promoting a better understanding of Canadian laws through a principled and coherent approach to reform. This volume expresses that commitment, in part, through the separation of the basic components — procedure, substance, evidence — that make up the statutory criminal law.

We have already produced a model code of evidence⁹ and in 1987 we published *Recodifying Criminal Law* which contains our proposed Code of Substantive Criminal Law for Canada. Our substantive Code sets out in statutory form, for the first time, the

6. The Law Commission (Great Britain), *Codification of the Criminal Law* (London: HMSO, 1985) at 17.

7. G. Létourneau and S.A. Cohen, "The Merits and Limitations of Codification: A Canadian Perspective," paper presented at the International Conference on Reform of the Criminal Law, held at the Inns of Court, London, 27 July 1987.

8. LRC, *Recodifying Criminal Law — Revised and Enlarged Edition*, Report 31 (Ottawa: The Commission, 1987) at 1.

9. LRC, *Evidence*, Report 1 (Ottawa: Information Canada, 1975).

general principles of criminal liability for which a person, if found guilty, may be imprisoned.

This publication is the first instalment of our Code of Criminal Procedure. Like our other work, it is based on a deep philosophical probe into the nature of criminal law. In it the reader will see the results of a careful endeavour to balance the liberty of the person against the obligation of the state to provide protection to its citizens. The first complete volume of *Recodifying Criminal Procedure* will be called *Police Powers*. The first of the two Titles that are to comprise that initial volume is *Search and Related Matters*. Title II will be devoted to the law relating to questioning suspects, arrest, compelling appearance, interim release and detention, and pretrial eyewitness identification. The remaining volumes of the Code of Criminal Procedure will set out procedures with respect to the trial process and remedies and appeals.

The issues that are the subject of this Title have previously been analyzed in several Working Papers and Reports to Parliament, as well as in a number of published and unpublished Studies:

Report 19, *Writs of Assistance and Telewarrants* (1983)

Report 21, *Investigative Tests: Alcohol, Drugs and Driving Offences* (1983)

Report 24, *Search and Seizure* (1985)

Report 25, *Obtaining Forensic Evidence* (1985)

Report 27, *Disposition of Seized Property* (1986)

Working Paper 30, *Police Powers, Search and Seizure in Criminal Law Enforcement* (1983)

Working Paper 34, *Investigative Tests* (1984)

Working Paper 39, *Post-Seizure Procedures* (1985)

Working Paper 47, *Electronic Surveillance* (1986)

Working Paper 54, *Classification of Offences* (1986)

Working Paper 59, *Toward a Unified Criminal Court* (1989)

While the first portion of this Code of Criminal Procedure builds on our previously published work, it also takes into account criticisms of it that have been communicated to us by the general public and our special consultants. Public hearings to discuss our work have been held in many centres across Canada over a number of years. We have heard from eminent judges, criminal lawyers, law teachers, police chiefs, and representatives of the provincial and federal governments. Our debt to all who have taken part in this exercise is immense. The reward for their contributions is a new code which is logical, organized, coherent and consistent. We think it is a code that is in harmony with the *Canadian Charter of Rights and Freedoms*¹⁰ and responds to the needs of present-day Canada.

10. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

These are claims that we have also made for our proposed code of substantive criminal law. While both the Code of Criminal Procedure and the Code of Substantive Criminal Law show the same fidelity to principle, clarity, logic and organization, they appear at first glance to be quite dissimilar. A code that sets out general principles of criminal liability and defines crimes can be written with great economy and need emphasize only a minimum of detail and technicality. Our code of substantive criminal law expresses the substantive law in just 132 sections.

Brevity of this kind is not possible in criminal procedure. Procedural law, at a minimum, must set out the series of steps or actions to be followed in order validly to administer justice within the state. General rules are often inadequate for this purpose. Failure to provide important detail reduces the ability of the law to guide action. Such a failure creates a legal void which must then be filled either by the common law or local practice. This in turn may cause inconsistency and uncertainty — two attributes that surely ought to be avoided in the intrusive and coercive environment in which the criminal law operates.

A useful and effective code of criminal procedure must thus be a larger, more detailed document than a code of substantive criminal law. We explain why this must be so in *Our Criminal Procedure*:

Criminal statutes not only define crimes; they also set out the procedures for conducting investigations and establishing guilt or innocence. In doing so they define the limits of freedom. Procedural law, since it performs this regulatory function, is notable for its emphasis on detail and technicality. . . . [P]rocedural law, to the extent that it will be regarded as effective law from the point of view of promoting just and equitable resolutions of disputes, must to some extent forever remain “technical” law.¹¹

Over the years we have demonstrated the incompleteness of the current *Code*’s statement of the substantive law. It “lacks a comprehensive General Part, which has required our courts to fashion, without legislative guidance, many of the basic principles of criminal law dealing with *mens rea*, drunkenness, necessity, causation and other matters.”¹² This defect of incompleteness exists to a far greater degree in the area of criminal procedure. A vast amount of the procedural law can be ascertained only by combing the common law or consulting the actual practices of various jurisdictions. A truly comprehensive code of criminal procedure must incorporate and clarify a wide range of ambiguous, amorphous and uncoded law. This is what we have attempted to accomplish in our new Code of Criminal Procedure. Nevertheless, while we believe that this Code goes some distance towards the removal of gaps and the eradication of uncertainty in procedural criminal law, we recognize that it is neither desirable nor possible for a code to be, in an absolute sense, comprehensive, exclusive or exhaustive. What the reader will encounter in the pages that follow is a statute of impressive range of coverage — one that, in our view, immeasurably improves on the procedures in the present *Criminal Code* and clarifies much of the present law.

11. *Supra*, note 1 at 6.

12. LRC, *Recodifying Criminal Law*, vol. 1, Report 30 (Ottawa: The Commission, 1986) at 3.

The contrast is great between our draft Code and the present *Code*. To demonstrate this we invite the reader to examine an area, such as search and seizure. The differences between the two codes will be immediately apparent. What is the statutory law concerning the search of a dwelling-house, search and seizure in urgent circumstances, the right to search incident to arrest, the seizure of items in plain view, and so forth? These are questions which our draft Code answers fully, but about which the present *Code* is largely silent.

Not only is our Code more complete in its coverage, it is also easier to understand. This reflects our dedication to the use of plain language in the drafting of statutes, to the extent possible. Whether in drafting legislation or in composing accompanying comments, the challenge for us has been not only to speak clearly but also to express our positions accurately. However, some areas, owing to their technicality, will never be *easy* to understand. Where possible, this Code uses language familiar to ordinary people. Thus Latin phrases such as *ex parte* and *in camera* have been replaced by the more understandable terms “unilateral” and “in private.” We have also tried to bring many of the older processes more fully into the twentieth century. Procedural innovations such as the telewarrant, first advocated by us and since incorporated in a minor form into the present *Criminal Code*, as well as others calling for the use of electronic recording and reproduction technologies, have been incorporated and extended to a far greater range of processes within the criminal justice system.

The structure and organization of this portion of our Code is logical and straightforward. It begins with general matters — interpretation provisions and rules of general application. Following this is a series of specific Parts which address the range of applicable police powers that comprise the area that this division of the Code labels *Search and Related Matters*:

- Search and Seizure;
- Obtaining Forensic Evidence;
- Testing Persons for Impairment in the Operation of Vehicles;
- Electronic Surveillance;
- Disposition of Seized Things; and
- Privilege in Relation to Seized Things.

Each Part is appropriately divided and subdivided for ease of use and reference.

Although this Code aspires to be comprehensive, it does not yet contain all the law that may ultimately be collected under the general heading, *Search and Related Matters*. For example, absent from this Code are provisions dealing with enterprise or organized crime. Substantive and procedural amendments to the present *Criminal Code* dealing with this subject were recently enacted by Parliament.¹³ Also, in Working Paper 47, *Electronic Surveillance*, we recommended the enactment of laws concerning the use

13. See, *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, S.C. 1988, c. 51, ss. 1-8 proclaimed in force January 1, 1989.

of optical surveillance devices to govern cases where the police had surreptitiously entered premises and installed such devices in the course of a criminal investigation. However, the Part of this Code dealing with electronic surveillance does not include any provisions respecting the use of optical surveillance devices. Both optical surveillance and enterprise crime are worthy of separate sustained study and will be the subject of future Commission work. In the interim, our Code omits mention of these matters.

Also, other important matters are not to be found in this volume. The remedy for a failure to follow a procedure is a vitally important aspect of procedural law; yet there are no remedies provisions in this portion of our Code. Remedies are more properly housed with other matters dealing with the trial and appeal process. The granting or denial of a remedy is a judicial act. While police actions may call for remedial relief or for censure, the law of remedies is not treated here as part of the law of police powers. Our position on the proper place of remedies within the criminal process will be discussed in a future Working Paper. Eventually the Commission's recommendations will appear in another Part of this Code.

Rules of evidence also are generally not included in this volume of the proposed Code. For the most part, their proper place is in a code of evidence, although certain rules, possessing a uniquely procedural character, that are necessary to the proper and complete articulation of our scheme will be found in some Parts of this Code.

In keeping with the proposal advanced in *Equality for All: Report of the Parliamentary Committee on Equality Rights*,¹⁴ we have conscientiously endeavoured to draft this Code in gender-neutral language. In doing so we have adhered to the standards and policies set forth in *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*,¹⁵ pertaining to the drafting of laws in both English and French.

This Report offers a blueprint for change. The legislation, in the areas canvassed, could be readily implemented if Parliament is inclined to act on our work at this point in time. However, it bears repeating that what we now present is part of a larger enterprise in which all parts are designed to integrate and cohere. While this document is a Report to Parliament and thus expresses the settled views of the Commission at this time, we anticipate the need for revision and refinement as we proceed toward the completion and ultimate consolidation of the remaining work.

14. Canada, Parliament, House of Commons, Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services Canada, 1985) at 119-120 (J. Patrick Boyer, M.P., Chairman).

15. Government of Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services Canada, 1986) at 57-58.

PART ONE

GENERAL

DERIVATION OF PART ONE

LRC PUBLICATIONS

Writs of Assistance and Telewarrants, Report 19 (1983)

Search and Seizure, Report 24 (1984)

Classification of Offences, Working Paper 54 (1986)

Recodifying Criminal Law, Report 31 (1987)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, ss. 2, 254(1), 487(2), 487.1

An Act to revise and codify the law of criminal procedure

CHAPTER I

SHORT TITLE

Short title

1. This Act may be cited as the *Code of Criminal Procedure*.

CHAPTER II

INTERPRETATION

Definitions

2. In this Act,

"clerk of the
court" (*greffier*)

“clerk of the court” includes a person, by whatever name or title the person may be designated, who from time to time performs the duties of a clerk of the court;

Criminal Code, s. 2

“court of appeal”
(*cour d'appel*)

“court of appeal” means

(a) in the Provinces of Nova Scotia and Prince Edward Island, the Appeal Division of the Supreme Court, and

(b) in any other province, the Court of Appeal;

Criminal Code, s. 2

"crime"(crime)

“crime” means an offence that is defined by the proposed Criminal Code (LRC) or any other Act of Parliament and that is punishable by imprisonment otherwise than on default of payment of a fine;

Working Paper 54, ss. 2, 3

Report 31, App. B, s. 2

“in private”
(*huis clos*)

“in private” means

(a) in relation to an application made unilaterally, without any member of the public or any party other than the applicant being present, and

(b) in relation to a hearing with respect to which notice must be given, without any member of the public being present;

“judge” (*juge*)

“judge” means a judge of the Criminal Court;

Working Paper 59, rees. 1, 2

“judicial district”
(*district
judiciaire*)

“judicial district” means one of the territorial divisions into which a province is divided for the purposes of the Criminal Court or, if there are no such divisions, the province;

“justice” (*jugé de paix*)

“justice” means a justice of the peace or a judge;

Criminal Code, s. 2

“medical practitioner” (*médecin*)

“medical practitioner” means a person qualified under provincial law to practise medicine;

Criminal Code, s. 254(1)

“objects of seizure” (*choses saisissables*)

“objects of seizure” means things, including funds in a financial account, that constitute or provide evidence with respect to the commission of a crime, but does not include

- (a) residues adhering to the surface of a person’s body, or
- (b) a person’s tissues, bodily fluids or other bodily substances such as breath, hair or nails, unless they have been removed or have become dissociated from the person’s body;

Report 24, s. 3

“peace officer” (*agent de la paix*)

“peace officer” includes

- (a) a sheriff, deputy sheriff and sheriff’s officer,
- (b) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison,
- (c) a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,
- (d) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or *Excise Act*,
- (e) a person appointed or designated as a fishery officer under the *Fisheries Act* when performing any duties or functions pursuant to that Act,
- (f) the pilot in command of an aircraft
 - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
 - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as the owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(g) officers and non-commissioned members of the Canadian Forces who are

- (i) appointed for the purposes of section 156 of the *National Defence Act*, or
- (ii) employed on duties that the Governor in Council, by regulations made under the *National Defence Act*, has prescribed to be of such a kind as to necessitate that the

officers and non-commissioned members performing them have the powers of peace officers;

Report 31, s. 2(1)
Criminal Code, s. 2

"photograph"
(*photographie*)

"photograph" means a picture, whether still or moving, that represents the appearance of a thing and that is produced with the aid of a camera;

"prescribed"
(*prescrit*)

"prescribed" means prescribed by regulation;

"prosecutor"
(*poursuivant*)

"prosecutor" means the Attorney General or, where the Attorney General does not intervene, the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them;

Criminal Code, s. 2

"unilaterally"
(*unilatéralement*
et *unilatérale*)

"unilaterally", in relation to the making of an application by a party, means without notice to any other party being required.

COMMENT¹⁶

Some of these definitions are taken or adapted from the current *Criminal Code*. Others are derived from our own Reports and Working Papers. The remainder are new. Our goals, in drafting these definitions, have been brevity and accuracy.

A word of explanation is merited for some of these definitions. "In private" replaces the Latin term *in camera* and reflects our policy of using clear language in this draft legislation. "Judicial district," a term less confusing than the current *Code*'s "territorial division" (see section 2 of the *Code*), is defined with reference to the scheme we proposed in Working Paper 59 for a Unified Criminal Court system.

"Objects of seizure," as defined here, does not include "information" although our original recommendation and draft legislation in Report 24 did make "information" part of the definition. This Code's search and seizure regime (found in Part Two) contemplates the seizure of things containing information (such as a computer or its diskettes), rather than seizure of the information itself. Nor is specific mention made of other elements of the definition "objects of seizure," as originally formulated. Rather it was believed that the phrase "constitute or provide evidence with respect to the commission of a crime . . ." necessarily embraces most "takings of an offence,"¹⁷ "evidence of an offence"¹⁸ and "contraband."¹⁹ This definition also now specifically excludes a number of

16. Each provision is followed by a comment unless it is self-explanatory.

17. Report 24, Recommendation One, s. 3(1)(a). See the definition of that term in Recommendation One, s. 3(2). Note also that we have elected to exclude those "takings" that merely constitute (in the words of our former definition) "property into or for which property taken illegally has been converted," owing to the difficulty in tracing such things.

18. *Ibid.*, s. 3(1)(b).

19. *Ibid.*, s. 3(1)(c). See the definition of that term in Recommendation One, s. 3(3).

things that may be loosely described as forensic body samples. These are governed by the provisions of Part Three (*Obtaining Forensic Evidence*) of this Code.

"Objects of seizure" does not specifically include instruments of crime. By contrast, the present law in some circumstances does permit the seizure of instruments of crime.²⁰ For the most part, instruments of crime will be covered by our definition of objects of seizure, since things used to commit a crime will often constitute potential evidence of a crime. Our definition might also cover things that in themselves would be illegal to possess or things that may be seized on a protective search incident to arrest. Under our scheme, these are justifiable grounds for seizing things that are coincidentally instruments of crime and constitute the appropriate ambit of the seizure power in this area of the law.²¹

Our definition "peace officer" is similar, but not identical, to that in Report 31. As promised,²² we have given further thought to whether the term, as it is used in this Code, ought to include "justice of the peace." To avoid any potential for the mixing of investigative and adjudicative functions, we have decided that it should not.

The definition "photograph" is straightforward and broad. It covers not only photographs taken from a usual camera, but also photographs resulting from the use of an X-ray machine. It is designed to accomplish the purposes detailed in section 78 in Part Three (*Obtaining Forensic Evidence*) and Division IX of Chapter III of Part Six (*Disposition of Seized Things*). However, the power to use an X-ray machine to obtain images of the inside of a person's body is strictly controlled by section 60 in Part Three.

The definition "prescribed" alerts the reader that various items, such as the fees for copying information or the forms for the applications, warrants or orders set out in this draft legislation, are to be prescribed by regulation. The power to prescribe these items by regulation is not set out in this volume of our Code. Rather, empowering sections will appear when the entire Code of Criminal Procedure is completed and consolidated. The forms will appear in that consolidated Code as well.

"Unilaterally" is the English term that replaces the Latin term *ex parte*.

20. Present *Code* s. 487(1)(c) allows a justice to issue a search warrant for anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant. Section 489 allows a person who executes a search warrant to seize, in addition to the things mentioned in the warrant, anything that the person believes has been obtained by or has been used in the commission of an offence. Section 11 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, allows a peace officer, when carrying out a lawful search under that Act, to seize anything by means of or in respect of which the officer believes on reasonable grounds an offence under that Act has been committed. Section 16(2) of that Act allows a court, after conviction, to order forfeiture of a thing seized under section 11 which is a conveyance.

21. For a more complete discussion of the Commission's approach to the seizure of instruments of crime, see: *Police Powers: Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (Ottawa: Supply and Services Canada, 1983) at 153-155; Report 24 at 14-15.

