PART FOUR

TESTING PERSONS FOR IMPAIRMENT IN THE OPERATION OF VEHICLES

DERIVATION OF PART FOUR

LRC PUBLICATIONS

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

Investigative Tests, Working Paper 34 (1984)

Recodifying Criminal Law, Report 31 (1987)

LEGISLATION

Criminal Code, ss. 254-258, 487.1(11)

INTRODUCTORY COMMENTS

This Part regulates one aspect of the broader category of investigative procedures in respect of the person: the obtaining and testing of breath and blood samples to detect impairment in the operation of vehicles. While preserving and consolidating much of the present law, this Part also simplifies the law and puts in statutory form a number of important reforms previously recommended by us.

Recommendation 10(5) of our proposed Code of Substantive Criminal Law (Report 31) retains the current *Criminal Code* offences of operating or having care and control of a motor vehicle while impaired by alcohol or a drug (paragraph 253(*a*)), and operating or having care and control of a motor vehicle while having more than 80 milligrams of alcohol in 100 millilitres of blood (paragraph 253(*b*)). The present offence of failing or refusing to comply with a request by a peace officer to provide either breath or blood samples for analysis to determine the concentration of alcohol in the blood is also continued.[121] However, the offences of failing or refusing to provide a breath sample for a "roadside" test by an "approved screening device" and failing to accompany a peace officer to enable such a breath sample to be taken, now found in subsection 254(5) of the *Criminal Code*, are deleted.[122]

The law governing the procedure for investigation and proof of alcohol- and drug-related driving offences is unnecessarily complex. It is the product of fragmentary responses to scientific advances in the area as well as to hardening public attitudes demanding more effective detection and prosecution of offenders. Some provisions, we believe, have become virtually unreadable. Section 258 of the *Criminal Code*, which incorporates amendments supplementing breath test provisions along with complicated conditions for drawing evidentiary presumptions and permitting the admission of certificate evidence in relation to blood tests, is a good example. Provisions such as this convinced us that even where the basic goals of the present law ought to be pursued, some rewriting of the present *Criminal Code* is necessary simply to achieve clarity.

Changing public attitudes toward alcohol- and drug-related driving offences have been reflected in the decisions of higher courts. In one recent decision, the Supreme Court of Canada held that a random spot-check procedure authorized by statute, although amounting to an "arbitrary detention" in violation of section 9 of the *Charter*, was justified as a "reasonable limit" within the meaning of section 1 of the *Charter*. In the view of the Court, the legislative objective of the "limitation" (the detection and deterrence of driving offences involving alcohol or drugs) was, in effect, of sufficient "pressing and substantial concern"[123] to justify overriding the constitutional right. The nature and degree of the intrusion represented by a totally random stop was proportionate to the purpose to be served.

The legislative objectives identified by the Supreme Court were recognized in the reform proposals set out in our 1983 Report, *Investigative Tests: Alcohol, Drugs and*

121. Report 31, rec. 10(6) at 69.

122. *Ibid.*, comment at 69-70.

123. *R.* v. *Hufsky*, [1988] 1 S.C.R. 621 at 634-637.

Driving Offences. Those proposals, which form the basis of this Part, were designed to counter perceived impediments to the successful prosecution of offences involving drinking and driving.[124] They also reflected the need to ensure that any legislative infringement of constitutional rights was reasonable,[125] and that any increased intrusion into privacy or personal integrity authorized by changes to the law (as it then stood) was balanced by provisions that guaranteed, to the greatest degree possible, both the accuracy of the evidence obtained and the health and safety of the individual.[126]

Except as noted below, the provisions of this Part continue the general approach of the present law. The provisions, central to this Part, allowing peace officers to obtain breath or blood samples, may be summarized as follows.

1. A peace officer may request a person who is operating or has the care or control of a vehicle to give breath samples for analysis by a preliminary breath testing device. The officer need only reasonably suspect that the person has alcohol in his or her blood to make this request. The preliminary breath testing device does not measure the amount of alcohol in the subject's blood: it indicates whether alcohol is present in an amount that appears to go beyond permissible limits, thus indicating whether further testing is necessary. It will no longer be a crime not to comply with this request, or not to accompany the officer for the purposes of the test.[127] Rather, upon failure or refusal, the person may be arrested and taken to a place where a breath analysis instrument (commonly known as a breathalyser, but designated in the *Criminal Code* only as an "approved instrument") is available. Failure or refusal to provide samples for this device will be a crime under section 59 of our proposed Criminal Code. In order to encourage compliance with these provisions and better ensure that citizens are aware of their rights, the person must be warned, at each stage, of the consequences of refusal.
2. A peace officer who reasonably believes that a person, at any time within the previous two hours, has committed an alcohol-related crime under section 58 of our proposed Criminal Code[128] may bypass the preliminary screening procedure. Instead, the person may be immediately requested to go with the officer to a place where breath samples may be taken for analysis by a breath analysis instrument. Where the officer believes obtaining breath samples would be impracticable because of any physical condition of the person, the person may be

124. Report 21 at 1. Specifically cited was the prohibition of compulsory blood tests contained in what was then s. 237(2) of the *Criminal Code*.

125. *R.* v. *Oakes*, [1986] 1 S.C.R. 103; *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, *per* Dickson, C.J. at 768-769. "Limits" are "reasonable" if rationally connected to the objectives sought to be attained, impair constitutionally guaranteed rights as little as possible and do not so severely trench on individual rights as to outweigh the legislative objectives.

126. Report 21 at 17.

127. The present offences are set out in s. 254(5) of the *Criminal Code*. Refusing to accompany the officer is one mode of committing the offence of refusing to comply with a demand under s. 254. See *R.* v. *MacNeil* (1978), 41 C.C.C. (2d) 46 (Ont. C.A.).

128. These, in essence, are the crimes of operating or having the care or control of a vehicle with ability impaired or with more than 80 milligrams of alcohol in 100 millilitres of blood.

requested to go with the officer to a place where blood samples can be taken. At this stage, the officer must warn the person that failure or refusal to comply with this request for either breath or blood samples may cause the person to be arrested and taken to an appropriate place for obtaining the relevant samples. Once the person is taken there, the officer may request the person to provide breath or blood samples and must warn the person that failure or refusal to comply with this request is a crime under section 59 of our proposed Criminal Code. Once again, whenever the police make requests of this nature, they are also required to issue clear warnings as to the consequences of a failure to comply.

3. A peace officer may apply to a justice (either in person or, where circumstances make a personal appearance impracticable, by telephone or other means of telecommunication) for a warrant to take samples of a person's blood. The grounds justifying the issuance of a warrant are essentially those set out in section 256 of the current *Criminal Code*. The justice may issue the warrant if satisfied that it is reasonable to believe: (1) that the person, within the preceding two hours, has committed an alcohol-related crime under our proposed Criminal Code section 58 and was involved in an accident resulting in the death of, or bodily harm to, any person; and (2) that a doctor is of the opinion that the person is unable to consent to having blood samples taken, by reason of any physical or mental condition resulting from the consumption of alcohol or the accident, and that taking the samples will not endanger the person's life or health.