22. See Report 31, note 11 at 13.

CHAPTER III GENERAL PROVISIONS

Common law
powers replaced

3. The provisions of Parts Two to Seven replace any common law powers of a peace officer, in relation to the investigation of a crime, to

(a) search a person, place or vehicle, seize a thing or retrieve a confined person, and maintain custody of and dispose of seized things;

(b) carry out or have carried out an investigative procedure to which Part Three (*Obtaining Forensic Evidence*) applies;

(c) take or have taken samples of a person's breath or blood for the purpose of determining the presence or concentration of alcohol in the person's blood; and

(d) intercept or have intercepted, by means of a surveillance device, a private communication.

COMMENT

The provisions of this volume of the Code on police powers replace entirely any common law powers which the police presently have that fall within the subject-matter referred to in this section.

Warning or
informing person

4. A peace officer who is under a duty to warn a person or to tell a person anything shall do so in a language and in a manner understood by the person.

COMMENT

The purpose and operation of this provision require little explanation or elaboration. The duty to warn or inform is imposed on peace officers by several provisions of this Code.

Shortening
notice period for
application

5. (1) The period of notice required for any application may be shortened if the persons to whom the notice must be given consent, or if a justice so orders.

Order shortening
notice period

(2) A justice may, on an application made unilaterally, make an order shortening a period of notice if satisfied that doing so would be reasonable in the circumstances and would not prejudice any person to whom the notice must be given.

Expediting
hearing

6. A justice may give any directions considered necessary for expediting a hearing.

Execution in
province

7. A warrant or order issued by a justice may be executed or carried out anywhere in the province in which it is issued, unless a particular location is specified in the warrant or order.

Criminal Code, s. 487(2)

COMMENT

This provision is designed, in a sense, to render uniform the jurisdiction of justices to issue orders or warrants under this Code, and to dispense with the current requirement to have some warrants “backed”²³ (*i.e.*, endorsed) by other justices in the same province who are entitled to exercise jurisdiction in the territorial division where the warrant is to be executed. We have not done away with all backing requirements. Section 36 in Part Two (*Search and Seizure*) includes a requirement that search warrants from another province be backed by a justice of the province where they will be executed. However, we doubt the value of maintaining an intraprovincial backing requirement, having weighed the cumbersomeness of the formality against the additional protection it offers.

Presumption of
authenticity of
warrant or order

8. An original warrant or order purporting to be signed by a justice is, in the absence of evidence to the contrary, proof of the authenticity of the warrant or order, without proof of the signature of the justice appearing to have signed it.

COMMENT

This provision dispenses with the need to prove, as a matter of course, the authentic nature of a warrant or order relied on as authority to do the acts it describes. Note, however, that this section refers only to the *original* of a warrant or order. A peace officer’s facsimile copy of a warrant obtained by telephone or other means of telecommunication, therefore, would not have the same evidentiary effect. Other provisions, contained in subsequent Parts of this Code, make it clear in fact that “[i]n any proceeding in which it is material for a court to be satisfied that [a particular act] was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that [the particular act] was *not* authorized by a warrant.”²⁴

23. See *Criminal Code*, s. 487(2).

24. See ss. 41 (search or seizure), 70 (carrying out of an investigative procedure), 120 (taking of a blood sample), 206 (interception of a private communication).

CHAPTER IV GENERAL APPLICATION PROCEDURES FOR WARRANTS

DIVISION I INTERPRETATION

Application of
Chapter

9. This Chapter applies to applications for warrants under Part Two (*Search and Seizure*), Part Three (*Obtaining Forensic Evidence*) and Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).

DIVISION II PROCEDURE ON HEARING APPLICATION

Hearing evidence

10. (1) A justice to whom an application for a warrant is made may question the applicant and hear or receive other evidence, including evidence by affidavit based on information and belief.

Questioning
deponent

(2) Where affidavit evidence is received, the justice may question the deponent on the affidavit.

Evidence on oath

(3) The evidence of any person shall be on oath.

Report 24, s. 10

COMMENT

Subsection (1) of this provision is designed to provide a broad base of sworn information (by subsection (3)) to a justice who is being asked to issue a warrant. Subsections (1) and (2) enable the justice to “go behind” a warrant application in order to ascertain, in an active and effective manner, whether the requirements for issuing a warrant have been met. In so doing, these subsections seek to guard against issuing warrants in inappropriate circumstances, against the consequent quashing of warrants, and against infringement of the rights of persons under the *Canadian Charter of Rights and Freedoms* (e.g., the right not to be subjected to “unreasonable search or seizure”²⁵).

Subsection (3) is to be read in the light of, and subject to, the provisions of section 14 of the *Canada Evidence Act*²⁶ relating to solemn affirmation.

25. Report 24 at 22.

26. R.S.C. 1985, c. C-5.

Recording oral application, evidence

11. (1) An application made orally and any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of an oral application or of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of an oral application or of oral evidence shall be certified as to time, date and accuracy.

Report 19, Part Two, rec. 2(2)
Criminal Code, s. 487.1(2)

COMMENT

This provision is designed to ensure the maintenance of records sufficient to allow for subsequent review. Because we have allowed generally for the making of oral warrant applications (see subsections 22(2), 57(2), 91(2) and 129(1)) and the hearing of oral evidence, section 11 expands slightly upon our recommendation in Report 19²⁷ (now embodied in subsection 487.1(2) of the present *Criminal Code*) relating to the recording of applications for warrants obtained by telephone or other means of telecommunication.

Procedure for issuing warrant on application by telephone

12. Where a warrant is issued on application made by telephone or other means of telecommunication, the justice shall

(a) complete the warrant; and

(b) transmit two copies of the warrant to the applicant, or direct the applicant to complete two copies of it.

Report 19, Part Two, rec. 6(a), (b)
Criminal Code, s. 487.1(6)(a), (b)

COMMENT

This section sets out the procedure for the completion of warrants obtained by telephone or other means of telecommunication. These are ordinary warrants and are not a distinct class of warrants. Only the procedure for obtaining the warrant differs. These differences arise and are necessitated by the physical separation of the issuing judge or justice from the applicant peace officer. Although our draft statute only speaks in terms of “warrants,” we will, throughout the comments to this Code, use the term “telewarrants” interchangeably with warrants that are obtained by telephone or other means of telecommunication. Paragraph (a) of section 12 is aimed at ensuring that an accurate record of an issued warrant is kept, should there be any discrepancy between the warrant issued by the justice and copies completed by an applicant peace officer under the justice’s direction in accordance with paragraph (b).²⁸ Paragraph (b) expands

27. Part Two, rec. 2(2).

28. Report 19 at 88.

slightly on the wording which we recommended in Report 19,²⁹ and which now appears in paragraph 487.1(6)(b) of the *Criminal Code*, by allowing the justice to “transmit two copies of the warrant to the applicant” In doing so, it dispenses with the need for the applicant to complete the copies by hand in all cases. Where the applicant has submitted a warrant application by facsimile machine, for example, the use of the same technology to place exact copies of the signed warrant in the applicant’s hands would clearly be the most efficient way to proceed.

DIVISION III FILING

Filing
application,
evidence, warrant

13. A justice to whom an application for a warrant is made shall, as soon as practicable, have the following filed with the clerk of the court for the judicial district in which the application was received:

- (a) the application received by the justice, or the record of the application or its transcription;**
- (b) the record of any oral evidence heard by the justice or its transcription;**
- (c) any other evidence received by the justice; and**
- (d) if a warrant is issued, the original warrant.**

Criminal Code, s. 487.1(6)(c)

COMMENT

The object of this provision is to ensure the maintenance and availability of the material upon which a warrant is based, so that those persons affected by the execution of the warrant can later find out if the warrant was properly issued. Section 13 sets out what must be filed. If the application is in written form, it must be filed. If the application is made orally, then the record of the oral application (*e.g.*, a tape recording), or the transcription of the record of the oral application, must be filed. Along with the application, any other supporting material must be filed, such as the record of oral testimony of witnesses or any affidavit evidence. Finally, the result of a successful application — the original warrant issued — must be filed. Although section 13 specifies the judicial district in which the application was received as the place of filing, it must be read in the light of section 14.

Notice of
out-of-district
execution

14. (1) A peace officer who executes a warrant in a judicial district other than the one in which it was issued shall, as soon as practicable, advise the clerk of the court for the

29. Part Two, rec. 6(b).

judicial district in which the warrant was issued of the place of execution.

Filing material
in district where
warrant executed

(2) After being so advised, the clerk of the court for the judicial district in which the warrant was issued shall have the material or a copy of the material listed in section 13 filed, as soon as practicable, with the clerk of the court for the judicial district in which the warrant was executed.

Criminal Code, s. 487.1(6)(c)

COMMENT

The aim of this provision is to ensure that material relating to an application for a warrant is filed where it is executed. As we noted in Report 19 (at 85), filing the material in that place is most likely to facilitate speedy access by persons affected by the seizure.

The two-step procedure contemplated by section 14 is made necessary by the possibility that a warrant may be executed at an unanticipated location.

PART TWO

SEARCH AND SEIZURE

DERIVATION OF PART TWO

LRC PUBLICATIONS

Police Powers — Search and Seizure in Criminal Law Enforcement, Working Paper 30 (1983)

Writs of Assistance and Telewarrants, Report 19 (1983)

Search and Seizure, Report 24 (1984)

Obtaining Forensic Evidence: Investigative Procedures in Respect of the Person, Report 25 (1985)

Disposition of Seized Property, Report 27 (1986)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, ss. 2, 101, 103, 164, 199, 320, 339(3), 395, 447(2), 487, 487.1, 488, 488.1, 489; Part XXVIII, Forms 1, 5, 5.1, 5.2

Food and Drugs Act, R.S.C. 1985, c. F-27, ss. 42, 51

Income Tax Act, R.S.C. 1952, c. 148; S.C. 1970-71-72, c. 63, s. 231

Narcotic Control Act, R.S.C. 1985, c. N-1, ss. 10-12, 14

INTRODUCTORY COMMENTS

This Part sets out the general procedures regulating the crime-related search for, and the seizure or retrieval of, “objects of seizure” and “confined” persons. (See the definition of these terms in sections 2 and 15, respectively. The search for, and seizure of, objects of seizure within a person’s body, including objects within the mouth, are dealt with separately in Part Three (*Obtaining Forensic Evidence*).

Part Two confers certain powers primarily on the police but also on others, and states the circumstances in which these powers may be acquired and the manner in which they should be exercised. Included are provisions specifying the circumstances in which a warrant may issue, the procedures to be followed in obtaining a warrant and the circumstances in which a search or seizure may be conducted without a warrant.

The search and seizure provisions in this Code replace the variety of search and seizure powers and procedures now found at common law, in the *Criminal Code* and in other federal crime-related statutes such as the *Narcotic Control Act*, the *Food and Drugs Act* and the *Income Tax Act*.³⁰ The basic goal is to better protect against unreasonable search and seizure while still providing for effective criminal investigation and law enforcement.

The *Canadian Charter of Rights and Freedoms* declares that “[e]veryone has the right to be secure against unreasonable search or seizure” (section 8),³¹ and that a law inconsistent with this right is “of no force or effect” (section 52). These declarations require that powers to search and seize — which impinge on such fundamental interests as the inviolability and dignity of the individual and the security and privacy of home, property and personal possessions — be carefully controlled.

We believe that legislation governing searches and seizures must incorporate the characteristics of “judiciality,” “particularity” and “accountability.”

In the landmark case of *Hunter v. Southam Inc.*,³² the Supreme Court of Canada held the obtaining of a warrant, where “feasible,”³³ to be a pre-condition to a valid search. In that case, the Court clearly incorporated the element we call “judiciality” into the warrant requirement. It stated that a statute authorizing a search or seizure is reasonable under the *Charter* if it requires that a neutral and detached arbiter determine, before authorizing a search, that there are reasonable and probable grounds (established on oath) to believe that an offence has been committed, and that there is evidence of that offence in the place to be searched.³⁴ This element of judiciality is an historically

30. See N.C. Brooks and J. Fudge, *Search and Seizure Under the Income Tax Act*, a Study Paper prepared for the Law Reform Commission of Canada (unpublished, 1985) at 64. The study concluded that investigatory search powers should be the same in all federal statutes and that powers broader than those set out in the *Criminal Code* could not be justified. Similarly, the Commission recommended, in Report 24, rec. 2(f) and 47-51, that special search and seizure provisions under the *Narcotic Control Act* and the *Food and Drugs Act* should be abolished.

31. A search is reasonable “if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable”: *R. v. Collins*, [1987] 1 S.C.R. 265, per Lamer J. at 278.

32. [1984] 2 S.C.R. 145.

33. *Ibid.* at 161.

34. *Ibid.* per Dickson J. at 159-168.

established characteristic of the warrant, that limits uncontrolled state intrusions on individual rights, and promotes the responsible use of search and seizure powers.

The requirement that the intrusion authorized be particularly identified has also become a characteristic of most Canadian search warrant legislation. We call this element "particularity." It requires, both in warrant applications and in the warrant itself, that the place to be searched, the items sought and the crime under investigation be clearly specified. Again, the ultimate purpose of requiring this detail is to limit and control state intrusions on individual rights.

The issuance of search warrants is now mainly a documentary process in Canada. Material and information supporting the issuance of a warrant must be reduced to writing or be recorded, and must be filed and made accessible to interested parties. This requirement facilitates accountability and subsequent review of the legality of any search or seizure that takes place.

In contrast, accountability and the potential for control and review are diminished when searches or seizures are conducted without warrant. A search or seizure without warrant depends solely on a judgment by the person conducting the search or seizure that the necessary pre-conditions for exercising the power have been satisfied. The authority to search or seize without warrant provides the opportunity for personal bias to influence decision-making. Accountability is impaired because objective supporting documentation or material need not be prepared, filed or made available either to persons affected or to the courts.

In our scheme, warrants are required wherever possible, so that discretionary intrusions by the state upon individual rights are carefully limited. This approach is consistent both with that of the Supreme Court of Canada in its interpretation of the *Charter* and with the aim of accountability. Accountability is enhanced by other provisions in this Part, such as that generally requiring search warrants to be executed "in the presence of a person who occupies or is in apparent control of the place or vehicle being searched . . ." (section 39), and that requiring unexecuted warrants to be returned with an explanation (section 34). Exceptions to the warrant requirement are clearly identified and restricted to searches conducted with consent, searches incident to arrest, searches conducted in exigent circumstances and, in limited and defined circumstances, the seizure of objects in "plain view."

For the benefit of the public as well as persons exercising search or seizure powers, provisions designed to promote the reasonable execution of the powers are included. Rules are clearly set out on such matters as: the general authority conferred by a warrant; the persons authorized to act under a warrant; the time when, and manner in which, a search or seizure may be made; the notification to be given to persons affected; and the procedure to be followed when a claim of privilege is made during a search.

CHAPTER I INTERPRETATION

Definitions	15. In this Part,
"confined" (<i>séquestrée</i>)	"confined" means confined or taken into custody unlawfully as defined in section 49 (confinement), 50 (kidnapping) or 51 (child abduction) of the proposed Criminal Code (LRC);
"night" (<i>nuit</i>)	"night" means the period between 2100 hours and 0600 hours on the following day;
"vehicle" (<i>véhicule</i>)	"vehicle" means a thing used or designed to be used as a means of transportation.

COMMENT

As noted, this Part applies not only to the search for and seizure of things, but also to the search for and retrieval of illegally detained persons. Because this Part is concerned, essentially, with crime-related searches, the definition "confined" is designed to limit the applicability of our search and retrieval provisions to circumstances in which the detention of a person constitutes a crime.

The definition "vehicle" is drafted widely to embrace all forms of conveyance, and is to be contrasted with the narrower definition of this term appearing in Part Four (*Testing Persons for Impairment in the Operation of Vehicles*). While the definition in Part Four is designed to limit the applicability of our breath and blood test provisions to cases involving conveyances that are not humanly powered, the definition in section 15 above recognizes the illogicality of distinguishing between different types of vehicles on this basis when dealing with the power to search.

Meaning of power to search person	16. The power to search a person, otherwise than with consent, for an object of seizure or a confined person means the power to <ul style="list-style-type: none">(a) stop and detain the person;(b) carry out a protective search of the person;(c) search anything carried by the person in which it is reasonable to believe that the object of seizure or confined person might be found;(d) search those areas of the surface of the person's body where it is reasonable to believe that the object of seizure might be found;
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(e) search those areas of the person's clothing where it is reasonable to believe that the object of seizure or confined person might be found; and

(f) remove any article of the person's clothing that it is reasonable and necessary to remove to see whether the person is carrying or concealing the object of seizure or confined person, or to effect seizure or retrieve the confined person.

COMMENT

Except for the general *Charter* requirement of “reasonableness,” there is, at present, little statutory guidance as to the permitted scope of personal searches. The police have therefore effectively acquired a broad but poorly defined power in this area. Certain provisions in this Chapter, together with certain provisions in Part Three relating to investigative procedures, further the goal of clarity by defining with precision the nature and limits of the power. Section 16 accomplishes much of this task by particularizing and defining the power to conduct external searches of persons for objects of seizure and confined persons.

The *Criminal Code* does not generally allow for a warrant to search a person.³⁵ A warrant under subsection 487(1) of the *Code* may only authorize a search of a “building, receptacle or place.” Crime-related searches of the person, therefore, are mainly done either pursuant to the common law power of search incident to arrest, or with consent. These two sources of authority to conduct personal searches are continued in this scheme. In addition, provision is made for the obtaining of a warrant to search a person for an object of seizure or a confined person, and for dispensing with the warrant requirement in exigent circumstances.

Paragraph (a) of section 16 is designed to facilitate the conducting of a personal search in a very basic way. It makes clear that there need not be independent authorization for stopping or detaining the person to be searched. The absence of independent authorization, therefore, will not render the detention arbitrary (see section 9 of the *Charter*) or support a civil claim for false arrest.

Paragraph (b) recognizes that a non-consensual personal search (whether legally authorized or not) may provoke unpredictable reactions, and that anyone authorized to search a person must have the power to take appropriate steps for self-protection. In order to achieve the purpose of protection, paragraph (b) does not require any actual belief that the person is carrying a weapon or escape tool; rather, it allows a protective search to be carried out simply as a precaution. The precise scope of a protective search is specified in section 17.

The remaining paragraphs of section 16 recognize that the scope of a personal search must bear a rational relationship to the purpose for which the search is authorized, but must be broad enough to enable those given the power to search to find and

³⁵ See, however, s. 395(1) dealing with warrants to search for “precious metals . . .” and so forth.

to seize what they are authorized to look for. The authority to search a person is not the same as a discretion to conduct an exploratory search of any part of the body or clothing until an object is found. Regard must first be had to the characteristics of what is sought, and the search must be confined to areas where it might reasonably be found.³⁶

The Supreme Court of Canada, in the recent case of *Cloutier v. Langlois*,³⁷ described the scope of the power to search a person incident to arrest for evidence as being a power to “frisk” the person. “Frisk” was stated to mean:

... a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual. Pockets may be examined but the clothing is not removed and no physical force is applied.³⁸

Our formulation of the scope of the power, particularly paragraph 16(f), allowing for the removal of clothing, might appear to be in some respects broader than that stated by the Court. However, our statement of the officer’s basis for the exercise of the power, set out in section 44, is in some respects narrower. Under our scheme, reasonable grounds are necessary to search for evidence, as distinct from searching for weapons (*i.e.*, a protective search). In contrast to *Cloutier*, the mere fact of arrest is not, under this scheme, a sufficient basis upon which to ground a warrantless search for evidence, in the absence of exigent circumstances. In our view, the overall balance struck in this legislation ensures that these searches will meet *Charter* standards.

Meaning of
protective search

17. The power to carry out a protective search of a person means the power to

- (a) frisk the person and search the person’s clothing and anything carried by the person or within the person’s reach for weapons and instruments of escape;**
- (b) if the frisk or search discloses that anything believed on reasonable grounds to be a weapon or instrument of escape is located under or in the person’s clothing, remove any article of the person’s clothing that it is reasonable and necessary to remove to effect a seizure; and**
- (c) seize anything believed on reasonable grounds to be a weapon or instrument of escape.**

Report 24, s. 20(a)

36. Note in this regard the requirement of s. 50, that every search of the person should respect the person’s dignity and involve the least degree of intrusion and invasion of privacy as is reasonably practicable. Section 17 should also be read in conjunction with s. 55 (obtaining forensic evidence) which makes it clear that the right to carry out a personal search does not, for example, include the power visually to inspect the naked body, manually probe body cavities, or perform surgical or other “medical” procedures, even where resort to such procedures might reasonably be expected to reveal the object sought. Such highly intrusive or potentially dangerous procedures are separately regulated with special safeguards.

37. [1990] 1 S.C.R. 158.

38. *Ibid.* at 185.

COMMENT

Section 17 defines the scope of the power (conferred by paragraph 16(b) and section 43) to conduct a protective search of the person. Paragraph (a) sets out what may be searched for: weapons and instruments of escape. It enables someone conducting a protective search to look for these things by frisking the person, searching the person's clothing, and searching anything carried by the person or that is within the person's reach. In this context, "frisk" has the meaning (previously referred to in the comment to section 16) given to it by the Supreme Court of Canada in the *Cloutier* case. The "reach" limitation defines the ambit of the search in a way that relates the scope of the search to its purpose; someone who conducts a protective search only needs to search those places that might realistically contain a weapon or an instrument of escape.

Paragraphs (b) and (c) set out additional powers facilitating seizure. These flow naturally from the general power to conduct the protective search.

The mechanism for returning or otherwise disposing of things seized temporarily during protective searches under the authority of this section is regulated by section 54.

Meaning of
power to search
vehicle

18. The power to search a vehicle, otherwise than with consent, for an object of seizure or a confined person means the power to stop and detain the vehicle, enter the vehicle and search those areas of the vehicle, or of anything within the vehicle, where it is reasonable to believe that the object of seizure or the confined person might be found.

Report 24, ss. 14, 28(2)

COMMENT

Sections 18 and 19 parallel, for vehicles and places, the scope provision for personal searches. (See section 16 and the comment thereto.)

The basic power to search a vehicle or place presupposes the inclusion of a power to stop, detain and enter a vehicle, or to enter a place. The further powers given in these sections, relating to the areas of vehicles or places that may be searched, once again are designed both to enable those conducting searches to find what is being sought, and to restrict the scope of searches in a rational manner.

Meaning of
power to search
place

19. The power to search a place, otherwise than with consent, for an object of seizure or a confined person means the power to enter the place and search those areas of the place, or of anything within the place, where it is reasonable to believe that the object of seizure or the confined person might be found.

Report 24, ss. 14, 28(2)

COMMENT

See the comment to section 18.

Meaning of
power to seize

20. The power to seize means

(a) in the case of a thing, the power to take possession or control of the thing; and

(b) in the case of funds in a financial account, the power to take control over the funds.

Report 24, s. 4

COMMENT

Taking physical possession of a thing is the traditional approach to effecting seizure, and is reflected in the present *Criminal Code*. Section 20 incorporates this traditional approach and expands upon it. Where a seizure is authorized by law, it will be possible to carry it out by taking control of the thing or funds without necessarily taking physical possession.

In the case of funds in a financial account, it is not technically possible to take physical possession and a seizure may be made only if control is assumed over the account. Alternatively, some seized things may not easily be moved to, or stored at, locations in police control. Allowing seizure by taking control should thus reduce administrative and storage burdens now imposed on the police.

Section 20 also reflects the Commission's support for the general principle that interference with an individual's interest in maintaining possession of property should be minimized wherever possible. This section encourages the use of an alternative to taking physical possession (*i.e.*, taking control) when such an approach can be as effective and will not prejudice the law enforcement interest.

Unlike paragraph 4(b) of Recommendation One in Report 24, section 20 does not envision a seizure being made by "taking photographs or other visual impressions of an object of seizure." We have not implemented the recommendation for three basic reasons.

First, the recommendation was partly intended to encourage the use of methods of seizing "information"³⁹ that would be less intrusive than physically taking things revealing the information.⁴⁰ It was thought that seizure of the information "in secondary or recorded form"⁴¹ under the authority of paragraph 4(b) would accomplish this goal. However, we have come to the conclusion that it is not technically possible to seize information in any event. As already noted,⁴² we have deleted "information" from the definition "objects of seizure"⁴³ and section 20 now defines only the power to seize

39. Report 24, rec. 1, s. 3, then included information within the proposed definition of "object of seizure."

40. *Ibid.* at 15-16.

41. *Ibid.* at 15.

42. See comment to s. 2.

43. See s. 2.

things and funds in a financial account. Thus, seizure of information recorded on or contained in a thing may be effected, under section 20, only by the seizure or taking control of the thing on which the information is recorded. However, the basic goal of the original recommendation can still be realized, and the intrusion and deprivation minimized, by use of the alternative procedures contained in sections 266 to 269. In the case of information contained in a seized thing, a peace officer may make a copy of the information which, when properly certified, is admissible in evidence and is to be given the same probative force as the information itself. If this procedure is used, the thing originally seized may be promptly returned.

Second, many sections of Part Six (*Disposition of Seized Things*) (e.g., those relating to the custody of and access to seized things, the sale of perishables and the destruction of dangerous things) can properly and logically apply only to things seized by taking physical possession or control.

Third, the recommendation can be applied only if accompanied by other provisions that would make the photograph or other visual impression admissible and give it the same probative value as the thing itself. However, we have concluded that such a blanket declaration as to probative value would not be appropriate in all cases, but rather could properly apply only in relation to information contained in, or to identify, seized things. It thus must be set out more narrowly and precisely than is done in the recommendation. Accordingly, we encourage the early return of these categories of things by providing, in the case of information, the already noted procedure and, for things requiring identification (usually things alleged to have been stolen), that a certified photograph of any thing seized in accordance with section 20 be admissible for the purpose of identifying that thing and, in the absence of evidence to the contrary, that it have the same probative force, for identification purposes, as the seized thing itself.

Thus, to make clear what the provisions of Part Six apply to, we have restricted the meaning of seizure and have placed the separate power to take photographs and make copies in sections 266 and 267.

CHAPTER II

SEARCH AND SEIZURE WITH A WARRANT

DIVISION I

APPLICATION FOR SEARCH WARRANT

Applicant

21. Any person may apply for a search warrant.

COMMENT

At present, anyone may apply for a search warrant under section 487 of the *Criminal Code*. Applications for telewarrants, however, may only be made by peace

officers.⁴⁴ Applications by private citizens for search warrants are quite rare, and allegations that citizens are abusing the procedure are scarce (perhaps non-existent). Section 21 continues to allow such applications to be made; however, sections 25 and 35 make it clear that only a peace officer may execute a warrant.

Subsection 22(1) continues the requirement that telewarrant applications be made by peace officers.

Application in person or by telephone

22. (1) An application for a search warrant shall be made in person or, if the applicant is a peace officer and it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally, in private and on oath, orally or in writing.

Report 24, s. 6

Form of written application

(3) An application in writing shall be in the prescribed form.

Report 19, Part Two, rec. 2(1)

Report 24, s. 6

Criminal Code, ss. 487(1), 487.1(1)

COMMENT

Section 22 sets out how a search warrant application is to be made. The procedure covers all search warrant applications and replaces a number of *Criminal Code* sections containing diverse requirements.⁴⁵

Subsection (1) states the two methods currently provided for in the *Criminal Code*.

Notwithstanding our belief that better and greater use should be made of new and simpler technologies, we nevertheless favour the “in person” application as the procedure that is normally to be used. Telewarrant applications should remain an exception to the rule.

Subsection (2), which deals with the manner in which the application is made, begins by requiring that the application be unilateral⁴⁶ and in private,⁴⁷ in order to enhance the effectiveness of the procedure. Subsection (2) retains the requirement that the decision to issue a warrant be based on information given on oath. However, unlike the present law, it allows applications in person to be made orally. In so doing, it

44. *Criminal Code*, s. 487.1(1), adopting a previous Commission recommendation. See Report 19, Part 2, rec. 2(1). The comments to this recommendation (at 84) justify the restriction on the basis that telewarrant procedures are designed to facilitate the access by peace officers to the justice of the peace.

45. See ss. 103(1), 164(1), 199(1), 320(1), 395(1), 487(1), and 487.1(1). See also s. 12 of the *Narcotic Control Act* and ss. 42(3) and 51 of the *Food and Drugs Act*.

46. “Unilaterally” is defined in s. 2 to mean “without notice to any other party being required.”

47. “In private” is defined in s. 2 to mean, in relation to a unilateral application, “without any member of the public or any party other than the applicant being present.”

recognizes the existence of modern methods for recording evidence in support of an application. As long as an accurate record is made of the material and evidence in support of an application, accountability is maintained. As a result of the requirements contained in subsection 11(1), an oral application in person will only be entertained if the justice has the means to record verbatim the application and any additional evidence presented. Since the justice may “question the applicant and hear or receive other evidence . . .” under subsection 10(1), an oral application can impart as much information to the justice as a written application.

To better realize the goal of particularity, subsection (3) requires that an application be made in accordance with a prescribed form. Subsection 487(1) of the present *Criminal Code* also prescribes a form for an information on oath (Form 1), but its adequacy has been questioned. The problems with the *Code*’s Form 1 are more fully discussed in the comment to section 24.

Justice on
application in
person

23. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on
application by
telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

Report 19, Part Two, rec. 2(1)
Criminal Code, s. 487.1(1)

COMMENT

Section 487 of the *Criminal Code* does not now specify the place where an “in person” search warrant application should be presented. The warrant may be issued in a judicial district different from that in which the alleged offence occurred, and the “building, receptacle or place” to be searched may be outside the judicial district of the issuing justice. Section 487 only requires that the application be made to a justice. Subsection (1) of section 23, however, requires the application to be made to a justice in a location having a substantial connection with the investigation.

On the other hand, the nature of the telewarrant application is such that insistence on a similar requirement for the place of application is not practical or necessary. In some jurisdictions, a centralized system for the receipt of applications has been established. For example, in Quebec all applications are directed to and considered by designated justices in Montreal. With such systems in place, telewarrant applications are most likely to be considered by justices having no connection with the location of the investigation. This is now recognized in subsection 487.1(1) of the *Criminal Code*, which requires that telewarrant applications be made to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction. Subsection (2) preserves the essence of the present approach. However, in accordance with the new Unified Criminal Court structure that we propose, it provides that the Chief Justice of

the Criminal Court shall designate the justices who may receive telewarrant applications.

Contents of
application

24. An application for a search warrant shall disclose

- (a) the applicant's name;**
- (b) the date and place the application is made;**
- (c) the crime under investigation;**
- (d) the person, place or vehicle to be searched;**

Report 19, Part Two, rec. 2(4)(b)
Criminal Code, s. 487.1(4)(b)

- (e) if the application is for a warrant to search for and seize objects of seizure,**

- (i) the objects of seizure sought,**
- (ii) the applicant's grounds for believing that the objects of seizure will be found on the person or in the place or vehicle, and**
- (iii) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person, place, vehicle or objects of seizure and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;**

Report 19, Part Two, rec. 2(4)(b), (c)
Report 24, ss. 5, 7
Criminal Code, s. 487.1(4)

- (f) if the application is for a warrant to search for and retrieve a confined person,**

- (i) the person sought,**
- (ii) the applicant's grounds for believing that the person will be found in the place or vehicle or concealed on the person to be searched, and**
- (iii) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person, place, vehicle or confined person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;**

Report 24, ss. 5, 7, 28(2)

- (g) if the applicant requests authority for the warrant to be executed during the night, the applicant's grounds for**

believing that it is necessary for the warrant to be executed during the night;

Report 24, s. 12

(h) if the applicant, on application made in person, requests authority for the warrant to be executed more than ten days after it is issued, the applicant's grounds for believing that the longer period is necessary; and

Report 24, s. 13

(i) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

Report 19, Part Two, rec. 2(4)(a)
Criminal Code, s. 487.1(4)

COMMENT

The *Criminal Code* now provides little guidance as to the form and content of the documentation required in an application for a search warrant. Some guidance is provided in Form 1, relating to section 487 search warrants. However, this form does not properly align with the substantive and probative requirements of section 487.⁴⁸ This state of affairs has led to improvisations and hence, to considerable variation in the form and content of applications, leading, on occasion, to reliance on forms that actually obscure the meaningful disclosure of the very detail required by law.

In contrast to the present law, section 24 sets out the mandatory, specific ingredients of every search warrant application. This detailed listing should reduce the number of search warrants approved on vague or deficient criteria and, by ensuring a better record of the application, should facilitate later review.

A separation of “substantive” and “probative” elements is not now required in an application for a search warrant under section 487 of the *Criminal Code*. However, this kind of separation is required in an application for a telewarrant.⁴⁹

Paragraphs (a) and (b) require the inclusion of certain basic formal elements, and are self-explanatory. The crime under investigation must be disclosed under paragraph (c).

Paragraph (d) and subparagraphs (e)(i) and (f)(i) set out the essential “substantive” requirements. They require the applicant to disclose what or who is to be searched and the object or person being sought.

Subparagraphs (e)(iii) and (f)(iii), which will not always be relevant, incorporate a disclosure requirement pertaining to prior applications that is currently only applicable

48. See the critical comments of Osler, J. in *R. v. Colvin, Ex Parte Merrick* (1971), 1 C.C.C. (2d) 8 at 11 (Ont. H.C.J.).

49. *Criminal Code*, s. 487.1(4), which adopted a Commission recommendation. See Report 19, Part Two, rec. 2(4); Report 24, rec. 6, comment at 17-18 and Appendix A at 75-76.

in the case of telewarrant applications.⁵⁰ A requirement of this nature should serve to inhibit forum shopping (which can undermine the judiciality of warrant proceedings), and help to curtail unjustified multiple applications. We see no reason, therefore, why it should not be made applicable to all search warrant applications.

Subparagraphs (e)(ii) and (f)(ii) state the key “probative” ingredients of any search warrant application; they relate directly to criteria that must be satisfied under subsections (1) and (2) of section 25 before a justice may issue a search warrant.

Paragraph (g), which will only be relevant in some search warrant applications, relates directly to the criteria that must be satisfied under section 28 before a justice may authorize the execution of a search warrant by night.

A search is a distressing and invasive procedure at the best of times. Night searches potentially add to the upset and intrusion. Our proposals encourage searches by day whenever possible. Section 488 of the *Criminal Code* provides that warrants issued under sections 487 and 487.1 must be executed by day unless night execution is specifically authorized. However, section 488 fails to specify criteria for granting authorizations to search at night. Further, warrants issued under some federal statutes (e.g., under section 10 of the *Narcotic Control Act*) may be executed at any time. Night searches are particularly disruptive of normal life and privacy but may be necessary, in some cases. Section 28 permits a night search to be authorized where the applicant has specified grounds for believing that it is necessary, and where “the justice is satisfied there are reasonable grounds for that belief.” The onus on the applicant can be discharged by proof that the object of seizure will be removed or destroyed if night execution is not allowed.

Paragraph (h), which again will only be relevant in some search warrant applications, relates directly to the criterion that must be satisfied under subsection 31(3) before a justice may authorize execution of a search warrant beyond the normal ten-day expiration period. The *Criminal Code* does not now require that searches with warrant be conducted within a specified period of time. However, a reasonable proximity between the time of issuance and execution of the warrant is desirable, so as to ensure that a warrant is executed in essentially the same circumstances that prompted the issuer to grant it.⁵¹ If a longer period than is normal for execution of the warrant is thought to be necessary, the applicant must justify an extension by setting out the grounds in the application itself.