Because the taking of blood samples represents a more serious intrusion than the taking of breath samples, and may entail some risks to health or life, the provisions of this Part relating to the taking of blood samples contain a number of special safeguards. No more than two blood samples may be taken. A doctor must supervise the taking of the samples, and must be satisfied that taking the samples will not cause danger to the person's life or health. No criminal liability may result from the failure or refusal of a doctor, or of a technician acting under a doctor's direction, to take a blood sample. Moreover, in recognition that a request for samples — whether of blood or breath — may in itself disrupt the treatment of injured persons, we have included a provision that allows for the medical screening of requests in certain circumstances.

Other provisions in this Part: establish technical procedures and requirements relating to the application for, and issuance of, blood sample warrants (these are similar to those governing search warrants and warrants to conduct other investigative procedures in respect of the person); enable detained persons whose breath analyses are unfavourable to request that blood samples be taken; establish procedures for having blood samples released for independent analysis; and allow blood samples to be tested for the presence of drugs.

Our proposed legislation leaves intact the general thrust of the present *Code* provisions governing the admissibility of breath and blood analysis results, the presumptions to be applied to the results and the use in evidence of certificates prepared by analysts, technicians or doctors. One change worth noting, however, relates to the number of blood samples that must be taken and analyzed in order for the statutory presumption now contained in paragraph 258(1)(*d*) of the *Code* to apply. To improve the accused's

ability to "make full answer and defence,"[129] we have changed that number from one to two.

Also worth noting in Part Four is the absence of an equivalent to subsection 258(3) of the *Criminal Code*. That provision makes admissible in certain proceedings, and allows an adverse inference to be drawn from, evidence that an accused has unreasonably failed to provide breath or blood samples. It is our view that the admissibility and effect of such evidence should be a matter for the ordinary rules of evidence. If, in the circumstances, the fact of a failure or refusal to provide a blood sample is relevant in proving "consciousness of guilt," it should be admitted into evidence and given the weight it deserves; if not, there is no good reason in logic or policy to continue to make this fact artificially admissible while asserting that an adverse inference of guilt need not necessarily be drawn from it.[130]

CHAPTER I
INTERPRETATION

Definitions

82. In this Part,

"analyst" (*analyste*)

"analyst" means a person designated by the Attorney General as an analyst for the purposes of this Part;

"breath analysis instrument" (*analyseur d'haleine*)

"breath analysis instrument" means an instrument designed to receive and analyze a sample of a person's breath in order to measure the concentration of alcohol in the person's blood, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"container" (*contenant*)

"container" means

(*a*) in respect of breath samples, a container designed to receive a sample of a person's breath for analysis, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada, and

(*b*) in respect of blood samples, a container designed to receive a sample of a person's blood for analysis, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"operate" (*conduire*)

"operate" includes, in respect of a vessel or an aircraft, navigate;

129. *Criminal Code*, s. 650(3) in relation to indictable offences. See subsection 802(1) where the right to a "full answer and defence" in summary convictions is set out.

130. See *R.* v. *Mackenzie* (1984), 6 C.C.C. (3d) 86 (Alta. Q.B.); *R.* v. *Van Den Elzen* (1984), 10 C.C.C. (3d) 532 (B.C.C.A.).

"preliminary breath testing device" (*alcootest*)

"preliminary breath testing device" means a device designed to ascertain the presence of alcohol in a person's blood, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"technician" (*technicien*)

"technician" means

(*a*) in respect of breath samples, a person designated by the Attorney General as being qualified to operate a breath analysis instrument, and

(*b*) in respect of blood samples, a person or member of a class of persons designated by the Attorney General as being qualified to take a sample of a person's blood for the purposes of this Part;

"vehicle" (*véhicule*)

"vehicle" means a motor vehicle, train, vessel or aircraft, but does not include anything driven by, propelled by or drawn by means of muscular power.

Criminal Code, ss. 2, 214, 254(1)

COMMENT

Existing definitions in the *Criminal Code* have been adapted to this scheme. Section 82 incorporates the definitions "operate" and "vehicle" set out in section 56 of our proposed Criminal Code.[131] It also incorporates definitions now found in section 2 and subsection 254(1) of the *Criminal Code*.

In most cases, the basic meanings of the defined terms have not been changed. The definition "analyst" is essentially unchanged. The definition "breath analysis instrument" is largely the same as that for the current term "approved instrument"; the change in terminology is simply an attempt to identify more clearly the function of the instrument. The term "container" replaces "approved container," but the substance of the definition is unaltered. "Operate" is defined as it is in section 56 of our proposed Code, and is derived from paragraph (*c*) of the definition set out in what is now section 214 of the *Criminal Code*. "Preliminary breath testing device" replaces "approved screening device" (the former is a descriptive term that better conveys the function of the instrument), but the definition remains essentially the same. The same is true for "technician" which replaces "qualified technician." The definition "vehicle" (a term that replaces "motor vehicle") repeats the definition set out in section 56 of our proposed Code. This definition furthers our intention, expressed in Recommendation 10(5) of Report 31, to make the substantive Code's impaired driving provision and the provision on driving while having more than 80 milligrams of alcohol in 100 millilitres of blood applicable where any "means of transportation (other than one humanly powered [such as a bicycle]) . . ." is involved.

131. Report 31, Appendix B at 188. We note recent amendments to the definitions "operate" and "motor vehicle." See the *Railway Safety Act*, S.C. 1988, c. 40, ss. 55(1), 56. Some or all of these changes may be incorporated into this Code after further study.

CHAPTER II
PRELIMINARY BREATH TESTS

Request for preliminary breath sample

83. (1) Where a peace officer reasonably suspects that there is alcohol in the body of a person who is operating or has the care or control of a vehicle, the peace officer may request that the person

(*a*) provide, as soon as practicable, such a breath sample as the peace officer considers necessary to enable a proper analysis to be made with a preliminary breath testing device; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the breath sample to be taken.

Warning

(2) When making the request, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where a breath analysis instrument is available.

Criminal Code, s. 254(2), (5)

COMMENT

This section largely retains subsection 254(2) of the present *Criminal Code*. The term "request" has been substituted for "demand," as it more accurately conveys the initial approach that we believe peace officers should employ to secure the co-operation of the motoring public. As is currently the case with a demand, however, a request made under this Part has a mandatory character; the consequences of non-compliance are alluded to in subsection (2) and are elaborated upon in later provisions of this Part.