Paragraph (i), concerning the necessity for the personal appearance of the applicant, will only be relevant in telewarrant applications. It relates directly to the additional criterion that must be satisfied under section 26 before a justice may issue a search warrant pursuant to an application “made by telephone or other means of telecommunication.” In most cases, “impracticability” will be synonymous with “urgency,” but it is not necessarily limited to such circumstances alone. A telewarrant should be available whenever circumstances of time or distance make it inappropriate

50. *Criminal Code*, s. 487.1(4)(d). An analogous requirement exists pertaining to previous wiretap applications: see *Criminal Code*, s. 185(1)(f).

51. See Report 24, rec. 3.

to insist on the applicant's personal appearance. Such circumstances will be encountered most frequently in remote areas where the need for a warrant may be pressing but too much time would be taken to travel to a location where a justice may be seen personally. On the other hand, this dispensation is not intended as a mere convenience for peace officers who simply prefer not to appear in person. The justice, in deciding the issue, has a measure of discretion equivalent to that enjoyed in deciding to issue the warrant itself.⁵²

DIVISION II ISSUANCE OF SEARCH WARRANT

Grounds for
issuing warrant
for object of
seizure

25. (1) A justice who, on application, is satisfied there are reasonable grounds to believe that an object of seizure will be found on a person or in a place or vehicle may issue a warrant authorizing a peace officer to search the person, place or vehicle for the object of seizure and to seize the object of seizure.

Report 19, Part Two, rec. 2(5)(c)

Report 24, s. 5

Criminal Code, ss. 487(1), 487.1(5)

Grounds for
issuing warrant
for confined
person

(2) A justice who, on application, is satisfied there are reasonable grounds to believe that a confined person will be found in a place or vehicle or concealed on the person to be searched may issue a warrant authorizing a peace officer to search the person, place or vehicle for the confined person and to retrieve the confined person.

Report 24, ss. 5, 28(2)

COMMENT

Section 25 replaces differently formulated requirements in various sections of the *Criminal Code* and other federal statutes.⁵³ Unlike the current *Code*'s main search warrant provision (section 487), it provides general authority for the issuance of a warrant to search a person. The scope of "[t]he power to search a person, otherwise than with consent, for an object of seizure or a confined person" is set out in section 16. The scope of the powers to search vehicles or places, "otherwise than with consent, for an object of seizure or a confined person" is defined in sections 18 and 19. Section 37 further sets out what may be done "under the authority of a search warrant."

Subsection (1) establishes the basis for issuing a warrant to search for and seize an object of seizure. The wording is permissive. The justice has a discretion, to be exercised judicially, concerning whether to issue the warrant.⁵⁴ The general approach of the

52. Report 19, Part Two, note 10 at 102.

53. See *Criminal Code*, ss. 103(1), 164(1), 199(1), 320(1), 395(1), 487(1), 487.1(5); *Narcotic Control Act*, s. 12; *Food and Drugs Act*, s. 42(3).

54. See *Descoteaux v. Mierzewski*, [1982] 1 S.C.R. 860, per Lamier, J. at 888-890.

present law continues. In determining whether to issue a search warrant, the justice must apply an objective test⁵⁵ and consider whether he or she is satisfied, based on the facts presented in the application, that there are reasonable grounds to believe that an object of seizure, related to a specific offence, is to be found on a specified person, or in a place or vehicle that is to be searched. The “reasonable grounds to believe . . .” criterion requires more than a mere suspicion, but the justice is not required to decide whether the mentioned crime has been committed, or whether the objects sought will, in fact, establish the commission of the crime.⁵⁶ The things or persons sought, the location or person to be searched and the particular crime under investigation must be linked, to the point that there are reasonable grounds to believe both that the things sought are in the premises to be searched⁵⁷ and that those things are objects of seizure.⁵⁸

Subsection (2) gives the justice a novel authority to issue a warrant to search for and retrieve a “confined” person (as defined in section 15). It is now included out of an abundance of caution to recognize clearly and directly a search for this purpose as being a legitimate aspect of police powers. The justice, in deciding whether to issue the warrant, must approach the matter in the same manner as an application for a warrant to search for an object of seizure.

Additional
ground if
application by
telephone

26. If the application is made by telephone or other means of telecommunication, a warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

Report 19, Part Two, rec. 2(5)
Criminal Code, s. 487.1(5)(b)

COMMENT

Section 26 sets out the additional test that the justice must apply if the application is brought by telephone or other means of telecommunication. Its equivalent is found in paragraph 487.1(5)(b) of the current *Criminal Code*.

Conditions
relating to
execution

27. A justice who issues a search warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

55. *Re Bell Telephone Co. of Canada* (1947), 89 C.C.C. 196 (Ont. H.C.), per McRuer, C.J. at 198.

56. *R. v. Johnson & Franklin Wholesale Distributors Ltd.* (1972), 16 C.R.N.S. 107 (B.C.C.A.); leave to appeal to S.C.C. refused at 114 (C.R.N.S.).

57. *R. v. Johnson & Franklin Wholesale Distributors Ltd.*, [1973] 5 W.W.R. 187 (B.C.C.A.).

58. See *Re Worrall* (1965), 44 C.R. 151 (Ont. C.A.).

COMMENT

Section 27 gives the justice a new discretion to impose conditions governing the execution of the warrant. Since the justice will be allowed a wider scope of inquiry on the application than was formerly the case (and should thus have a more thorough appreciation of all of the surrounding circumstances), a power to include such conditions is appropriate. One example of how this power might be exercised is if it is anticipated that the search will require the handling of privileged material. In such a case, the justice may consider it appropriate to impose special conditions on the manner of executing the warrant so as to safeguard the contentious material.

Authorizing
execution by
night

28. If the applicant has specified grounds for believing that it is necessary for the search warrant to be executed during the night and the justice is satisfied there are reasonable grounds for that belief, the justice may, by the warrant, authorize its execution during the night.

Report 24, s. 12
Criminal Code, s. 488

COMMENT

Section 28 empowers the justice to authorize execution of the search warrant by night. It should be read together with paragraph 24(g), which sets out the information that must be supplied to the justice to justify this authorization. Unlike section 488 of the present *Code*, section 28 includes criteria for deciding whether to allow execution by night.

Form of warrant

29. A search warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

Report 19, Part Two, rec. 2(6)(a)
Criminal Code, ss. 487(3), 487.1(6)(a)

COMMENT

In later volumes of this Code, we will be providing specific model forms setting out the contents of search warrants in general.⁵⁹ Subsection 487(3) of the *Criminal Code* now provides that a search warrant issued under section 487 “may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.” While the use of Form 5 is not mandatory, the substance of the form must be incorporated in some manner.⁶⁰ However, the present form is deficient and may cause confusion. On its face, for example, the form does not require that an alleged offence be set out or in any way related to the things searched for.

A warrant should disclose the nature of the offence in relation to which evidence is sought precisely enough to enable anyone concerned to understand it. It should

59. In our previous Reports we provided this detail only for telewarrants: Report 19, Part Two at 98.

60. *Rex v. Solloway Mills & Co.* (1930), 53 C.C.C. 261 (Alta. S.C.A.D.), per Hyndman, J.A. at 263.

describe the location to be searched with sufficient accuracy to enable one to know the precise premises or vehicle in relation to which the search has been authorized. Accordingly, to prevent “fishing expeditions” and to achieve particularity more effectively than do the forms suggested in the *Criminal Code*, this section contemplates mandatory prescribed forms for all search warrants as well as a specific list of the items and information they are to contain.

Contents of
warrant

- 30. A search warrant shall disclose**
- (a) the applicant’s name;**
 - (b) the crime under investigation;**
 - (c) the objects of seizure or confined person sought;**
 - (d) the person, place or vehicle to be searched;**
 - (e) any conditions imposed relating to its execution;**
 - (f) the date it expires if not executed;**
 - (g) the date and place of issuance; and**
 - (h) the name and jurisdiction of the justice.**

DIVISION III EXPIRATION OF SEARCH WARRANT

Warrant issued
on application in
person

31. (1) A search warrant issued on application made in person expires ten days after it is issued.

Shortening
expiration period

(2) A justice who is satisfied that a shorter expiration period is sufficient may issue a warrant with an expiry date that is less than ten days after the date of issue.

Extending
expiration period

(3) A justice who is satisfied there are reasonable grounds to believe that a longer expiration period is required may issue a warrant with an expiry date that is more than ten days but not more than twenty days after the date of issue.

Report 24, s. 13(1), (2)(a), (b)

COMMENT

Imposing a reasonable time-limit on the execution of search warrants is, in our view, necessary in the interests of particularity and judiciality; it ensures, to a reasonable degree, that warrants are not executed in circumstances that have altered radically from those contemplated by the justices issuing them.⁶¹

⁶¹ See Report 24 at 26.

The *Criminal Code* does not generally require that a search warrant be executed within a specified period (although a seven-day expiry period for warrants to search for obscene matter and crime comics may be inferred from subsections 164(2) and 320(2) of the *Code*). Our empirical research indicates that some issuers have attached deadlines for execution, and that warrants with expiry dates have been executed more promptly than those without deadlines.⁶²

Our research also reveals that most search warrants are executed within two days after issuance.⁶³ We therefore believe that a deadline of ten days for the execution of a search warrant issued on application made in person should generally be adequate; a longer period would undermine the rationale for the existence of expiry dates. Subsection 31(1) thus establishes that such search warrants expire ten days after being issued.

The discretion to issue a warrant having a later expiry date, given by subsection 31(3), makes a fixed longer deadline unnecessary. Subsection 31(2) also empowers the justice to set an expiry date less than ten days after the date of issue.

The power to shorten the expiry period, provided in subsection (2), may be exercised on the justice's own motion, and on the basis of the information in the application. As noted above, however, the power to extend the time will be exercised only if an extension is sought in the warrant application and the application specifies the applicant's grounds for belief that the longer period is necessary.

Warrant issued
on application
by telephone

32. A search warrant issued on application made by telephone or other means of telecommunication expires three days after it is issued.

Report 19, Part Two, rec. 2(9)

COMMENT

The telewarrant is designed for situations in which the need for a warrant is immediate and it is impracticable for the applicant to appear personally before the justice. This being so, we consider the three-day expiration period provided by this section to be ample.

Paragraph (c) of subsection 487.1(5) of the *Code* now provides that the justice has a discretion to specify a time period within which the warrant should be executed. Form 5.1, relating to warrants that issue under section 487.1, previously adhered to the format we favour. Initially, Form 5.1 required execution within three days; however, it was recently amended⁶⁴ to delete the reference to the three-day expiry period.

In recommending a three-day expiry period in Report 19 (at 93), we drew from empirical research demonstrating that 82.5 per cent of all conventional warrants were

62. Report 19, Part Two at 93; Report 24 at 25-26.

63. Report 24 at 26.

64. *Miscellaneous Statute Law Amendment Act, 1987*, S.C. 1988, c. 2, s. 26.

executed within two days and that 97.1 per cent of warrants on which an expiry date was specified were executed within only one day.

Expiry on
execution

33. A search warrant that is executed before the expiry date disclosed in it expires on execution.

COMMENT

Section 33 provides that a warrant expires upon execution, even if it is executed before its specified expiration date.

We have, through the inclusion of this provision, endeavoured to preclude the possibility of multiple successive searches being carried out (within the stated period) with respect to the same person, place or vehicle under the purported authority of a single warrant.

Return of
expired warrant

34. If a search warrant expires without having been executed, a copy of the warrant shall have noted on it the reasons why the warrant was not executed, and shall be filed as soon as practicable with the clerk of the court for the judicial district in which it was issued.

Report 19, Part Two, rec. 2(9)(a)

Report 27, rec. 2(2)

Criminal Code, s. 487.1(9)(a)

COMMENT

This provision, which serves the principle of accountability, is largely self-explanatory. Except in the case of telewarrants,⁶⁵ the present law does not require a report to a supervising authority where a warrant is not executed. Section 34 would change this situation by requiring an explanation whenever any search warrant (telephonic or otherwise) goes unexecuted.

DIVISION IV EXECUTION OF SEARCH WARRANT

Who may
execute warrant

35. A search warrant may be executed in the province in which it is issued by a peace officer of the province.

Report 24, s. 11(1)

⁶⁵ See *Criminal Code*, s. 487.1(9)(a).

COMMENT

The current provisions of the *Criminal Code* contain differing formulations describing who may execute a search warrant. Some are silent on the subject. Section 103, although it envisions an application “by or on behalf of the Attorney General,” does not specify by whom a warrant must be executed. Sections 164, 320 and 395 do not say by whom warrants must be executed either. Section 199 specifies execution by “a peace officer,” and section 487.1 says that a justice “may issue a warrant to a peace officer.” Section 487 envisions execution of a warrant issued thereunder by “a person named therein or a peace officer.” (This latter provision has been interpreted as allowing a warrant to be issued to all peace officers in a given province.⁶⁶)

Warrants issued under the *Narcotic Control Act* and the *Food and Drugs Act* must be executed by a “peace officer named therein.” Accordingly, although more than one officer may execute such warrants under the supervision of a named officer who is present, a general direction or failure to name would invalidate the warrant.⁶⁷

This section restricts the execution of search warrants to peace officers. It is premised on our view that the rarely used power of private individuals to execute warrants (where it exists) is unnecessary, and that searches should be conducted by disinterested persons.⁶⁸ Although the section requires that the executing officer be a peace officer of the province in which the search warrant is issued, we see no legitimate interest served by restricting execution to a named peace officer.⁶⁹ Such a restriction cannot lessen the intrusiveness of a search. Also, the justice is not normally in a position to evaluate the particular fitness of a named person to execute the warrant. The decision is an administrative one that is best left to the appropriate police force.

Execution in
different province

36. (1) A search warrant may be executed in another province if it is endorsed by a justice of that province.

Endorsement by
justice

(2) The justice may endorse the warrant if it was issued on application made in person and the justice is satisfied that the person, place or vehicle to be searched is in the province.

Form of
endorsement

(3) The endorsement shall be in the prescribed form.

66. *R. v. Solloway and Mills* (1930), 53 C.C.C. 271 (Ont. C.A.).

67. See *R. v. Genest*, [1989] 1 S.C.R. 59; *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

68. See Report 24 at 24.

69. In *R. v. Genest*, *supra*, note 67 at 84, the Supreme Court described the naming requirement in drug searches as being “important”, because it establishes an accountability mechanism to balance the extensive extra powers now given to officers to search private dwellings for drugs. Since these extraordinary powers are eliminated in this scheme and new accountability mechanisms are added with respect to all searches, a counterbalancing naming requirement is no longer necessary.

Effect of
endorsement

(4) The endorsement authorizes peace officers of the province in which the warrant was issued or endorsed to execute the warrant in the province in which it was endorsed.

Criminal Code, s. 487(2). (4)

COMMENT

Section 487(2) of the current *Criminal Code* implies that a search warrant may not be executed outside of the territorial division of the justice who issues it, even if the location of the intended search is in the same province, unless the warrant is first “endorsed . . . by a justice having jurisdiction in [the] territorial division” where the target “building, receptacle or place” is located. “Endorsement” is basically an administrative requirement; in practical terms, it is a signature that has the effect of indicating the approval of a judicial officer in the location of the intended search.

Section 7 (for reasons explained in the comment to that section) allows a search warrant to be executed, without further endorsement, at any location within the province of issuance. Subsection (1) of section 36 complements that provision by allowing a warrant to be executed extraprovincially after it has been endorsed. We have retained an extraprovincial endorsement requirement to ensure that justices are made aware of, and are given some say in, the execution of search warrants within their province.

Subsection (2) elaborates and, in our view, improves upon subsection 487(2) of the present *Code* by clearly articulating a test for the justice to apply in determining whether to endorse the warrant.

Subsection (3) is self-explanatory. It is the equivalent of the current requirement in subsection 487(2) that an endorsement be “in Form 28.”

Subsection (4) is self-explanatory, and is the equivalent of subsection 487(4) of the current *Code*.

The endorsement and execution of search warrants issued on application made by telephone or other means of telecommunication outside of the province of issuance is not allowed under this scheme. Taking the time to appear before a justice in another province to have a warrant endorsed would be incompatible with the function of such warrants as devices to be used in cases where a personal appearance is not practicable. If there is time to appear, this kind of application is not appropriate; if there is no time to appear, telewarrant applications can be made in the province of intended execution.

Power under
warrant

37. A peace officer may, under the authority of a search warrant,

(a) search a person, place or vehicle specified in the warrant;

(b) search a person who is found in a place or vehicle specified in the warrant if the officer believes on reasonable grounds that the person is carrying or concealing the

object of seizure or the confined person identified in the warrant;

(c) seize anything believed on reasonable grounds to be the object of seizure identified in the warrant; and

(d) retrieve any person believed on reasonable grounds to be the person identified in the warrant as a confined person.

Report 24, ss. 5, 24(a), (b), 28(1)

COMMENT

Section 37 defines the scope of the authority to search and seize under a warrant.

Paragraph (a) is self-explanatory.

Paragraph (b) is drafted so as to ensure that warrants to search places or vehicles are not frustrated simply because the objects of seizure (or the confined persons) sought are being carried or concealed by persons who are present at the time of execution. Currently, where a warrant issued under section 487 of the *Criminal Code* authorizes the search of a place, a person who happens to be in the place at the time of the search may not be searched under the authority of the warrant even if the officer believes on reasonable grounds that the person is carrying a thing specified in the warrant.⁷⁰ In our view, the present law is unnecessarily restrictive. Personal search should not always be regarded as a distinct intrusion requiring independent authorization. An important investigation can be totally frustrated by the artificiality of the line that is presently drawn.⁷¹ Accordingly, paragraph (b) provides a power to search persons found in the place or vehicle specified in a warrant, incidental to the search of the place or vehicle. It does not, however, confer a general power to search all persons found in the target place or vehicle; the authority is conditional on the officer's reasonable belief "that the person is carrying or concealing the object of seizure or the confined person identified in the warrant."