The threshold for permitting a peace officer to request a breath sample for a "roadside" preliminary breath testing device continues to be a reasonable suspicion that there is alcohol in the body of a person operating or having care or control of a vehicle. The *Criminal Code* term "forthwith," which tells how soon the person must comply with the request, is replaced by the expression "as soon as practicable"; this change takes account of case law holding that "forthwith" means "as quickly as possible," not "immediately."[132]

Our proposed legislation, unlike subsection 254(5) of the current *Criminal Code*, does not make it a crime to fail or refuse to comply with a demand to give a breath sample for a preliminary breath testing device. As our forthcoming provisions on arrest will make clear, failure or refusal provides grounds for arrest and for conveyance of the person to a place where a breath analysis instrument is available. Subsection (2)

132. See *R.* v. *Seo* (1986), 25 C.C.C. (3d) 385 at 409 (Ont. C.A.), and also the remarks of Le Dain, J., in *R.* v. *Thomsen*, [1988] 1 S.C.R. 640.

provides that this new consequence must be explained by the officer when making the request.

The procedural changes in this Part (and in our forthcoming arrest provisions) dealing with those who do not provide breath samples for "roadside screening" complement, and are explained by, the comment accompanying Recommendation 10(6) of Report 31.[133] The present law requires the courts to choose between accommodating the conferring of *Charter* rights (which may render it impossible to conduct roadside screening effectively) and refusing to accord these rights (which makes criminal conviction possible in circumstances where an individual under detention has been denied the right to counsel).[134] The Supreme Court of Canada has effectively chosen the latter option. In a recent case, it held that limiting the right to counsel at the roadside screening stage was reasonable under the *Charter*.[135] It also emphasized, however, that the means chosen to promote a legislative objective important enough to warrant overriding a constitutional right had to be proportional to that objective.[136] In our view, the objectives of roadside screening and the detection and deterrence of impaired driving can be as effectively achieved with less drastic effects on individual rights than is now the case. Under sections 83 and 84 of our legislation, the authorities retain all necessary powers to stop and test suspected drinking drivers. However, the method now used to enforce submission to the less accurate preliminary screening procedure (exposing to criminal liability roadside detainees who are denied the right to counsel) is eliminated.[137]

CHAPTER III
REQUEST FOR SAMPLES FOR BLOOD-ALCOHOL ANALYSIS

DIVISION I
REFUSAL TO PROVIDE PRELIMINARY BREATH SAMPLE

Request for breath samples

84. Where a person has been arrested for failure or refusal to provide a breath sample for a preliminary breath testing device or to accompany a peace officer for the purpose of enabling the breath sample to be taken, a peace officer may request that the person provide, as soon as practicable, such breath samples as a technician considers necessary to enable a proper analysis to be made with a breath analysis instrument.

133. Report 31 at 69-70. See *R.* v. *Thomsen*, *supra*, note 132.

134. See S.A. Cohen, "Roadside Detentions" (1986), 51 C.R. (3d) 34 at 41.

135. *R.* v. *Thomsen*, *supra*, note 132.

136. *Ibid.* at 653-654.

137. See *R.* v. *Therens*, [1985] 1 S.C.R. 613.

COMMENT

Under the present law, if a person fails or refuses, without reasonable excuse, to provide a breath sample for an "approved screening device," he or she commits a crime. The range of minimum punishments for this crime is set out in *Criminal Code* subsection 255(1). It is the same generally as that which applies to a conviction for the crimes of driving while impaired and driving while having more than 80 milligrams of alcohol in 100 millilitres of blood.

In effect, the legislative history of the crimes of drunk driving shows that Parliament, in an attempt to deal harshly with this harmful activity, has increased the scope of criminal liability. First, there is the crime of impaired driving. Second, there is a kind of deemed impairment crime, that of driving while having more than 80 milligrams of alcohol in 100 millilitres of blood. Third, there is the crime of refusal to provide breath or blood samples. As regards breath samples, it covers not only a failure to provide breath samples for a breathalyser, but also failure to provide a breath sample for a roadside screening device.

Although this legislation is by now familiar to police officers, lawyers and judges, in our view it contains serious defects, defects of a kind that may be easily rectified without disrupting a vigorous law enforcement policy. A breathalyser can accurately measure the amount of alcohol in a person's blood. An "approved screening device" cannot. Hence it is used preliminary to a breathalyser, not in place of one. Imposing criminal liability for a refusal to provide a breath sample into a roadside screening device extends the ambit of criminal liability forward in time to an event which merely assists a police officer in determining whether he or she should request that a person provide clear evidence of guilt against himself or herself by blowing into a breathalyser. This approach fails to give due weight to the fundamental principle of restraint in the use of the criminal law. In our view, the law should use alternative methods which help police investigate such crimes without over-extending the reach of the criminal law.

This section creates such an alternative method. If a person fails to provide a breath sample into a preliminary breath testing device, the police officer has the authority to request that the person provide breath samples for a breathalyser. Any criminal liability for failure to provide a breath sample arises only from failure to provide breath samples into a breathalyser.

DIVISION II
COMMISSION OF ALCOHOL-RELATED CRIME

Request for breath samples

85. (1) Where a peace officer believes on reasonable grounds that a person, at any time within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), the peace officer may, as soon as practicable, request that the person

(*a*) provide, as soon as practicable, such breath samples as a technician considers necessary to enable a proper analysis to be made with a breath analysis instrument; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the breath samples to be taken.

Warning

(2) When making a request that the person accompany the peace officer, the peace officer shall warn the person that in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where a breath analysis instrument is available.

Report 21, recs. 1, 8
Criminal Code, s. 254(3)(*a*)

COMMENT

Subsection (1) of this provision continues subsection 254(3) of the present *Criminal Code*. It sets out the second situation in which a peace officer is justified in making a request for breath samples for analysis by a "breath analysis instrument." Satisfaction of the threshold test in subsection (1) justifies the making of the request and dispenses with any need for a prior request or test involving a preliminary screening device.

The person, who will be under detention at this point,[138] has a right to consult with counsel and to be told of that right before complying with the request. Since the person in jeopardy has access to legal advice, making it a crime to fail or refuse unreasonably to comply with a request is justified.

Request for blood samples

86. (1) If the peace officer believes on reasonable grounds that, because of any physical condition of the person, it would be impracticable to obtain breath samples from the person or the person would be incapable of providing breath samples, the peace officer may, as soon as practicable, request that the person

(*a*) submit, as soon as practicable, to having blood samples taken for the purpose of determining the concentration of alcohol in the person's blood; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the blood samples to be taken.

Warning

(2) When making a request that the person accompany the peace officer, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where blood samples can be taken.

Report 21, recs. 3, 8
Criminal Code, s. 254(3)(*b*)

138. *Ibid.*

COMMENT

Subsection (1) of this section codifies most of what the present law now addresses in paragraph 254(3)(*b*) of the *Criminal Code*. It must be read in the light of subsection 103(1) below, which (unlike the current *Code*) limits the number of blood samples that may be requested to two.

Subsection (2) obliges the officer to provide a warning similar to that which must be given under subsection 85(2) when requesting breath samples.

DIVISION III
WARNING REGARDING REFUSAL

Warning

87. When making a request for breath samples or blood samples, the peace officer shall warn the person that it is a crime under section 59 (failure or refusal to provide breath sample) of the proposed Criminal Code (LRC) to fail or refuse, without a reasonable excuse, to comply with the request.

Report 21, rec. 8

COMMENT

This section is designed to ensure that persons to whom requests are made under section 84, 85 or 86 (*i.e.*, after arrest and transportation to a place where the samples can be taken) are made aware of their legal obligation to comply. The giving of a warning in these circumstances reflects prevailing police practice in Canada.

DIVISION IV
RESTRICTION ON REQUEST FOR SAMPLES

Request not prejudicial to medical treatment

88. A peace officer may not request that a person who has been admitted to hospital or is undergoing emergency medical treatment provide breath samples or submit to having blood samples taken unless the attending medical practitioner is of the opinion that making the request and taking the samples would not be prejudicial to the person's proper care or treatment.

Report 21, rec. 5

COMMENT

This section makes it clear that if a person has been admitted to hospital or is undergoing emergency medical treatment, the protection of the health and safety of the patient is to be given priority over the peace officer's ability to request that the person give breath or blood samples. Although subsection 254(4), subparagraph 256(1)(*b*)(ii)

and subsection 256(4) of the *Criminal Code* now provide some protection to the patient where blood samples are sought, we do not believe they go far enough. The *Code* provisions apply to the *taking* of blood samples but provide no mechanism for the screening of *requests*. Since the making of a request (whether for breath or blood samples) can be disruptive and adversely affect the well-being of the patient, this section limits the authorities' contact with the patient for this purpose.

DIVISION V
REQUEST FOR BLOOD SAMPLES AFTER DISCLOSURE OF BREATH ANALYSES RESULTS

Disclosure of results

89. (1) As soon as practicable after the results of breath analyses are known, a peace officer shall tell the person who provided the breath samples the results.

Request for blood samples

(2) A person who is detained in custody may, after being told the results of the breath analyses, request that blood samples be taken and, if a request is made, a peace officer shall arrange for the samples to be taken.

Report 21, recs. 9, 10

COMMENT

The analysis of blood to determine blood-alcohol concentrations in the body is recognized as more accurate than analysis of breath.[139] Section 89 is a new provision designed to facilitate access by detained persons to the more accurate procedure.

The key to providing this access lies in ensuring that all persons who provide breath samples for a "breath analysis instrument" are promptly advised of the analysis results. This requirement, now imposed clearly by subsection (1), causes no administrative difficulties, since a breath analysis result is known virtually as soon as the sample is taken. Persons who learn that they have failed a breath test and are then released have the ability to make their own arrangements for blood tests. If they have spoken to a lawyer, they may be advised to undergo a blood test. Subsection (2) simply seeks to ensure that detained persons, who may also wish to have blood tests done, have equal access to the more accurate procedure.

A majority of the Commission is of the view that the provisions that generally apply to blood samples given at the request of officers should also apply to samples taken following a request made under this section. By this approach, no privilege would arise in relation to the samples or analysis results. The samples should thus remain in the custody of the authorities and be safeguarded by them in the same manner as any

139. See P. Harding and P.H. Field, "Breathalyser Accuracy in Actual Law Enforcement Practice: A Comparison of Blood- and Breath-Alcohol Results in Wisconsin Drivers" (1987) 32 Journal of Forensic Sciences 1235.

blood samples taken under this Part would be safeguarded. The provisions of Chapter V incorporate the majority view and are, by section 101, specifically made applicable to samples taken under subsection 89(2).

A minority of the Commission takes a different view. Since the purpose of this section is to put the detained person in the same position as the person who has been released, it believes that the results of any analysis of blood samples taken following a request made under this section and provided to the detained person should be considered the privileged property of that person. The authorities, therefore, should not be able to have access to the results of the analysis of "their half" of a person's sample unless the person gives notice of an intention to adduce the analysis results at trial. This view is put into legislative form in the Alternative Draft contained in Chapter V.

An accused who wishes to tender at trial the results of an analysis done by an "analyst" (as defined in section 82) may do so by way of certificate, in accordance with section 123.

CHAPTER IV
WARRANT TO TAKE BLOOD SAMPLES

DIVISION I
APPLICATION FOR WARRANT

Applicant

90. A peace officer may apply for a warrant authorizing the taking of samples of a person's blood.

Report 21, rec. 4
Criminal Code, s. 256(1)

COMMENT

Section 90 states who may apply for a warrant authorizing the taking of blood samples. The present *Criminal Code* does not specifically exclude anyone from bringing ordinary warrant applications, although it does restrict telewarrant applications to peace officers. Having regard to the conditions for obtaining a warrant, set out in section 94, it is appropriate that only peace officers be permitted to make the application.

Application in person or by telephone

91. (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 and on oath, orally or in writing.

Form of written application

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

Criminal Code, s. 256(1), (3)

COMMENT

Section 91 says how an application for a blood sample warrant may be made. The procedure is similar to that for a search warrant.

Subsection (1) states the two methods currently provided for in subsection 256(1) of the *Criminal Code*.

Subsection (2), dealing with the manner in which the application must be made, requires that it be unilateral (*i.e.*, "without notice to any other party"). Unlike our other warrant application requirements, the requirement regarding this application does not stipulate that it be made in private, since the person from whom the samples may be taken will often be unconscious and there need be no concern that knowledge of the application may result in the loss or destruction of the evidence. Subsection (2) also expands upon the present law by allowing applications for blood sample warrants to be made orally as well as in writing. The reasons for this change have already been explained in the comment to subsection 22(2).

The *Criminal Code* now requires that written applications for blood sample warrants be made "on an information on oath in Form 1." However, Form 1 is designed for search warrant applications. Apart from its inherent imperfections,[140] the form is an inappropriate vehicle for making applications relating to a completely different subject. Subsection (3) prescribes a special form that allows for easy inclusion of the contents described in section 93.

Justice on application in person

92. (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.

Criminal Code, s. 256(1)

COMMENT

The *Criminal Code* does not now specify where the application should be made. Owing to the urgent circumstances that normally attend these applications, subsection (1) of this provision gives considerable flexibility to the applicant in choosing where to apply. This will be of particular assistance in the case of applications arising out of accidents in remote areas.

140. See the comment to s. 24.

Subsection (2) is self-explanatory. It follows the current provisions of the *Criminal Code*, but is drafted to accord with the Unified Criminal Court system we have proposed (Working Paper 59).