Paragraphs (c) and (d) permit an officer having reasonable grounds to seize objects or retrieve confined persons under the authority of a warrant. Other objects of seizure, in order to be seizable, must fall within the "plain view" rule set out in sections 48 and 49.

Execution by day

38. A peace officer shall execute a search warrant during the period beginning at 0600 hours and ending at 2100 hours,

70. See, for example, *R. v. Ella Paint* (1917), 28 C.C.C. 171 (N.S.S.C.); *R. v. Mutch* (1986), 26 C.C.C. (3d) 477 (Sask. Q.B.).

71. This in turn may lead officers to seek alternative justifications to conduct personal searches. For example, an unnecessary arrest may occur so as to allow the officer to conduct a personal search incident to that arrest.

unless the issuing justice has, by the warrant, authorized its execution during the night.

Report 24, s. 12
Criminal Code, s. 488

COMMENT

See the comment to paragraph 24(g) and section 28.

Execution in
presence of
occupier

39. A peace officer shall execute a search warrant in the presence of a person who occupies or is in apparent control of the place or vehicle being searched, unless it is impracticable to do so.

COMMENT

Under our proposed law, a search is generally not to be conducted by stealth or in the absence of parties affected by the search or having an interest in the things to be seized.⁷² Section 39 is designed, as far as possible, to provide occupiers or persons in apparent control of searched places or vehicles with first-hand knowledge of the fact of the search and of the manner in which it is conducted. This enables them, among other things, to ascertain that search methods are no more drastic than they need to be. If the occupier or person in apparent control of a house is present during a search, for example, he or she may wish to supply the police with the keys to locked cupboards or cabinets, and so forth, that might otherwise be forced open and damaged in the process. The personal presence of an affected party also provides a means of ensuring that only that which is authorized to be seized is taken and that no unnecessary rummaging occurs. The section thus promotes accountability in the execution of search warrants.

Providing copy
of warrant

40. (1) A peace officer shall, before starting a search or as soon as practicable, give a copy of the warrant
(a) in the case of a warrant to search a person, to the person; or
(b) in the case of a warrant to search a place or vehicle, to a person present and in apparent control of the place or vehicle.

Report 19, Part Two, rec. 2(7)
Report 24, s. 15(1)
Criminal Code, s. 487.1(7)

⁷² Some searches, of course, will have to be carried out in the absence of any other person. Searches of open fields or abandoned property are examples of this. Also, if the owner or occupier is missing or his or her whereabouts cannot be ascertained, then it will be impractical to insist upon his or her presence during the search.

Copy in
unoccupied place
or vehicle

(2) A peace officer who executes a warrant to search a place or vehicle where there is no person present and in apparent control shall, when the search is done, indicate on a copy of the warrant the date and time of the search and whether anything was seized, and shall affix the copy of the warrant in a prominent location in the place or vehicle.

Report 19, Part Two, rec. 2(8)

Report 24, s. 15(2)

Criminal Code, s. 487.1(8)

COMMENT

The purpose of this section to inform the individual affected by a search conducted pursuant to a search warrant as to the scope and purpose of the search, and to assure that individual (at the earliest time practicable) that the search is one for which there has been prior judicial authorization.⁷³ This information and assurance should, in many cases, make the job of peace officers easier.⁷⁴ Although the requirements of this provision may cause minor inconvenience to peace officers in some instances, we believe that the overall benefit, both to peace officers and to persons affected by search warrants, outweighs any possible disadvantages.⁷⁵

Subsection 29(1) of the current *Criminal Code* (the heading to which refers only to arrest situations) makes it “the duty of everyone who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.” Subsections (7) and (8) of section 487.1 of the *Code* contain provisions, applicable to peace officers executing telewarrants, other than those issued under subsection 258(1), that are very similar to section 40 of our proposed legislation. Like subsections (7) and (8) of section 487.1, section 40 goes beyond what is currently provided for in subsection 29(1) of the *Code*. Section 40 does not require that a request for a copy of the warrant be made by the affected person before being entitled to it. Also, the section is not conditional upon it being feasible for the officer to have the search warrant with him or her when executing it; section 40 requires the officer to have a copy of the warrant available at the time of the search.

Finally, the section requires generally that a copy of the warrant should be provided before the search is started, when information and assurance would be of most benefit.⁷⁶

Subsection (2) sets out requirements for posting the warrant when it is executed in a place or vehicle where there is no person present and in apparent control. It is self-explanatory.

73. See Report 24 at 27-28.

74. *Ibid.* at 28.

75. *Ibid.*

76. *Ibid.*

**DIVISION V
EVIDENTIARY RULE WHERE
ORIGINAL OF WARRANT ABSENT**

Absence of
original warrant

41. In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant.

Report 19, Part Two, rec. 2(12)
Criminal Code, s. 487.1(11)

COMMENT

In this scheme, a justice who issues a warrant on an application made by telephone or other means of telecommunication retains the original. The applicant either receives two transmitted copies or prepares two copies by hand on the direction of the issuing justice. In these circumstances, the original warrant is not in the possession of the officer when the search is conducted and there is a potential for error in the process of preparation of the warrant by the applicant. It is therefore essential that the original warrant be before the court when review of the legality of the warrant or its execution takes place.

Section 41 partly mirrors subsection 487.1(11) of the current *Criminal Code*. The *Code* section provides that the absence of either the transcribed and certified information on oath or the original warrant is, in the absence of evidence to the contrary,⁷⁷ proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication. Section 41, however, provides that only the absence of the original warrant will, in the absence of evidence to the contrary, provide such proof. This change avoids a potential anomaly that could result from the present subsection, *i.e.*, a finding that a search has not been authorized by a warrant issued on such application (because the information on oath cannot be found) even though the original warrant is before the court.

⁷⁷ See *R. v. Titus*, 20 September 1988 (N.B. Prov. Ct.), [unreported]. There it was suggested (at 35 of the original judgment) that "evidence to the contrary" might be "a verbatim record of the entire transaction" and not simply the oral recollection on oath of a police officer.

CHAPTER III SEARCH AND SEIZURE WITHOUT A WARRANT

DIVISION I SEARCH AND SEIZURE IN EXIGENT CIRCUMSTANCES

Power to search

42. (1) A peace officer may, without a search warrant, search a person, place or vehicle for an object of seizure or a confined person if the officer believes on reasonable grounds that

(a) the object of seizure or confined person will be found on the person or in the place or vehicle; and

(b) the delay involved in obtaining a warrant would endanger anyone's life or safety.

Power to seize

(2) The peace officer may seize anything believed on reasonable grounds to be the object of seizure, or retrieve any person believed on reasonable grounds to be the confined person, found in the course of the search.

Report 24, ss. 21, 28(1)

COMMENT

Section 42 defines the limit of the power to search in exigent circumstances outside of the context of an arrest, and reflects the Commission's view that some sacrifices of warrant protections are justified when life or safety would otherwise be endangered.

The power provided by section 42 allows, without a warrant, only searches that could otherwise be authorized by warrant. The power to stop conferred here is triggered by the satisfaction of an onerous test.⁷⁸

Once a search is authorized under this test, the scope of the power to search is defined by sections 16 to 19 and 50.

78. The power provided by s. 42 is not a power to "stop and frisk," as developed in the United States. There, the stop and frisk law authorizes "investigatory stops" of persons in public places where there is a "reasonable suspicion" (the suspicion must be particular and objective rather than general or a "hunch") that a crime has been, or is about to be, committed. Once an authorized "stop" occurs, a "protective frisk" (something less than a "full" search) is authorized if there is a reasonable apprehension for the officer's safety. The "frisk" is limited to what is necessary to discover weapons that might be used to harm the officer or others nearby, and generally may not exceed a "pat down" of outer clothing. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968).

Section 42 subsumes the powers to seize weapons and explosives now found in sections 101, 102 and 492 of the *Criminal Code*.

DIVISION II SEARCH AND SEIZURE INCIDENT TO ARREST

Protective search

43. Anyone who has arrested another person may, incident to the arrest and without a search warrant, carry out a protective search of the person.

Report 24, s. 20(a)

COMMENT

This section should be read in conjunction with section 17, which defines the scope of the power to carry out a protective search.

Searches made incident to arrest, without warrant, likely constitute the vast majority of all searches in Canada. Recent case law has tended to broaden this common law power. Originally intended for self-protection, to prevent an apprehended escape or to prevent the imminent destruction of evidence, the Supreme Court of Canada has now declared the existence of a police discretion to use the power to frisk search the arrested person for evidence as well as for weapons, even in the absence of reasonable grounds to believe that the weapons or evidence will be found.⁷⁹

We believe that this power should be codified and that clear and precise conditions for its exercise should be established. The general guiding principle is, again, that the scope of a search permitted incident to arrest should be defined and limited by its authorized purpose. The purpose should, in turn, bear some relationship to the fact that the search is taking place in the context of an arrest.

Section 43 recognizes that an arrest carries with it the possibility that the arrested person may react unpredictably and violently. The authority to arrest must carry with it the power to arrest effectively and to cope with any dangerous action or attempted escape the arrest may provoke. Section 17, consistent with the approach of the Supreme Court of Canada in the *Cloutier* case, defines the scope of the protective search power in terms of these goals. Because of the potential for unpredictable reactions, the power may be exercised pre-emptively and need not be based on reasonable grounds for belief that the arrested person in fact possesses anything that may help him or her to escape or that could cause danger. In our view, a measured power to act to prevent escape and protect life or safety in the context of an arrest outweighs the interest of the arrested person in maintaining the inviolability of his or her person.

79. See *Cloutier v. Langlois*, *supra*, note 37; *R. v. Morrison* (1987), 58 C.R. (3d) 63 (Ont. C.A.); *R. v. Miller* (1987), 62 O.R. 97 at 100-101.

Additional power
of peace officer

44. A peace officer who has arrested a person may, incident to the arrest and without a search warrant,

(a) if the officer believes on reasonable grounds that an object of seizure will be found on the person and that the delay involved in obtaining a warrant would result in the loss or destruction of the object of seizure, search the person for the object of seizure and seize anything believed on reasonable grounds to be the object of seizure; or

Report 24, s. 19

(b) if the person is in present control of, or is an occupant of, a vehicle and the officer believes on reasonable grounds that an object of seizure will be found in the vehicle and that the delay involved in obtaining a warrant would result in the loss or destruction of the object of seizure, search the vehicle for the object of seizure and seize anything believed on reasonable grounds to be the object of seizure.

Report 24, s. 22

COMMENT

Section 44 provides an additional power to conduct personal or vehicular searches, incident to arrest, in relation to objects of seizure. As previously discussed in the comment to section 16, it confines the availability of the power to cases in which the peace officer has a reasonably grounded belief that he or she will find an object of seizure on the person or in the vehicle that is in the present control of, or is occupied by, the arrested person and that the obtaining of a warrant would be impracticable. In our view, this test fulfils both the letter and spirit of the *Charter* without impeding law enforcement. The guiding principle that powers to search should be defined by, and be proportional to, the authorized purposes of the search again applies.

DIVISION III SEARCH WITH CONSENT AND SEIZURE

Power to search

45. (1) A peace officer may search without a warrant

(a) a person or anything carried by the person if the person consents to the search; and

(b) a place or vehicle with the consent of a person who is present and in apparent control and who is apparently competent to consent to the search.

Report 24, s. 18(1)

Restriction on
consent under
this Part

(2) A person may not consent, under this Part, to a search for an object of seizure inside the person's body.

COMMENT

The common law has tolerated searches with consent on the basis that consent amounts to a waiver of the normal legal protections against the intrusion, including the need to establish sufficient legal grounds for the action and the need to fulfil required procedural conditions. Before enactment of the *Charter*, Canadian case law on the specific issue of consent searches was almost non-existent. In essence, mere co-operation with the police in allowing a search was considered to amount to consent and little attention was given to the motives for, or circumstances of, that co-operation.⁸⁰ However, the Supreme Court of Canada adopted a different approach in setting out principles governing the general issue of waiver of statutory procedural guarantees. The Court held that such waivers should be clear and unequivocal, made with full knowledge of the rights that the guarantees are designed to protect, and with an appreciation of the consequences of giving up those rights.⁸¹ Similar principles were then applied by the Court in considering the question of the waiver of constitutional or *Charter* guarantees, such as the right to counsel before police questioning.⁸²

These principles may also be properly applied to the question of waiver or consent in the context of a search. The failure of the law to establish procedural safeguards for consent searches may frustrate accountability, encourage the use of trickery and ultimately undermine citizen co-operation with police investigations. The *Charter* also makes it desirable to codify consent procedures as a way of ensuring that consent searches are reasonable.

Subsection (1) of section 45 establishes the general legitimacy of consent searches — whether of persons, the things they are carrying or the places and vehicles they control. Subsection (2) limits the scope of section 45, making it inapplicable to the types of personal searches for objects of seizure that are dealt with as investigative procedures under Part Three (*Obtaining Forensic Evidence*). That Part has its own procedures governing consent.

Information
required to be
disclosed

46. (1) When asking a person for consent, a peace officer shall tell the person

- (a) what crime is being investigated;**
- (b) what the officer is looking for;**
- (c) what the proposed search will involve; and**
- (d) that consent may be refused or, if given, may be withdrawn at any time.**

Report 24, s. 18(2)

Form of consent

(2) Consent may be given orally or in writing.

Report 24, s. 18(3)

80. See *Reynen v. Antonenko* (1975), 20 C.C.C. (2d) 342 (Alta. S.C.T.D.) at 348-349.

81. See, for example, *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41.

82. See *Clarkson v. R.*, [1986] 1 S.C.R. 383; *R. v. Manninen*, [1987] 1 S.C.R. 1233, *per* Lamer, J. at 1241-1244. See also *R. v. Turpin*, [1989] 1 S.C.R. 1296, re: waiver of right to a jury trial.

COMMENT

To be legally effective, a consent must be voluntary and informed. This is our minimum standard.

Subsection (1) of section 46 establishes, in detail, the information that the peace officer must give to the person whose consent is sought.

Subsection (2) recognizes that it may not always be practicable to obtain a written consent.

Power to seize

47. The peace officer may seize anything believed on reasonable grounds to be an object of seizure, or retrieve any person believed on reasonable grounds to be a confined person, found in the course of the search.

Report 24, s. 18(1)

COMMENT

This section gives the express power to seize things (or retrieve confined persons) found during a consensual search. The power to seize (or retrieve) is not contingent on the subject's consent.

CHAPTER IV SEIZURE OF OBJECTS IN PLAIN VIEW

Power to seize

48. (1) Where a peace officer engaged in the lawful execution of duty discovers in plain view anything believed on reasonable grounds to be an object of seizure, the officer may seize it.

Report 24, s. 25

Private premises

(2) Subsection (1) does not confer authority to enter private premises.

COMMENT

Sections 48 and 49 are designed to provide peace officers with the authority to seize objects of seizure that they discover while lawfully executing their duty. A peace officer searching premises for stolen goods may discover a cache of illegal drugs or, when arresting an individual, may see a prohibited weapon close by (but not within the reach of the person and therefore not seizable incident to arrest by virtue of sections 17 and 43). A power to seize such items when they are discovered in plain view is an obvious necessity.

Section 489 of the *Criminal Code* now enables anyone executing a section 487 or 487.1 search warrant to seize things not covered by the warrant if they are reasonably believed to have been "obtained by or . . . used in the commission of an offence." This

power, it has been argued, does not allow the seizure of mere evidence. For such evidence, another warrant would have to be sought; in the interim, the things discovered in plain view might be lost or destroyed.

In Report 24 (at 42-43), we rejected a proposal that would have permitted the seizure of all objects of seizure found in the course of a search. We were concerned that such a rule might encourage arbitrary seizures and, in effect, invite peace officers to conduct “fishing expeditions” for objects totally unrelated to the original justification for search. We remain of the view that adoption of a “plain view” rule would provide a balanced solution and would prevent such general exploratory intrusions into the privacy of individuals.

Certain elements of the American “plain view doctrine” have been incorporated into these provisions. First, there must be prior legal authority for the intrusion that provides the “plain view.” An officer who sees an object of seizure in a house while on the street “walking the beat” and looking through the window of a house would still have to obtain a warrant; seeing the object does not, in itself, authorize an entry onto private property. On the other hand, if the officer is already in the house pursuant to a warrant authorizing a search for specified things, other objects of seizure in plain view may be seized without warrant. This element of the rule is codified in section 48. Second, consistent with earlier authorities but contrary to recent American Supreme Court jurisprudence, discovery of the object must be inadvertent. This means that the discovery was not anticipated and that the police did not know in advance the location of the evidence and intend to seize it. Where the police have prior knowledge, they should obtain a warrant. This aspect of the rule is embodied in the term “discovers” used in section 48. Third, it must be immediately apparent to the police, by the visual sighting and without the manipulation or movement of the object, that they have an object of seizure before them. This requirement, set out in section 49, prevents unjustifiable rummaging. By contrast, a search for specified objects under a warrant does comprehend a movement or manipulation of other objects so as to reveal or uncover the objects sought. If, in the course of a search with a warrant, movement or manipulation occurs and other unanticipated objects of seizure come into plain view, they are seizable, provided, of course, that the search itself was not a mere pretext for general rummaging. The manner in which the search itself was conducted also has a bearing on this. One cannot, for example, search in desk drawers when looking for stolen television sets. Where this occurs, the searcher is in fact engaging in a fishing expedition and the view of potentially seizable objects thus provided is not legally sufficient to justify the seizure of those objects. These aspects of the rule emerge on a proper construction of section 48.

If all of the requirements of the “plain view” rule are satisfied, objects of seizure so found may be seized without a warrant.⁸³

Object of seizure
not in plain view

49. An object of seizure is not in plain view if movement or manipulation of it is required in order for the peace officer

83. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), at 466-471; *Horton v. California*, 110 S. Ct. 2301 (1990); *R. v. Askov* (1987), 60 C.R. (3d) 261 at 270-271 (Ont. Dist. Ct.); *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 (Sask. C.A.).

to acquire reasonable grounds for believing it to be an object of seizure.

COMMENT

See the comment to section 48.

**CHAPTER V
EXERCISING SEARCH AND SEIZURE POWERS**

Manner of
carrying out
search

50. (1) A search of the person shall be carried out in a manner that respects the dignity of the person and that, having regard to the nature of the search and the circumstances,

(a) involves as little intrusion as is reasonably practicable; and

(b) provides as much privacy as is reasonably practicable.

Report 25, rec. 11

Waiver of
requirements

(2) A person who is to be searched may waive the requirement set out in paragraph (1)(a) or (b), orally or in writing.

COMMENT

Section 50 is a prescription of common sense that applies whenever a personal search is undertaken. While recognizing that the specific purpose of the search must, to some extent, define the manner in which it is conducted, it seeks to minimize the intrusion and loss of privacy occasioned by the search. Where, for example, a person is to be searched for a particular and identifiable object of seizure, this section (when combined with paragraph 16(f)) would require that the person's clothing be removed in stages (as opposed to all at once) until the object is found or discovered not to be present.⁸⁴ It would also require, whenever feasible, that the search be conducted out of public view, and by an officer of the same sex as the person being searched.

Insofar as it requires that the dignity of searched persons be respected, section 50 is also the embodiment of a fundamental principle. In practical terms, this principle would require basic decency and courtesy, and would prohibit behaviour that is calculated to degrade the subject of a personal search.

A significant deviation from the requirements of this section could well be unconstitutional and might, in any event, result in the exclusion of evidence seized. The remedies applicable to breaches of provisions of this Code are considered in a forthcoming Commission Working Paper, and will be the subject of a separate Part of this Code.

84. See *R. v. Simmons*, [1988] 2 S.C.R. 495.

Subsection 50(2) is self-explanatory. For further discussion of the subject of waiver, see the comment to section 45.

Obtaining
assistance to
search

51. A peace officer who carries out a search may obtain the assistance of any person whose assistance the officer reasonably believes is necessary to carry out the search effectively.

Report 24, s. 11(2)

COMMENT

In some cases, the assistance of a private individual (for example, an accountant in a search related to a complex commercial crime) may both improve the effectiveness of a search and minimize the intrusion suffered. Section 51 does not change the present law⁸⁵ but is included clearly to give the officer a discretion, without the need for special or additional authorization, to obtain any assistance reasonably believed to be necessary.

Under our proposed Criminal Code, no duty is imposed on citizens to assist in the carrying out of searches.⁸⁶ Accordingly, anyone who fails or refuses to assist an officer in conducting a search does not commit the crime of obstruction under our proposed Criminal Code.⁸⁷

Demand to enter
private premises

52. A peace officer who is authorized to enter private premises to carry out a search shall, before entering the premises, identify himself or herself as a peace officer, make a demand to enter, state the purpose of the entry and allow the occupant a reasonable time to let the officer in, unless the officer believes on reasonable grounds that doing so would result in the loss or destruction of an object of seizure in relation to which the search is authorized, or would endanger anyone's life or safety.

Report 24, s. 27(1), (2)

COMMENT

Section 52's requirement of the making of a "demand to enter . . ." and the stating of the purpose of entry codifies and expands upon the common law applicable to searches of dwelling-houses.⁸⁸ It is our belief that an equally legitimate expectation of privacy extends to all private premises (including, for example, offices),⁸⁹ and not

85. See *R. v. Strachan*, [1988] 2 S.C.R. 980.

86. This may be contrasted with the duty imposed to take reasonable steps, on request, to help a public officer in the execution of his or her duty to arrest a person. See Report 31, rec. 25(3).

87. Report 31, rec. 25(1) and at 116-117.

88. *Semayne's Case* (1604), 5 Co. Rep. 91a, at 91b; *Wah Kie v. Cuddy* (1914), 23 C.C.C. 383 (Alta. C.A.); *R. v. Landry*, [1986] 1 S.C.R. 145; *Eccles v. Bourque*, [1975] 2 S.C.R. 739.

89. See *R. v. Rao* (1984), 40 C.R. (3d) (Ont. C.A.), per Martin, J.A. at 32-33.

merely to residential private premises. The requirement that the occupant be given a reasonable time to let the officer in follows reasonably from the requirement that the demand be made and the purpose of entry stated.

This section, however, dispenses with the need to make the demand, and so forth, in circumstances where, we believe, an overriding interest must be protected.⁹⁰ If circumstances render it illogical to insist on a demand being made, or if the occupant does not respond to the officer's demand within a reasonable time, the use of force to enter is authorized. The degree of force that may be resorted to in these circumstances is regulated by subsection 23(1) of our proposed Criminal Code.⁹¹

In drug searches, reliance on the above exceptions to the "demand" requirement will likely be frequent. However, the qualifications built into this section reflect a different, more structured approach from that now evident in section 14 of the *Narcotic Control Act* and subsection 42(5) and section 51 of the *Food and Drugs Act*. Those provisions authorize, without requiring prior notice or demand, the breaking open of virtually anything during the course of a search for drugs under those Acts.

Opportunity to
make claim of
privilege

53. (1) No peace officer, or person assisting a peace officer, who knows of the possible existence of a privilege in respect of a thing or in respect of information contained in a thing shall examine or seize the thing or examine the information without affording a reasonable opportunity for a claim of privilege to be made.

Report 27, rec. 3(5)
Criminal Code, s. 488.1(8)

Procedure if
claim made

(2) If a privilege is claimed, the officer shall, without examining the thing or the information or having it photographed or copied,

(a) seize the thing by taking control of it, and take steps to ensure that the thing or the information contained in it is not examined or interfered with; or

(b) seize the thing by taking possession of it, place it in a package, suitably seal and identify the package and place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is an agreement in writing between the officer and the person claiming the privilege that a specified person will act as custodian, in the custody of that person.

Report 27, rec. 3(5)
Criminal Code, s. 488.1(2)

90. See *Eccles v. Bourque*, and *Wah Kie v. Cuddy*, *supra*, note 88.

91. See Report 31 at 178-179 and rec. 3(13)(a) at 38-40. Section 23(1) of the proposed Criminal Code (LRC) protects from criminal liability any person who "performs any act that is required or authorized to be performed by or under an Act of Parliament or an Act of the legislature of a province; and . . . uses such force, other than force used for the purpose of killing or inflicting serious harm on another person, as is reasonably necessary to perform the act and as is reasonable in the circumstances."

Custodian of
seized thing

(3) The peace officer who seizes the thing by taking control of it, or the sheriff or person in whose custody the sealed package is placed, is the custodian of the seized thing for the purposes of Part Seven (*Privilege in Relation to Seized Things*).

COMMENT

Section 53 regulates the general manner of seizing and dealing with property in respect of which a claim of privilege might be made. The purpose is to preserve that privilege while causing minimal interference with the power to search.

Subsection 53(1) continues and expands upon subsection 488.1(8) of the present *Criminal Code*. The current provision applies only when documents are to be examined, copied or seized, and only when the documents are in the possession of a lawyer who claims that a named client has a solicitor-client privilege. In contrast, subsection 53(1) applies whenever a seizing officer knows that a privilege may be claimed by anyone in relation to any thing or any information recorded on a thing, regardless of who possesses the thing. The new formulation ensures that the special procedures of subsection 53(2) protect all things and forms of information in respect of which a claim of privilege may be asserted.

Subsection 53(2) establishes the procedure applicable when a privilege is claimed in relation to anything that an officer is about to seize. The sealing procedure has been designed so as to prevent a breach of a claimed privilege before the validity of the claim can be determined. Paragraph 53(2)(a) is drafted to take into account things for which the sealing provision is impracticable. The sealing procedure now set out in subsection 488.1(2) of the *Criminal Code* is basically continued in paragraph 53(2)(b).

Part Seven (*Privilege in Relation to Seized Things*) regulates the procedure for hearing and deciding the merits of the privilege claim. It also regulates disposition of the seized things once the validity of the claim is determined. (Disposition is now governed by subsections (3) to (11) of section 488.1 of the *Criminal Code*.)

Return of seized
weapons

54. (1) A peace officer who, during a protective search, seizes anything believed to be a weapon or instrument of escape shall have the thing returned to the person from whom it was seized as soon after the seizure as it is safe and practicable to do so, unless seizure or retention of the thing is otherwise authorized.

Delivery of
seized weapons
to peace officer

(2) If a person other than a peace officer seizes, during a protective search, anything believed to be a weapon or instrument of escape, the seized thing shall be delivered, as soon as practicable, to a peace officer to be dealt with in accordance with subsection (1).

COMMENT

Section 54 provides a simple and straightforward mechanism for the return of items seized temporarily during protective searches conducted by either peace officers or private citizens. It recognizes that when things are seized solely as a precautionary measure (for example, a nail file with a sharp point may present a potential danger), the need to retain them generally disappears once the investigatory encounter is at an end or the risk has subsided.⁹²

92. The provision is designed to avoid the necessity of treating anything removed in the course of a protective search as a seized thing that must be retained and only returned in accordance with the provisions of Part Six (*Disposition of Seized Things*).

PART THREE

OBTAINING FORENSIC EVIDENCE

DERIVATION OF PART THREE

LRC PUBLICATIONS

Investigative Tests, Working Paper 34 (1984)

Obtaining Forensic Evidence, Report 25 (1985)

Classification of Offences, Working Paper 54 (1986)

INTRODUCTORY COMMENTS

Part Three establishes a scheme to regulate certain investigative procedures that are not regulated by other Parts of this Code and that use the suspected or accused person as a source of incriminating evidence. It deals with procedures, as section 55 puts it, that are “carried out by or at the request of a peace officer for the purpose of obtaining evidence or information relating to a person’s responsibility for the commission of a crime, in a manner that requires physical contact with the person or the person’s participation in the procedure and awareness of that participation.” Included within the ambit of this Part are such diverse procedures as the examination of a person’s body for identifying marks, the making of dental impressions, the taking of hair or blood samples, and the employment of physical performance tests. It does not deal, as section 55 also states, with “an investigative procedure that merely involves questioning the person, searching the person pursuant to Part Two (*Search and Seizure*) or taking samples of the person’s breath or blood pursuant to Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).” The rules governing such procedures, as section 55 suggests, are to be found in other Parts of this Code.

Very few of the investigative procedures to which this Part relates are now the subject of clear statutory regulation in Canada. Many are conducted only through the uninformed or unwitting co-operation of the subject or the ingenuity of investigators. There is no clear or comprehensive statute law regulating when such procedures may be used, how they should be performed, or what the rights and obligations of prospective subjects are.

The common law also fails to be clear and comprehensive in regulating investigative procedures. For example, there is no common law (or statutory) basis in Canada for issuing a search warrant to extract evidence from a human body by means of surgery;⁹³ the taking of blood samples from a suspect without consent or statutory authority has been held to constitute an unreasonable search and seizure;⁹⁴ and the cases are conflicting as to whether hair samples may be seized from a person in the course of a search incident to arrest.⁹⁵ Other issues — for example, the precise scope of police powers to remove concealed, indigenous or other substances from the body, the extent to which police powers to arrest and investigate include the power to forcibly administer investigative procedures,⁹⁶ and the consequences of a suspect’s failure or refusal to co-operate with investigators⁹⁷ — have not been fully clarified or resolved.

93. *Re Laporte and The Queen* (1972), 8 C.C.C. (2d) 343 (Que. Q.B.).

94. *R. v. Pohoretsky*, [1987] 1 S.C.R. 383.

95. See *R. v. Alderton* (1985), 44 C.R. (3d) 254 (Ont. C.A.); *R. v. Legere* (1988), 43 C.C.C. (3d) 502 (N.B.C.A.).

96. The law is unclear as to compulsory inclusion of a suspect in a lineup. See *Marcoux and Solomon v. The Queen*, [1976] 1 S.C.R. 763. This case must now be read in the light of the Supreme Court of Canada’s decision in *R. v. Ross*, [1989] 1 S.C.R. 3. Requiring a suspect to participate in a lineup after his assertion of a desire to consult with counsel is a violation of the *Charter* and resulting evidence of identification should be excluded. See also *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387, holding that statutory requirements that persons charged but not yet convicted submit to fingerprinting do not violate the *Charter* and expressing *obiter*, at 404, an extremely broad power to strip and examine the body for identifying features incident to arrest.

97. See the discussion and cases cited in Working Paper 34 at 57-60.

One undesirable consequence of the lack of recognition and regulation of police powers of investigation is that prosecutors, seeking to adduce evidence derived from use of the procedures, have had to resort to the common law principle that relevant evidence, even if illegally obtained, is *prima facie* admissible. In our view, it is preferable that evidence in criminal cases be admitted because it is recognized as having been legally obtained by following clearly stated rules.

The purposes of this scheme are: (1) to enhance the certainty, clarity, consistency and accessibility of the law for the benefit of investigators, suspects and the general public; (2) to recognize and effectively regulate the use of a number of modern techniques of criminal investigation; and (3) to balance individual and state interests in a manner consistent with the letter and spirit of the *Canadian Charter of Rights and Freedoms* (section 8).⁹⁸ The effectiveness of criminal investigation and law enforcement is maintained and enhanced in a scheme that implements principles of restraint, minimizes opportunities for the police to exercise unnecessary discretion and ensures fairness, equality and accountability.

The approach we have employed may be roughly summarized as follows.

1. With one exception, any investigative procedure to which this Part relates may be carried out by (or at the request of) a peace officer if the subject consents. Conditions are set out for securing a valid consent.
2. Some investigative procedures may be carried out without the subject's consent if a warrant is obtained. The conditions and procedure for obtaining a warrant are clearly spelled out.
3. With the exception of X-ray and ultrasound examinations, the procedures for which a warrant could otherwise be obtained may be carried out without consent or a warrant in exigent circumstances (as we have defined them).
4. A warrant may not be issued to administer "a drug known or designed to affect mood, inhibitions, judgment or thinking," and moreover, a person may not consent to the administration of such a drug if it is to be done (in the words of subsection 55(1)) "by or at the request of a peace officer for the purpose of obtaining evidence or information relating to [that] person's responsibility for the commission of a crime."
5. Certain procedures involving inspection of the surface of the body, except specified private parts, may be carried out without either consent or a warrant, when an arrest is made for a crime punishable by more than two years' imprisonment.
6. Any investigative procedure may be carried out privately by a suspect or an accused person. This scheme does not in any way regulate arrangements for investigative procedures made for defence purposes.

98. For a detailed discussion of the relationship between our scheme and the *Charter* (especially as regards "self-incrimination," the "presumption of innocence," "security of the person," "unreasonable search or seizure," and "cruel and unusual treatment"), see Report 25 at 15-23.

CHAPTER I INTERPRETATION

Application of
Part

55. (1) This Part applies to any investigative procedure that is carried out by or at the request of a peace officer for the purpose of obtaining evidence or information relating to a person's responsibility for the commission of a crime, in a manner that requires physical contact with the person or the person's participation in the procedure and awareness of that participation.

Exception

(2) This Part does not apply to an investigative procedure that merely involves questioning the person, searching the person pursuant to Part Two (*Search and Seizure*) or taking samples of the person's breath or blood pursuant to Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).

Report 25, rec. 1

COMMENT

Section 55 states which investigative procedures are regulated by this Part. It begins, in subsection (1), by specifying that this Part is only concerned with procedures carried out by or at the request of peace officers. It does not, therefore, purport to govern investigative procedures conducted with respect to a suspect or accused at the instance of counsel, and so forth. Moreover, as the term "investigative" suggests, this Part is concerned only with procedures carried out before an adjudication takes place. It does not, for example, apply to search or identification procedures carried out in prisons after conviction and sentence. In that context, such procedures would not be "for the purpose of obtaining evidence or information relating to a person's responsibility for the commission of a crime," nor would procedures or tests carried out for medical purposes (although some activity within the scope of this section could have medical aspects or implications).

Subsection (1) further makes it clear that investigative contacts with victims or witnesses are not regulated here. Only procedures contemplating physical contact with, or the participation of, the person under investigation fall within the scope of these provisions.

Any investigative procedure not involving physical contact must, in order to fall within the scope of this Part, involve "the person's participation in the procedure and awareness of that participation." These words make it clear that procedures carried out surreptitiously or through the use of stratagems are not governed by the particular provisions of this Part.

Standing alone, subsection 55(1), if read literally, might appear to suggest that this Part applies to a number of other investigative procedures that are actually regulated elsewhere in our Code, such as searches and interrogations. Subsection (2) clarifies the

scope of application of the rules contained in this Part of our Code by specifying the procedures that have been excluded from it.

CHAPTER II INVESTIGATIVE PROCEDURES WITH A WARRANT

DIVISION I APPLICATION FOR WARRANT

Applicant and
nature of warrant

56. A peace officer may apply for a warrant authorizing the carrying out of one or more of the following investigative procedures:

- (a) the visual inspection of the surface of a person's body;**
- (b) the visual inspection of a person's body cavities and the probing for, removal of and seizure of any object of seizure concealed in a body cavity;**
- (c) the taking of prints or impressions from any exterior part of a person's body;**
- (d) the taking of dental or bite impressions from a person;**
- (e) the taking of hair samples from a person;**
- (f) the taking of scrapings or clippings from a person's finger-nails or toe-nails;**
- (g) the removal of residues or substances from the surface of a person's body by means of washings, swabs or adhesive materials;**
- (h) the taking of saliva samples or swabs from a person's mouth for purposes other than the detection of intoxicating substances;**
- (i) the physical examination of a person by a medical practitioner; or**
- (j) the examination of a person by means of X-rays or ultrasound.**

Report 25, rec. 4

COMMENT

In Report 25,⁹⁹ we divided investigative procedures into three broad categories: those that were absolutely prohibited; those that could be carried out with consent; and

99. Recommendations 2, 3, 6.

those for which judicial authorization could be obtained or that could be carried out without consent or judicial authorization in exigent circumstances. Following consultations on Report 25, we have modified our scheme by adding a limited power to carry out certain investigative procedures incident to arrest, without consent or a warrant.¹⁰⁰ Also, we have been persuaded to permit a number of procedures previously included in the “absolutely prohibited” category to be carried out pursuant to a warrant or with consent.¹⁰¹

The only procedure that we continue to recommend be prohibited is the administration of drugs known or designed to affect mood, inhibitions, judgment or thinking.¹⁰² This prohibition results indirectly from the fact that the procedure may not be conducted even with consent (as specified in section 73), nor does it appear in the section 56 list of procedures for which a warrant may be obtained. However, one procedure which we formerly recommended be prohibited — radiographic or ultrasonic examination (paragraph 56(j)) — may now be judicially authorized, subject to considerations of health and safety.