Contents of application

93. 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 from whom the blood samples are to be taken;

(*e*) the applicant's grounds for believing that the person, within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC) and was involved in an accident resulting in the death of, or bodily harm to, someone;

(*f*) the applicant's grounds for believing that a medical practitioner is of the opinion that

(i) the person is unable to consent to the taking of the blood samples because of a physical or mental condition resulting from the consumption of alcohol, the accident or an occurrence related to or resulting from the accident, and

(ii) taking the blood samples would not endanger the person's life or health;

(*g*) 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; and

(*h*) 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

The application procedure for a blood sample warrant must be governed by the same general goals as search warrant application procedures: judiciality, particularity, accountability and strict regulation of discretionary intrusions upon individual rights. To achieve these goals, it is essential that the factors justifying any judicial authorization of such intrusions be stated clearly.

The present *Criminal Code* calls for applications to be made using Form 1, which is designed for search warrant applications; Form 1 is thus ill-suited to the purpose, creating the opportunity for blood sample warrants to be issued on vague or deficient criteria. Section 93 therefore sets out specifically the information to be included in an application for a blood sample warrant, separating the substantive and probative elements in the application. This kind of separation is now clearly seen only in section 487.1 of the *Criminal Code*, which sets out the statements to be included in a telewarrant application. Our Code expands on this approach.

DIVISION II
ISSUANCE OF WARRANT

Grounds for issuing warrant

94. (1) A justice may, on application, issue a warrant authorizing the taking of samples of a person's blood if the justice is satisfied there are reasonable grounds to believe that

(*a*) the person, within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC) and was involved in an accident resulting in the death of, or bodily harm to, someone; and

(*b*) a medical practitioner is of the opinion that

(i) the person is unable to consent to the taking of blood samples because of a physical or mental condition resulting from the consumption of alcohol, the accident or an occurrence related to or resulting from the accident, and

(ii) taking the blood samples would not endanger the person's life or health.

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.

Report 21, rec. 4
Criminal Code, s. 256(1)

COMMENT

This section generally carries forward the conditions (set out in subsection 256(1) of the present *Criminal Code*) for the issuance of a warrant authorizing the taking of blood samples.

As a result of consultations, we have refined our previous recommendations in two respects. First, we have opted to limit the availability of blood sample warrants to situations in which an accident causing death or injury has occurred (see paragraph

94(1)(*a*)). The operative principle here is restraint. Second, we have not limited the availability of such warrants to cases in which the person is unconscious, but have recognized that there may be circumstances in which a conscious person will be unable to give consent (*e.g.*, owing to intoxication or injury).

In deciding whether to issue a warrant to take blood samples, the justice has the same kind of discretion as is exercised in issuing a search warrant.[141] The justice must be satisfied that the conditions set out in paragraphs (1)(*a*) and (*b*) are met. Note that, although paragraph (*b*) requires that the justice be "satisfied there are reasonable grounds to believe . . ." that a doctor has the opinion described in subparagraphs (i) and (ii), it does not contemplate the justice's considering independently the validity or weight of that opinion.

Subsection (2) of section 94 complements paragraph 93(*h*). The special basis on which a warrant for blood samples may issue when application is made by telephone or other means of telecommunication is identical to that in section 26 dealing with search warrants. The uniqueness of a warrant that is issued after such an application lies only in the manner in which it is obtained. Once issued, this warrant confers the same powers as a warrant issued after the applicant's personal appearance. As is the case when a search warrant is issued by means of a telewarrant application, the warrant must be completed by the justice and either two copies must be transmitted to the applicant or the applicant must complete two copies. (See section 12.)

Conditions relating to execution

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

COMMENT

This section gives the issuing justice a power identical to that given when search warrants are issued under section 27. This power is appropriate to the wider scope of inquiry permitted in the application proceedings. The obtaining of a more thorough understanding of all of the facts and circumstances surrounding the request for a warrant better enables the justice to set conditions ensuring that the purpose of the warrant is achieved in the safest, most efficient and least intrusive manner possible. Section 100 alludes to the fact that the issuing justice has the power, under this section, to impose a special condition that a copy or facsimile of the warrant be given to a named person other than the person from whom a blood sample is to be taken. This would most often be of use when the person from whom the sample is to be taken is unconscious. (See the comment to section 100 in this regard.)

Form of warrant

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

Criminal Code, s. 256(2)

141. See the comment to s. 25.

COMMENT

Subsection 256(2) of the *Criminal Code* now provides that a warrant to take blood samples "may be in Form 5 or 5.1 varied to suit the case." Both forms are, in fact, drafted for search warrants. The defects in these forms are discussed in the comments to sections 29 and 32. Our criticisms of these forms for search warrants have even greater force when the forms are to be used as authority to obtain blood samples. By requiring the use of a specific form relating only to the taking of blood samples, we have endeavoured to maximize and enhance the particularity of blood sample warrants.

Contents of warrant

97. The warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the person from whom the blood samples are to be taken;

(*d*) the time and date the application was made;

(*e*) any conditions imposed relating to its execution;

(*f*) the time and date it expires if not executed;

(*g*) the time, date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

COMMENT

This section sets out the details to be included in the warrant. The basic format of section 30 is followed.

DIVISION III
EXPIRATION OF WARRANT

Six-hour expiration period

98. A warrant authorizing the taking of blood samples expires six hours after it is issued or, if it is executed less than six hours after it is issued, on execution.

COMMENT

The general reasons for imposing fixed expiry periods on warrants have been discussed previously.[142] Section 98, which has no equivalent in the current *Criminal Code*, establishes an expiry period for blood sample warrants. It recognizes that the usefulness of blood samples diminishes after a point, and therefore is designed (along with other time-limit provisions of this Part) to prevent intrusions that are rendered unreasonable by the passage of time.

142. See the comments to ss. 31-33.

While the six-hour period is admittedly somewhat arbitrary, it allows reasonable time for a warrant to be executed.

Return of expired warrant

99. If a 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.

COMMENT

This section is similar to, and justified on the same basis as, a requirement found in section 34.

DIVISION IV
PROVISION OF COPY OF WARRANT

Person to whom copy given

100. A peace officer shall, as soon as practicable after executing a warrant, give a copy of the warrant to the person from whom the blood samples were taken, unless the justice who issued the warrant imposed a condition requiring that the copy be given to another designated person.

COMMENT

As in the case of search warrants,[143] the Commission believes that copies of blood sample warrants should generally be given (without the need for a request) to the people they affect. Since the person affected may be unconscious, and since others (for example, family members) may have an interest in ensuring that blood samples are not taken from the person unless there is a medical necessity or valid legal authorization, section 100 provides for a copy to be given to any other person named by the issuing justice.