The procedures for which a warrant may be issued are those designed to obtain “real evidence” (in the sense that term was used by the Supreme Court of Canada in the *Collins* case¹⁰³). The inclusion of each represents a balancing of the potential probative value of evidence that may be obtained through its use against the intrusion it involves.

By the terms of section 56, only a peace officer may apply for a warrant to conduct an investigative procedure. In this respect, an investigative procedure warrant application is different from a search warrant application.

Application in person or by telephone

57. (1) An application for a warrant shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally, in private and on oath, orally or in writing.

Form of written application

(3) An application in writing shall be in the prescribed form.

COMMENT

Sections 57 through 59 establish the basic procedure for obtaining this kind of warrant. (See also the provisions in Part One.)

100. See s. 72 and the accompanying comment.

101. See s. 73 and the accompanying comment.

102. See comment to s. 73.

103. *R. v. Collins*, *supra*, note 31 at 284.

Section 57 envisions (as is the case in search warrant applications) that the application for a warrant to conduct an investigative procedure will normally be made in person. Once again, however, a telewarrant application may be made if the personal appearance of the applicant is impracticable.

As with the other warrant application provisions in this Code, section 57 provides that the application shall be oral or written, made unilaterally, in private and on oath, and made in a particular form if it is written.

Justice on
application in
person

58. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on
application by
telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

COMMENT

Section 58 is identical to section 23, dealing with search warrant applications. Subsection (1) requires the application to be made to a justice in a location having a substantial connection with the investigation, and provides flexibility to the applicant in choosing the place of application.

Subsection (2), consistent with provision concerning other telewarrant applications in this Code, does not specify a place for bringing an application.

Contents of
application

59. An application for a warrant shall disclose

- (a) the applicant's name;**
- (b) the date and place the application is made;**
- (c) the crime under investigation;**
- (d) the person who is to be subjected to the investigative procedure;**
- (e) whether the person has been arrested for, charged with or issued an appearance notice in relation to the crime under investigation;**
- (f) the procedure to be carried out;**
- (g) the applicant's grounds for believing that carrying out the procedure will provide probative evidence of the person's involvement in the crime and that there is no practicable and less intrusive means for obtaining the evidence;**
- (h) if the application is for a warrant for an examination of the person by means of X-rays or ultrasound, the**

applicant's grounds for believing that carrying out the examination would not endanger life or health;

(i) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;

(j) the name of a person or a class of persons believed by the applicant to be competent, by virtue of training or experience, to carry out the procedure;

(k) if the applicant, on application made in person, requests authority for the warrant to be executed more than ten days after it is issued, the applicant's grounds for believing that the longer period is necessary; and

(l) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

COMMENT

For the same reasons that this Code establishes specific requirements for the contents of search warrant applications, section 59 sets out, with precision, the required contents of an application for a warrant to conduct an investigative procedure. The substantive and probative elements of the application are again clearly separated, as in section 24 in Part Two (*Search and Seizure*).

Paragraphs 59(i) to (l) set out certain elements that supplement the substantive and probative elements of this application. The requirements include specification of the person or class of persons believed to be competent to carry out the procedure, the grounds for seeking a longer than normal expiry period for the warrant and the justification, where necessary, for applying by telephone or other means of telecommunication. These supplement the other formal elements set out in paragraphs 59(a) to (c).

Paragraphs (d) to (g) set out the substantive and probative elements of the application, including identification of the intended subject, the fact that the subject has been arrested, charged with or issued an appearance notice in relation to a specified crime under investigation, the procedure to be carried out and the applicant's grounds for belief that carrying out the procedure will provide evidence of the intended subject's involvement in the crime and that there is no practicable and less intrusive means of obtaining the evidence.

Paragraph (h) adds a unique probative element that must be considered if an X-ray or ultrasound examination is sought: the applicant's grounds for belief that carrying out the examination will not endanger life or health. This complements subparagraph 60(1)(b)(iii), which requires the justice, before approving this application, to be satisfied of this condition.

The clear specification of matters to be included in the application helps to ensure that only reasonable, necessary and expressly justified intrusions are approved. An application containing the proper information will provide an objective reviewable basis for, and record of, the decision.

DIVISION II ISSUANCE OF WARRANT

Grounds for
issuing warrant

60. (1) A justice may, on application, issue a warrant authorizing the carrying out of an investigative procedure listed in section 56 if

(a) the person who is to be subjected to the procedure has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment; and

(b) the justice is satisfied there are reasonable grounds to believe that

(i) carrying out the procedure will provide probative evidence of the person's involvement in the crime,

(ii) there is no practicable and less intrusive means for obtaining the evidence, and

(iii) if the application is for a warrant for an examination of the person by means of X-rays or ultrasound, the carrying out of the examination would not endanger life or health.

Report 25, rec. 5

Additional
ground if
application by
telephone

(2) If the application is made by telephone or other means of telecommunication, the warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

COMMENT

Section 60 establishes the grounds for issuing a warrant. Paragraph (a) of subsection (1) is designed to ensure that bodily intrusions of the type described in section 56 not be judicially authorized in relation to minor offences. In this respect, it is premised on the principle of restraint. The requirement that the grounds exist to justify an arrest or charge or the issuance of an appearance notice is an essential protection against unjustified encroachments on the freedom or personal security of the individual.

Our desire to ensure that unreasonable encroachments on individual freedom be prevented, that personal security be protected, and that the principle of restraint be respected finds expression in the exacting standards of paragraph (1)(b).

Subsection (2) is identical to section 26 in Part Two (*Search and Seizure*) and reflects the purpose and exceptional nature of telewarrant applications.

Conditions
relating to
execution

61. A justice who issues a warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

COMMENT

Section 61 gives a justice the power to impose conditions on the execution of the warrant. The need for such conditions may become apparent in the course of the thorough inquiry that may be conducted on the application.¹⁰⁴ A justice may find it desirable to impose conditions concerning the person or class of persons who will carry out the procedure, requiring that the procedure be carried out by a person of the same sex as the subject, and so on.

Form of warrant

62. A warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

COMMENT

Sections 62 and 63 are included for consistency with the principle of particularity (a principle we have sought to implement in other Parts of this Code). The application of this principle requires that warrants authorizing intrusions into the privacy or bodily security of individuals be precise and readily understandable by all parties affected. Also, they should not be subject to local variations in form or substance. The ultimate goals of these requirements are fairness, accessibility and the prevention of unreasonable or unnecessary intrusions. As with other warrants under this Code, use of a form appropriate to the specific procedure is prescribed. The items to be included in the warrant are self-explanatory.

Section 69 generally requires that the subject of an investigative procedure be given a copy of the warrant before the procedure is carried out. Thus, both investigators and the subject are given a clear statement of what is authorized and required and opportunities for abuses or misinterpretations (which exist whenever the scope of an authority is vaguely stated) are diminished.¹⁰⁵

Contents of
warrant

63. A warrant shall disclose
(a) the applicant's name;
(b) the crime under investigation;

104. The power is similar to that given a justice who issues a search warrant: see s. 27 and the accompanying comment.

105. See the accompanying comment to s. 40, relating to search and seizure.

- (c) the person who is to be subjected to the investigative procedure;
- (d) the procedure to be carried out;
- (e) any conditions imposed relating to its execution;
- (f) the date it expires if not executed;
- (g) the date and place of issuance; and
- (h) the name and jurisdiction of the justice.

COMMENT

See the comment to section 62.

DIVISION III EXPIRATION OF WARRANT

Warrant issued
on application in
person

64. (1) A warrant issued on application made in person expires ten days after it is issued.

Shortening
expiration period

(2) A justice who is satisfied that a shorter expiration period is sufficient may issue a warrant with an expiry date that is less than ten days after the date of issue.

Extending
expiration period

(3) A justice who is satisfied there are reasonable grounds to believe that a longer expiration period is required may issue a warrant with an expiry date that is more than ten days but not more than twenty days after the date of issue.

COMMENT

We have already noted that the goals of judiciality and particularity require a reasonable proximity between the times of issuance and execution of search warrants and that warrants should be executed under substantially the same circumstances that have prompted the issuer to grant them. Also, research has shown that warrants with fixed expiry dates tend to be executed more promptly than those without them. These observations have equal force and relevance to expiration periods for investigative procedure warrants. Investigative procedures can ordinarily be easily arranged and performed within the ten-day period this Code sets for the execution of search warrants. Ten days, therefore, is the expiration period established in section 64. As with search warrants, power is provided to the justice, under subsections (2) and (3) of section 64, to either shorten or lengthen (to a maximum of twenty days) the expiration period. In considering whether to specify a longer expiration period, the justice will have to have regard to the applicant's grounds for belief that the longer period is necessary (which paragraph 59(k) mandates as part of the application). As with search warrants, the justice may also shorten the period on his or her own motion.

In providing, in section 66, that a warrant executed before its expiration date expires on execution, we have attempted to prevent the repetition of a particular investigative procedure under the purported authority of a single warrant. If a warrant authorizes more than one investigative procedure, carrying out any particular procedure only causes the warrant to expire with respect to that procedure.

Warrant issued
on application
by telephone

65. A warrant issued on application made by telephone or other means of telecommunication expires three days after it is issued.

COMMENT

For telewarrants to conduct investigative procedures, section 65 specifies an expiration period identical to that established in section 32 for searches authorized in the same way. See the comment to section 32 in Part Two (*Search and Seizure*).

Expiry on
execution

66. If all of the procedures authorized by a warrant are carried out before the expiry date set out in the warrant, the warrant expires on the date that the last procedure is carried out.

COMMENT

See the comment to section 64.

Expiration of
unexecuted
warrant

67. (1) If none of the procedures authorized by a warrant is carried out before the warrant expires, a copy of the warrant shall have noted on it the reasons why no procedure was carried out.

Filing copy of
warrant

(2) The copy shall be filed as soon as practicable with the clerk of the court for the judicial district in which the warrant was issued.

COMMENT

Subsection 67(1), like section 34, is designed to promote accountability. Subsection 67(2) complements the standard filing requirements for warrants set out in section 13.

DIVISION IV EXECUTION OF WARRANT

Who may
execute warrant

68. A warrant may be executed by a peace officer of the province in which it is issued.

Providing copy
of warrant

69. A peace officer shall, before executing a warrant or as soon as practicable, give a copy of the warrant to the person who is subjected to the procedure.

COMMENT

This section imposes a requirement similar to that imposed by paragraph 40(1)(a) in relation to warrants to search a person. As the comment to that provision explains, the purpose of the requirement is to assure the affected person (at the earliest time practicable) that the procedure is one for which there has been prior judicial authorization.¹⁰⁶ For further elaboration, see the comment to paragraph 40(1)(a).

DIVISION V EVIDENTIARY RULE WHERE ORIGINAL OF WARRANT ABSENT

Absence of
original warrant

70. In any proceeding in which it is material for a court to be satisfied that the carrying out of an investigative procedure was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the carrying out of the procedure was not authorized by a warrant.

COMMENT

Section 70 is similar to the evidentiary provision applicable to search warrants issued on application by telephone or other means of telecommunication (section 41). It is designed, once again, to facilitate later review. Its insistence upon the production of the original warrant in subsequent proceedings emphasizes our belief that while provision for telewarrant applications should be made in an attempt to make our processes more efficient, such processes should raise no questions concerning their rigour or integrity. See also the comment to section 41.

106. See Report 24 at 27-28.

CHAPTER III

INVESTIGATIVE PROCEDURES WITHOUT A WARRANT

DIVISION I

INVESTIGATIVE PROCEDURES IN EXIGENT CIRCUMSTANCES

Grounds for
carrying out
procedure

71. Where a person has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment, a peace officer may, without a warrant, carry out or have carried out with respect to that person any investigative procedure listed in paragraphs 56(a) to (i) if the officer believes on reasonable grounds that

- (a) doing so will provide probative evidence of the person's involvement in the crime;**
- (b) the delay involved in obtaining a warrant would result in the loss or destruction of the evidence; and**
- (c) there is no practicable and less intrusive means for obtaining the evidence.**

Report 25, rec. 6

COMMENT

Section 71 creates a limited exception to the requirement that investigative procedures regulated by this Part be carried out only by consent or under the authority of a warrant. These requirements may be dispensed with in exigent circumstances where clear justification, based on grounds specified in this section, exists. Only procedures for which a warrant could otherwise be obtained under section 56, with the exception of examination by means of X-rays or ultrasound (paragraph 56(j)), may be carried out under this exception.

Section 71 closely follows Recommendation 6 of Report 25. The following four cumulative conditions must be met before the power may be exercised.

1. The intended subject must have been "arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment." In other words, the officer must already have reasonable grounds to believe that the intended subject has committed the crime. This section does not authorize the conducting of investigative procedures in order to acquire the reasonable grounds for belief necessary to justify an arrest or charge. The only alterations to our previous recommendation¹⁰⁷ are the substitution of "more than two years' imprisonment," for "five years or more" (in

107. Report 25, rec. 6(a).

order to conform with the scheme for the classification of offences¹⁰⁸ to be incorporated in this Code), and the addition of a reference to persons who have been “charged . . . or issued an appearance notice.” If the criteria of this section are satisfied, we believe the public interest in preventing the loss or destruction of evidence justifies carrying out the procedures even if the subject is not then in custody.

2. The officer must believe, on reasonable grounds, that carrying out the procedure “will provide probative evidence of the person’s involvement in the crime.” The procedure, therefore, may not be carried out if it merely amounts to a “fishing expedition” based on a hope or mere suspicion that probative evidence will emerge.
3. The officer must believe, on reasonable grounds, “that there is no practicable and less intrusive means for obtaining the evidence.” Unreasonable or unnecessary intrusions are not permitted.
4. The officer must believe, on reasonable grounds, “that the delay involved in obtaining a warrant would result in the loss or destruction of the evidence.” This requirement will most often be satisfied in the case of persons arrested immediately before the need to conduct the procedure arises, but it could also relate to other circumstances. The availability of an application by telephone or other means of telecommunication for these procedures should narrow the range of occasions in which the peace officer will be able to claim to have the necessary grounds for belief that evidence will be lost or destroyed owing to delay.

It should be noted that the safeguards contained in Chapter IV, Division I, including the requirement that the procedures be conducted by qualified and competent persons, also come into play when investigative procedures are conducted in exigent circumstances. The reporting and filing requirements of sections 80 and 81 must also be complied with to ensure accountability.

DIVISION II INVESTIGATIVE PROCEDURES INCIDENT TO ARREST

Visual inspection

***72. A peace officer who has arrested a person for a crime punishable by more than two years’ imprisonment may, incident to the arrest and without a warrant, carry out or have carried out the visual inspection of the surface of the person’s body, excluding the person’s genitals, buttocks and, where the person is female, breasts, if the officer believes on reasonable grounds that**

108. This scheme derives from LRC Working Paper 54.

* A minority of the Commission dissents with respect to the inclusion of this section in the Code.

- (a) doing so will provide probative evidence of the person's involvement in the crime; and**
- (b) there is no practicable and less intrusive means for obtaining the evidence.**

COMMENT

This section provides a power, exercisable without a warrant in carefully restricted circumstances, visually to inspect the body of the arrested person for probative evidence. This minimally intrusive power complements the power to search a person incident to arrest set out in sections 43 and 44.

Section 72 is not based on a previous Commission recommendation. In Report 25, we had taken the position that inspection of the surface of the person's body to seek evidence should only be allowed on consent, with judicial authorization (Recommendations 3, 4(b)) or in exigent circumstances (Recommendation 6). A majority of the Commission is now of the view, however, that the minimal intrusion involved in a purely visual inspection of the surface of the body (excluding private parts) of a person arrested for a crime punishable by more than two years' imprisonment is justified in the circumstances stated. It seems inappropriate, for example, to require a peace officer to obtain a court order to authorize the rolling up of a sleeve to look for a wound or tattoo, especially when one considers that this administrative burden is avoided if the arrested person is fortuitously wearing a short-sleeved shirt. Further, if the limited power conferred here did not exist, the police officer who believes that a visual inspection will produce probative evidence would be encouraged to resort to other devices in order to enable the inspection to take place: for example, arrested persons might be taken into custody in order to facilitate an even more intrusive, but quite legal, custodial strip search. Also, it appears that the essence of this power is available to the police at common law in any event.¹⁰⁹

A minority of us do not endorse this approach and continue to support the position taken in Report 25. In Part Two of this Code, we apply the principled approach of the Supreme Court of Canada in the *Southam* case, requiring that independent judicial authorization, where feasible, precede any significant invasion of privacy or intrusion on the security of property. A minority of us reason that this approach ought to apply with even more force in the case of bodily intrusions. A modest amount of administrative inconvenience is not too great a cost to pay in the service of these interests. Also, since the person will be under arrest in any event, and therefore subject to restraint, nothing is lost by requiring that a warrant be obtained and that the police justify the need to carry out the bodily intrusion before it takes place. However, a majority of us have been persuaded by the argument that the Report 25 approach imposes an unpalatable administrative burden on the police. Perhaps more importantly, any safeguards erected in this way would prove to be more illusory than real, since the police would be legally capable of bypassing the requirement by resorting to other lawful devices in order to carry out the inspection. This reasoning, the minority counters, if applied consistently, would suggest the elimination of all warrant requirements.