143. See the comment to s. 40.

CHAPTER V
TAKING, TESTING AND RELEASING BLOOD SAMPLES

DIVISION I
INTERPRETATION

Application of Chapter

101. This Chapter applies to blood samples taken pursuant to a warrant, a request made under paragraph 86(1)(*a*) (request by peace officer) or a request made in the circumstances described in subsection 89(2) (request by person detained in custody).

DIVISION II
TAKING AND TESTING BLOOD SAMPLES

Conditions for taking samples

102. (1) Blood samples shall be taken from a person

(*a*) as soon as practicable after the request for the samples has been made or the warrant has been issued;

(*b*) by a medical practitioner or a technician acting under the direction of a medical practitioner; and

(*c*) in a manner that ensures the least discomfort to the person.

Opinion of medical practitioner

(2) Blood samples shall not be taken unless the medical practitioner is of the opinion, before each sample is taken,

(*a*) that taking the sample would not endanger the person's life or health; and

(*b*) in the case of a blood sample taken pursuant to a warrant, that the person is unable to consent to the taking of the sample because of a physical or mental condition resulting from the consumption of alcohol, the accident with respect to which the warrant was issued or an occurrence related to or resulting from the accident.

Report 21, recs. 13, 14
Criminal Code, ss. 254(3), (4); 256(4)

COMMENT

Subsection 102(1) contains a number of safeguards for persons from whom blood samples are to be taken. The timeliness requirement of paragraph (*a*) (one undoubtedly observed in any event by most police officers, as any undue delay in taking the sample

will affect the value attributed to the analysis results) is designed to help ensure that blood samples are taken at a time when they are scientifically useful, and that persons are not subjected to the taking of such samples when their usefulness has diminished or disappeared. Paragraph (*b*) contains the essence of that part of subsection 254(4) of the present *Criminal Code* which ensures that blood samples are taken by a competent person in a competent fashion. Paragraph (*c*) is self-explanatory and is designed to minimize the intrusion occasioned by the taking of blood samples.

Subsection 102(2) also repeats parts of paragraph 254(3)(*b*) and subsection 254(4) of the present *Criminal Code*. It complements the requirements for obtaining the warrant set out in our paragraph 94(1)(*b*) and also makes it clear that the supervising doctor has the final word as to whether, when and how the samples may be taken, since the person's health and safety are to have paramount importance.

Number of samples

103. (1) No more than two separate blood samples may be taken from a person.

Size of sample

(2) Each blood sample shall be taken in such an amount as a medical practitioner considers necessary to enable the sample to be divided into two parts suitable for separate analysis for the purpose of determining the concentration of alcohol in the person's blood.

Report 21, recs. 3, 4
Criminal Code, ss. 254(3), 256(1)

COMMENT

Sections 103 to 105 set out certain requirements relating to the taking of blood samples. The *Code*'s current requirements (which are somewhat different) are less clearly articulated, and are largely discoverable only by reference to the evidentiary provisions of section 258.

Although section 258 creates a rebuttable presumption with reference to the analysis results of one blood sample, the present *Criminal Code* does not place a specific limit on the number of blood samples that may be taken. Subsection 254(3), for example, refers simply to "such samples of the person's blood . . . as in the opinion of the qualified medical practitioner or qualified technician taking the samples are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood." In a similar manner, subsection 256(1) refers to "such samples of the blood of the person as in the opinion of the person taking the samples are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood." Subsection (1) of section 103 now clearly authorizes the taking of a maximum of two blood samples. In doing so, it limits the power of the state to intrude upon the bodily integrity of the individual.

Subsection (2) is self-explanatory; it makes it the responsibility of the medical practitioner to determine the appropriate size of each sample.

Dividing and sealing samples

104. (1) Each blood sample shall be divided into two parts and each part shall be placed in a separate sealed container.

Custody and safeguarding of samples

(2) The peace officer investigating the crime in relation to which the blood samples were taken shall have custody of the samples, and shall take steps to ensure their preservation and safeguarding.

Criminal Code, s. 258(1)(*d*)(i), (iv)

COMMENT

Subsection (1) of section 104 retains the present requirement that blood samples be placed in sealed containers. Subsection (2) is a new provision, included for completeness and to place the responsibility for preserving and safeguarding the samples clearly on the person most logically suited for the task.

Analysis on behalf of peace officer

105. (1) The peace officer may have one part of each blood sample analyzed by an analyst for the purpose of determining the concentration of alcohol in the blood.

Retaining sample for separate analysis

(2) The peace officer shall retain the other part of each sample so as to permit an analysis to be made on behalf of the person from whom the samples were taken.

Report 21, rec. 11
Criminal Code, s. 258(1)(*d*)(i), (v)

COMMENT

Subsection (1) of this provision is included clearly to empower the police to have one part of each blood sample analyzed. Subsection (2) is designed to facilitate the exercise by accused persons of the right (in section 107) to have samples released for independent analysis. At present, subparagraph 258(1)(*d*)(i) of the *Criminal Code* requires (in order for the rebuttable presumption stated in that provision to apply) that, when a blood sample is taken, another sample also be taken and retained "to permit an analysis thereof to be made by or on behalf of the accused." Our provision states the requirement for retention more directly.

Preservation of breath samples and release of such samples for independent analysis are not features of our present law. Requirements that the accused be given extra samples of breath for independent analysis have been enacted and re-enacted in the *Criminal Code* over the years[144] but have not been brought into force. The failure to give the accused breath samples for independent analysis has been held not to infringe the *Canadian Bill of Rights*[145] or the *Charter*.[146] The apparent reason that the relevant

144. S.C. 1968-69, c. 38, s. 16; re-enacted by S.C. 1974-75-76, c. 93, s. 18(1) and (2); re-enacted by S.C. 1985, c. 19, s. 36; s. 258(1)(*d*)(i) to come into force on proclamation.

145. R.S.C. 1985, App. III.

146. See *Duke* v. *The Queen*, [1972] S.C.R. 917; *R.* v. *Potma* (1983), 31 C.R. (3d) 231 (Ont. C.A.). But see also *R.* v. *Bourget* (1987), 56 C.R. (3d) 97 (Sask. C.A.), holding that failure to disclose relevant material violated s. 7 of the *Charter*.

sections have not been brought into force relates to the technical difficulty in preserving breath samples. (This difficulty does not arise in the case of blood samples.) Given this problem, the Commission does not, at this time, propose that such a requirement should apply where breath samples are taken.

Testing blood sample for drugs

106. A blood sample may be tested for the presence of drugs.

Report 21, rec. 2
Criminal Code, s. 258(5)

COMMENT

Section 106 is modelled on subsection 258(5) of the current *Criminal Code*. If blood samples are obtained following a request or under a warrant, they will be analyzed to determine the concentration of alcohol in the blood. If the analyses prove negative or an unexpectedly low concentration of alcohol is found, it may be reasonable in some cases to suspect that erratic driving or unusual behaviour has been caused by the use of drugs. Section 106 enables this possibility to be explored.