109. See *R. v. Beare*; *R. v. Higgins*, *supra*, note 96 at 403-404.

DIVISION III INVESTIGATIVE PROCEDURES WITH CONSENT

Procedures that
may be
conducted with
consent

73. (1) A peace officer may, without a warrant, carry out or have carried out any investigative procedure, other than an investigative procedure that involves the administration of a drug known or designed to affect mood, inhibitions, judgment or thinking, if the person who is to be subjected to the procedure consents.

Report 25, recs. 2(a), 3(a)

Information
required to be
disclosed

(2) Where a person's consent is sought,

(a) the person shall be given a description of the investigative procedure, an explanation of its nature and the reasons for its being carried out;

(b) the individual who is to carry out the procedure shall tell the person whether there are any significant risks to health or safety associated with the procedure and, if so, what those risks are; and

(c) a peace officer shall tell the person that the person has the right to consult with counsel before deciding whether to consent to the procedure, and that consent may be refused or, if given, may be withdrawn at any time.

Report 25, rec. 10(1)

Form of consent

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

COMMENT

As noted in the comment to section 56, we proposed in Report 25 that investigative procedures be divided into three groups: those that were absolutely prohibited, those that could be carried out with judicial authorization (or without such authorization in exigent circumstances) and those that could be carried out with consent. The absolute prohibition category related to procedures of a medical nature which, when transposed to a non-therapeutic setting, we believed should not be conducted even with consent. Included were procedures involving: the administration of substances (*e.g.*, truth serums, enemas or emetics);¹¹⁰ all surgical procedures involving "the puncturing of human skin or tissue . . ." (but not the less intrusive, quasi-surgical taking of blood samples);¹¹¹ procedures for removing stomach contents;¹¹² and "any procedure designed to produce a pictorial representation of any internal part of the subject that is not exposed to view . . ." (*e.g.*, X-rays, ultrasound or other potentially dangerous procedures having a similar purpose).¹¹³

^{110.} Report 25, rec. 2(a).

^{111.} *Ibid.*, rec. 2(b).

^{112.} *Ibid.*, rec. 2(c).

^{113.} *Ibid.*, rec. 2(d).

We took the position that consent to such objectionable methods of obtaining evidence could never reasonably be given.¹¹⁴ On the other hand, we also observed in Report 25 that to deny persons the right to consent to procedures for which a warrant might otherwise be obtained would be an unjustified curtailment of individual rights and analogous to preventing accused or suspected persons from making voluntary statements to the police.

Subject to the mind-altering drug exception, and in accordance with our preference for respecting the autonomy of individuals, section 73 alters our former position and now permits all investigative procedures to be carried out if the subject gives a genuine and informed prior consent. With respect to the exception, we remain of the view that the administration of such drugs is such a repugnant, unreliable and intrusive method of obtaining evidence that it should continue to be absolutely prohibited.

Subsection (2) generally parallels the conditions for obtaining a valid consent to search, set out in section 46, but is more stringent in some respects because of the potentially more intrusive nature of some of these investigative procedures. As is the case when seeking consent to an ordinary search, the officer must here advise the intended subject that consent can be refused or withdrawn at any time, and must describe the procedure, explain its nature and tell the subject why it is being carried out. However, paragraph (b) also requires that the person carrying out the procedure tell the person whose consent is sought about potential risks to health or safety, while paragraph (c) requires the peace officer to advise the subject of his or her right to consult with counsel before deciding whether to consent. These precautions are employed in the cause of ensuring that any consent given where such intrusive powers are implicated is genuinely voluntary and informed. Since these intrusions are to occur when the criminal process has already been set in motion, the need for clear advice as to right to counsel is crucial. The subject's stated desire to have counsel present during an investigative procedure of the kind regulated here should be accommodated wherever practicable.¹¹⁵

Subsection (3), which stipulates that consent may be given orally or in writing, is similar to provisions found throughout this Code where consent to police investigative procedures may be given.

114. *Ibid.* at 37.

115. *Ibid.* at 27.

CHAPTER IV EXERCISING POWER TO CARRY OUT INVESTIGATIVE PROCEDURES

DIVISION I REQUIREMENTS FOR CARRYING OUT PROCEDURES

Competence of person carrying out procedure	<p>74. (1) An investigative procedure shall be carried out by a person who, by virtue of training or experience, is competent to carry it out.</p> <p style="text-align: right;">Report 25, rec. 12</p>
Dental impressions	<p>(2) Dental or bite impressions shall be taken by a person who is qualified under provincial law to take dental or bite impressions.</p>
Medical procedures	<p>(3) An investigative procedure that involves probing for or removing an object of seizure that is inside a person's body shall be carried out by a medical practitioner.</p> <p style="text-align: right;">Report 25, rec. 4(j)</p>
Exception	<p>(4) A peace officer may probe for or remove an object of seizure concealed in a person's mouth if the officer is carrying out the procedure pursuant to section 71 (exigent circumstances).</p>

COMMENT

Chapter IV sets out general directions, safeguards and accountability mechanisms that apply in relation to any investigative procedure covered in this Part.

The purpose of section 74 is to help ensure that authorized investigative procedures are carried out in the safest and most reliable manner possible. Some of the procedures authorized under this scheme could involve risks to health or safety if not carried out by qualified persons. Others (*e.g.*, gunshot residue tests) may pose less risk, but may still need to be conducted by qualified persons in order to preserve the integrity and validity of the procedure.¹¹⁶ Where a warrant is sought, the application must specify "the name of a person or class of persons believed by the applicant to be competent, by virtue of training or experience, to carry out the procedure."¹¹⁷ The justice who issues the warrant may require the investigative procedure to be carried out by a person so qualified.¹¹⁸

116. See Working Paper 34 at 9-10.

117. See s. 59(f).

118. See s. 61.

Whether a procedure has in fact been carried out by qualified personnel will be assessed and determined in the courtroom by the application of the same procedures and criteria used to assess the qualifications of any person claiming expertise.

Subsections (2) and (3) of section 74 are precise in indicating the classes of persons qualified to carry out the types of quasi-medical procedures to which they refer. Subsection (3), which refers to the probing for and removal of objects that are inside a person's body, is not designed to qualify the power to carry out, or have carried out, mere visual inspection of body cavities or the surface of a person's body. (See paragraphs 56(a) and (b) and section 72.)

Subsection (4) is included for clarity, to avoid an interpretation that an object in the mouth is "inside the body" and therefore that, by virtue of subsection 74(3), probing for and removing objects concealed in the mouth must be carried out by a medical practitioner. This provision enables a peace officer to carry out such probing and removal in exigent circumstances, as defined in section 71. This effectively preserves the right, now recognized at common law, of peace officers to prevent attempts to conceal evidence in the mouth or destroy it by swallowing it.¹¹⁹

Information
required to be
disclosed

75. (1) A person who is to be subjected to an investigative procedure carried out without the person's consent shall be

(a) given a description of the procedure, an explanation of its nature and the reasons for its being carried out; and

(b) told that the person is required by law to submit to the procedure and that such force as is necessary and reasonable in the circumstances may be used to carry it out.

Report 25, rec. 9

Time of
disclosure

(2) The information shall be provided to the person before the procedure is carried out or, if that is impracticable, at the first reasonable opportunity.

Waiver of
requirement

(3) The person may waive the requirement set out in paragraph (1)(a), orally or in writing.

COMMENT

Subsection (1) of section 75 clearly specifies the information to be given to an intended subject before any investigative procedure is carried out without consent. By ensuring that the intended subject understands what is about to be done, why, and what the extent of his or her legal obligation is, it helps foster both compliance with the law and the knowledge that the law is not operating arbitrarily. Although subsection (1) does not specify who must provide the information, it would necessarily be someone

119. This power is most frequently used in drug cases. See *R. v. Brezack* (1949), 96 C.C.C. 97 (Ont. C.A.); *Scott v. The Queen* (1975), 24 C.C.C. (2d) 261 (F.C.A.); *R. v. Collins*, *supra*, note 31.

knowledgeable about the things referred to in paragraphs (a) and (b). While a peace officer would generally be the person required to fulfil the obligation under paragraph (b), the proper person to make disclosure under paragraph (a) will vary with the procedure. In some cases, both the peace officer and the person carrying out the procedure may have to participate to make full and meaningful disclosure.

Subsection (2) is an addition to our original recommendation. It allows for flexibility in the timing of the disclosure.

As indicated, these disclosure requirements generally apply before any investigative procedure is carried out. Additional disclosure to the subject is required where procedures are conducted under warrant (section 69) and where consent is sought (subsection 73(2)).

Subsection (3) sets out the protections that may only be waived when the carrying out of the procedure does not depend on the subject's consent. Such waiver is not allowed where consent to the procedure is sought. This ensures the voluntary and informed nature of any consent.

Manner of
carrying out
procedure

76. (1) An investigative procedure shall be carried out in a manner that respects the dignity of the person and that, having regard to the nature of the procedure and the circumstances,

(a) involves as little discomfort as is reasonably practicable; and

(b) provides as much privacy as is reasonably practicable.

Report 25, recs. 11, 13

Waiver of
requirements

(2) A person who is to be subjected to an investigative procedure may waive the requirement set out in paragraph (1)(a) or (b), orally or in writing.

COMMENT

Section 76, which parallels a similar rule in section 50, is designed to promote civility in the treatment of persons subjected to procedures authorized by this scheme. Requiring consideration of the nature of the procedure and surrounding circumstances is a pragmatic recognition of the realities of law enforcement and provides some needed flexibility. For example, while it would be preferable for procedures that require exposure of the subject's private parts to be carried out by persons of the same sex as the subject, this may prove impossible in remote areas or in circumstances where time is of the essence. The requirement that the subject be caused as little discomfort as is reasonably practicable is similarly flexible. The degree of discomfort must vary with the nature of the procedure and other considerations, such as the extent of the subject's co-operation.

Section 76 also embodies a fundamental principle, by requiring that the human dignity of the subject be respected. This requirement is not flexible. In practical terms, it

calls for simple decency and courtesy, and would prohibit behaviour that is calculated to degrade the subject.

Subsection (2) of this provision is largely self-explanatory. It states which of our statutory protections may always be waived.

Exemption from
criminal liability

77. No person is guilty of a crime by reason of a failure or refusal to carry out an investigative procedure with respect to another person.

COMMENT

In Report 25 (at 29 and 43), we expressed the view that legislation governing investigative procedures in respect of the person should provide clearly that private citizens are not obliged to conduct or assist in conducting any investigative procedures. Conscripting of private citizens into the field of criminal investigation would be an unjustified infringement of their individual rights. In particular, the conscription of physicians into such activity could amount to an unconscionable intrusion into the special relationship between doctor and patient.

Section 77 implements the policy of Report 25 in a manner consistent with the exemption from criminal liability of medical practitioners and technicians who refuse to take blood samples from suspected impaired drivers.¹²⁰

DIVISION II SCOPE OF POWER

Visual inspection
and power to
photograph

78. The authority to inspect visually a person's body cavities or the surface of a person's body without the person's consent includes the authority to take a photograph of any probative evidence revealed by the inspection.

COMMENT

Under this scheme, a peace officer may obtain a warrant to inspect the surface or cavities of a person's body visually (see paragraphs (a) and (b) of section 56). Non-consensual visual inspection may be accomplished without a warrant in certain circumstances (*e.g.*, incident to a lawful arrest) that are more fully described in sections 71 and 72 of this Part. Section 78 allows accurate and reliable records to be made of things discovered in the course of an inspection which appear to have some evidentiary value. This section, for purposes of accountability and to ensure that the best and most reliable evidence of things discovered in the course of an investigation finds its way to

120. See *Criminal Code*, s. 257(1). See also s. 119 and the accompanying comment.

court, allows photographs to be taken in limited circumstances. Under the section no separate authority need be obtained in order to take photographs if probative evidence is revealed. However, the power to photograph does not exist if no probative evidence is discovered.

Power to
examine, test or
analyze

79. (1) A peace officer may have anything taken or obtained in the course of carrying out an investigative procedure examined, tested or analyzed.

Safeguarding of
evidence

(2) If probative evidence is revealed, the thing, or that portion of it remaining after the examination, test or analysis, shall be safeguarded so as to preserve it for use in subsequent proceedings.

Application of
section

(3) This section does not apply to anything seized under this Part as an object of seizure.

COMMENT

A number of the procedures authorized in this scheme (*e.g.*, the taking of prints, impressions, photographs) enable physical evidence or information to be obtained without physically removing anything from the subject of the procedure. Other procedures, however, specifically include the removal of something for examination or analysis to determine its value as evidence. Subsection (1) of section 79 makes it clear, in both contexts, that the responsible peace officer need not delay in having anything taken or obtained examined, tested or analyzed to determine its probative value. No additional authorization or permission is required. This new statutory rule reflects the present practice.

Subsection (2) also codifies what, no doubt, is the current practice.

It is not intended that the custody or “restoration” procedures of Part Six (*Disposition of Seized Things*) apply to things taken or obtained by peace officers under this Part, unless they have been seized as objects of seizure (*e.g.*, objects seized from a body under paragraph 56(*b*)). A future Part of this Code, regulating disclosure by the prosecution, will establish requirements for the disclosure of the results of the testing or analysis conducted under this Part, while a further Part governing the judge and conduct of trial will contain provisions pertaining to the release, for scientific testing, of samples or things that become exhibits. In the interest of developing a coherent integrated scheme, we also defer, for the time being, questions relating to the return or disposal of things taken under this Part, and to the maintenance and disposal of records relating to them.

Where this Part authorizes the seizure of an object of seizure in the course of carrying out an investigative procedure (see paragraph 56(*b*)), subsection (3) stipulates that the disposition of that thing is not governed by this section. Rather, it is governed by the provisions of Part Six. Nevertheless, the reporting requirements of section 80 do apply. Thus, in addition to the investigative procedure report required by section 80, an inventory and a post-seizure report under Part Six must also be prepared and filed.

DIVISION III
REPORT OF PROCEDURES CARRIED OUT

Requirement for
and contents of
report

80. (1) Where an investigative procedure has been carried out pursuant to a warrant, section 71 (exigent circumstances) or 72 (incident to arrest), or where anything has been taken or obtained in the course of carrying out an investigative procedure with a person's consent, a peace officer shall, as soon as practicable, complete and sign a report that discloses

- (a) the crime under investigation;**
- (b) the person who was subjected to the procedure;**
- (c) the procedure that was carried out and a description of anything that was taken or obtained;**
- (d) the time, date and place that the procedure was carried out;**
- (e) the name of the person who carried out the procedure; and**
- (f) the name of the peace officer.**

Additional
contents where
procedure carried
out in exigent
circumstances

(2) Where the procedure was carried out pursuant to section 71 (exigent circumstances), the report shall disclose, in addition, the grounds for the peace officer's belief that carrying out the procedure would provide probative evidence of the person's involvement in the crime, that the delay involved in obtaining a warrant would result in the loss or destruction of the evidence and that there was no practicable and less intrusive means for obtaining the evidence.

Report 25, rec. 7(1), (2)

Additional
contents where
procedure carried
out incident to
arrest

(3) Where the procedure was carried out pursuant to section 72 (incident to arrest), the report shall disclose, in addition, the grounds for the peace officer's belief that carrying out the procedure would provide probative evidence of the person's involvement in the crime and that there was no practicable and less intrusive means for obtaining the evidence.

Additional
contents where
all authorized
procedures not
carried out

(4) Where the procedure was carried out pursuant to a warrant issued for more than one investigative procedure and not all of the authorized procedures were carried out, the report shall disclose, in addition, the reasons why each of the authorized procedures was not carried out.

Report 25, rec. 7

COMMENT

The purpose of this section is to ensure accountability and to facilitate a review of the legality of investigative procedures carried out under this Part.

Under subsection (1), a report must be completed as soon as practicable after an investigative procedure is carried out without consent or something has been taken or obtained. The matters to be disclosed under paragraphs (a) through (f) are self-explanatory. The matters specified in subsections 80(2) and (3) apply where no warrant was obtained. They are designed to elicit from the peace officer, after the fact, the grounds relied on as justification for carrying out the procedure, and for proceeding without a warrant. Thus, a peace officer is required to justify his or her actions regardless of whether a warrant is obtained or not. Where no warrant is obtained, the officer must also justify the failure to obtain a warrant.

The requirements of subsections (2) and (3) are self-explanatory. Their purpose is to ensure accountability and the maintenance of records for subsequent review.

Subsection (4) contains a requirement similar to that set out in relation to unexecuted search warrants in section 34. The rationale for that provision also applies here. The reporting requirements in relation to warrants that expire without any procedures being carried out are set out in section 67.

Providing copy
of report and
filing

81. The peace officer shall, as soon as practicable,
(a) give a copy of the report to the person who was sub-
jected to the procedure; and
(b) have the report filed with the clerk of the court for the
judicial district in which the procedure was carried out.

Report 25, rec. 7(3)

Acknowledgements

During the course of our work in developing this Report, we have consulted with many distinguished individuals who bring to our processes wide experience from the fields of policing and law enforcement, law teaching, the practice of law (either as prosecutors or as defence counsel) as well as leading members of the judiciary from various jurisdictions across the country. We are truly grateful to all of them for their advice and hereby acknowledge their enormous influence on our work. Although it is not possible to name everyone with whom we met during the codification exercise, we especially wish to thank those persons listed in the Appendix to this Report.

We also express our gratitude to the current and past Ministers of Justice and their Deputies, Solicitors General and their Deputies, and Members of Parliament who have been involved in our work, for their encouragement and support. Without their help, this Report would have been more imperfect than it is. Needless to say, the views contained in this document do not necessarily reflect those of Parliament, the Department of Justice or any of the individual consultants.

And finally, we would like to extend our thanks to present and former co-ordinators, consultants and staff who have assisted us in this project.