DIVISION III
APPLICATION TO RELEASE BLOOD SAMPLES

Applicant and notice

107. A person from whom blood samples are taken may, on reasonable notice to the prosecutor, apply for an order to release one part of each sample for the purpose of analysis or testing.

Criminal Code, s. 258(4)

Time and manner of making application

108. The application shall be made in writing to a justice within three months after the day on which the blood samples were taken.

Criminal Code, s. 258(4)

Contents of application

109. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) the date the blood samples were taken; and

(*e*) the nature of the order requested.

Affidavit in support

(2) The application shall be supported by an affidavit.

Service of notice

110. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on the prosecutor.

Hearing evidence

111. A justice to whom an application is made may receive evidence, including evidence by affidavit.

Service of affidavit

112. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on the prosecutor.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

113. The evidence of any person shall be on oath.

Recording evidence

114. (1) 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 oral evidence shall be identified as to time, date and contents.

Certification of transcript

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

Order to release samples

115. The justice shall, on application, order the release of one part of each sample, subject to any conditions that the justice considers necessary to ensure its preservation for use in any proceeding.

Report 21, rec. 11
Criminal Code, s. 258(4)

Form of order

116. The order shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of order

117. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) the date the blood samples were taken;

(*d*) any conditions imposed by the justice;

(*e*) the date and place of issuance; and

(*f*) the name and jurisdiction of the justice.

Filing application, evidence, order

118. The justice shall, as soon as practicable after the hearing, have the following filed with the clerk of the court for the judicial district in which the application was made:

(*a*) the notice of the application;

(*b*) the application;

(*c*) the record of any oral evidence heard by the justice or its transcription;

(*d*) any other evidence received by the justice; and

(*e*) the original of the order.

COMMENT

The provisions of Division III (sections 107 to 118) in essence embody subsection 258(4) of the current *Criminal Code*. Designed to promote the right to "make full answer and defence,"[147] they provide for an application to enable the accused to obtain the release of one part of each blood sample taken, in order to challenge the analysis results. Release must be ordered by the justice if an application, by or on behalf of the person from whom blood samples have been taken, is made within the time period specified in section 108.

These provisions replace the ill-defined "summary application," now specified in subsection 258(4) of the *Criminal Code*.[148]

For ease of reference, all of the procedural requirements for this application are now included in this Part and Division without further comment on the individual sections. However, when this Code is complete and consolidated, these requirements will appear in a general Part setting out common procedures governing all applications for orders.

DIVISION IV
EXEMPTION FROM CRIMINAL LIABILITY

Refusal to take blood sample

119. No medical practitioner or technician is guilty of a crime because of a failure or refusal to take a blood sample from a person and no medical practitioner is guilty of a crime because of the practitioner's failure or refusal to have a blood sample taken from a person by a technician acting under the practitioner's direction.

Report 21, rec. 16
Criminal Code, s. 257(1)

147. See *Criminal Code*, ss. 650(3), 802(1).

148. See the criticisms of summary applications in the comments to s. 214 (disposition of seized things).

COMMENT

Section 119 is similar to subsection 257(1) of the current *Criminal Code*. It reflects the view of the Commission that the conscription of physicians or technicians into the area of criminal investigation and law enforcement would be an unjustified infringement of the individual rights of those persons; in some cases, it would be an unconscionable intrusion into the doctor-patient or nurse-patient relationship. This provision makes it clear that failure or refusal to take a blood sample or to have one taken does not amount to breach of a legal duty,[149] and does not render a doctor or technician guilty of obstruction.

Section 119 does not incorporate subsection 257(2) of the current *Criminal Code*, which purports to prevent criminal or civil liability from arising if doctors, and technicians acting under their direction, take blood samples with reasonable care and skill. It is questionable whether a pronouncement on civil liability is constitutionally appropriate in a criminal statute.[150] Moreover, the *Criminal Code* provision merely states an obvious proposition of civil or tort law that must be applied by civil courts in any event.[151] The reference to criminal liability is unnecessary since section 102 directs that blood samples taken under the authority of this Part must be taken either by medical practitioners or technicians acting under their direction and section 23 of our proposed Criminal Code[152] would apply to protect from criminal liability persons who take samples under section 102 with reasonable care and skill.

[Alternative — A minority of the Commission would propose an alternative draft of Chapter V.

As in the majority draft, subsections 102(1) to 104(1) would apply to blood samples taken pursuant to a warrant or pursuant to a request made by a peace officer under paragraph 86(1)(a) or a request made by a detained person in the circumstances described in subsection 89(2). Section 119 would also be of general application.

Subsection 104(2) to section 118 would be made applicable only to blood samples taken pursuant to a warrant or pursuant to a request made by a peace officer.

The following provisions would be added and made applicable to blood samples taken pursuant to a request made by a detained person in the circumstances described in subsection 89(2):

Providing sample to person

119.1 (1) One part of each blood sample shall be given to the person from whom the samples were taken.

149. See Report 31, rec. 25(1) and comment at 116.

150. See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 412-413; *R.* v. *Zelensky*, [1978] 2 S.C.R. 940, *per* Laskin C.J.C. at 963.

151. See A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) Chapter 5, generally, and the particular discussion at 142-143.

152. Section 23 provides that "no person is guilty of a crime who performs any act that is required or authorized to be performed by or under an Act of Parliament . . . and uses such force . . . as is reasonably necessary to perform the act and as is reasonable in the circumstances."

Results confidential and privileged

(2) The results of any analysis or test carried out with respect to that part of a blood sample are confidential and privileged with respect to the person from whom the samples were taken.

Notice of intention to tender results

(3) If the person intends to tender the results in evidence in any proceeding, reasonable notice shall be given to the prosecutor of that intention.

Custody and safeguarding of samples

119.2 (1) The peace officer investigating the crime in relation to which the blood samples were taken shall have custody of the other part of each blood sample, and shall take steps to ensure its preservation and safeguarding.

Analysis and testing on behalf of peace officer

(2) The peace officer may have that part of each blood sample analyzed by an analyst for the purpose of determining the concentration of alcohol in the blood and tested for the presence of drugs.

Disclosure of results

(3) The results of the analysis or test shall not be disclosed by the analyst or individual who carried out the test unless the person from whom the samples were taken has given notice under subsection 119.1(3).

Inadmissibility of evidence

119.3 If a person from whom blood samples were taken has not given notice under subsection 119.1(3), the fact that blood samples were taken and the results of any analysis or test carried out with respect to them are not admissible in evidence in any proceeding, and the fact that blood samples were taken shall not be the subject of comment by anyone in the proceeding.]

CHAPTER VI
EVIDENTIARY RULES

DIVISION I
ABSENCE OF ORIGINAL OF WARRANT

Original warrant absent

120. In any proceeding in which it is material for a court to be satisfied that the taking of a blood sample 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 taking of the blood sample was not authorized by a warrant.

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

COMMENT

This section is the same as section 41 and is based on the same reasoning as is stated in the comment to that section.

DIVISION II
RESULTS OF ANALYSES

Presumption relating to breath sample results

121. (1) In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), where samples of a person's breath have been taken and analyzed in accordance with the conditions set out in subsection (2),

(*a*) if the results of the analyses are the same, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the concentration determined by the analyses; and

(*b*) if the results of the analyses are different, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the lowest of the concentrations determined by the analyses.

Conditions for presumption to apply

(2) The conditions for the purposes of subsection (1) are as follows:

(*a*) at least two samples of the person's breath were taken;

(*b*) the samples were taken pursuant to a request made by a peace officer under section 84 or paragraph 85(1)(*a*);

(*c*) the samples were taken as soon as practicable after the crime was alleged to have been committed;

(*d*) the first sample was taken not more than two hours after the crime was alleged to have been committed;

(*e*) an interval of at least fifteen minutes passed between the taking of the samples;

(*f*) each sample was received from the person directly into a container or into a breath analysis instrument operated by a technician; and

(*g*) an analysis of each sample was made with a breath analysis instrument operated by a technician.

Presumption inoperative

(3) Subsection (1) does not apply if a peace officer failed to tell the person who provided the breath samples the results of the breath analyses in accordance with subsection 89(1) or

failed to arrange for the taking of samples of the person's blood in accordance with subsection 89(2).

Criminal Code, s. 258(1)(*c*)

COMMENT

This section (among other things) restructures and simplifies paragraph 258(1)(*c*) of the current *Criminal Code*, which deals with the conclusions to be drawn from analyses of breath samples. It does not incorporate the unproclaimed provision in subparagraph 258(1)(*c*)(i), which would require that the accused be given samples of his or her breath "in an approved container . . .," owing to the technical difficulties that have prevented this *Code* provision from being proclaimed. (See the comment to section 105.)

Subsection (1) creates a rebuttable presumption. A failure to satisfy the conditions of subsection (2) does not necessarily make the results of an analysis inadmissible; however, the presumption may not be applied and expert evidence interpreting the results will be required. Subsection (3), which has no equivalent in paragraph 258(1)(*c*) of the current *Code*, makes the presumption inapplicable where the requirements of section 89 have not been fulfilled.

Presumption relating to blood sample results

122. (1) In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), where samples of a person's blood have been taken and analyzed in accordance with the conditions set out in subsection (2),

(*a*) if the results of the analyses are the same, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the concentration determined by the analyses; and

(*b*) if the results of the analyses are different, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the lower of the concentrations determined by the analyses.

Conditions for presumption to apply

(2) The conditions for the purposes of subsection (1) are as follows:

(*a*) the blood samples were taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*);

(*b*) two samples of the person's blood were taken;

(*c*) the samples were taken as soon as practicable after the crime was alleged to have been committed;

(*d*) the first sample was taken not more than two hours after the crime was alleged to have been committed;

(*e*) an interval of at least fifteen minutes passed between the taking of the samples;

(*f*) each sample was taken by a medical practitioner or a technician acting under the direction of a medical practitioner;

(*g*) at the time each sample was taken, the individual taking the sample divided it into two parts;

(*h*) both parts of each sample were received from the person directly into, or placed directly into, containers that were subsequently sealed;

(*i*) one part of each sample was retained to permit an analysis to be made by or on behalf of the person;

(*j*) an analyst made an analysis of one part of each sample that was contained in a sealed container; and

(*k*) if an order to release one part of each sample has been made pursuant to section 115, that order has been complied with.

Criminal Code, s. 258(1)(*d*)

COMMENT

This section, which is similar to section 121, is designed in part to simplify paragraph 258(1)(*d*) of the current *Code*. Subsection (1) sets out a presumption, similar to that in subsection 121(1), that applies to the results of analyses of blood if the conditions set out in subsection (2) are met. Although analysis of blood is considered to be more accurate than analysis of breath, paragraph 258(1)(*d*)'s provision that only one blood sample need be taken in order for the presumption to apply is changed. As with breath samples, two samples of blood must now be taken.[153] The *Code*'s requirement for a division of the blood samples, and the retention of one part of each divided sample for possible testing by the accused, is retained.

Paragraph (*k*) of subsection (2) rephrases subparagraph 258(1)(*d*)(i) of the current *Criminal Code* so as to remove a possible problem in interpretation of the present provisions. As now worded, paragraph 258(1)(*d*) appears to allow the operation of the presumption to be defeated if the accused does not seek the release of a retained sample within three months.

153. See R.E. Erwin, *Defense of Drunk Driving Cases: Criminal/Civil*, vol. 2, 3d ed. (New York: M. Bender, 1971) at 16-4 to 16-6, demonstrating the improvement in the probative value of evidence obtained if two samples are taken.

DIVISION III
CERTIFICATE EVIDENCE

Proof of facts alleged in certificate

123. In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), each of the following certificates is evidence of the facts alleged in the certificate without proof of the signature or the official character of the individual appearing to have signed the certificate:

(*a*) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with a breath analysis instrument and that the sample of the standard so analyzed is suitable for use with a breath analysis instrument;

Criminal Code, s. 258(1)(*f*)

(*b*) where samples of a person's breath have been taken pursuant to a request made by a peace officer under section 84 or paragraph 85(1)(*a*), a certificate of a technician stating

(i) that the analysis of each of the samples has been made with a breath analysis instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with a breath analysis instrument,

(ii) the results of the analyses so made, and

(iii) if the technician took the samples,

(A) the time and place each sample was taken, and

(B) that each sample was received from the person directly into a container or into a breath analysis instrument operated by the technician;

Criminal Code, s. 258(1)(*g*)

(*c*) a certificate of an analyst stating that the analyst has made an analysis of one part of each sample of a person's blood that was contained in a sealed container identified in the certificate, the date and place it was analyzed and the result of the analysis;

Criminal Code, s. 258(1)(*i*)

(*d*) where samples of a person's blood have been taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner or a technician, stating

(i) that the medical practitioner or technician took the samples,

(ii) the time and place each sample was taken,

(iii) that, at the time the samples were taken, the medical practitioner or technician divided each sample into two parts, and

(iv) that both parts of each sample were received from the person directly into, or placed directly into, containers that were subsequently sealed and that are identified in the certificate;

Criminal Code, s. 258(1)(*h*)

(*e*) where samples of a person's blood have been taken by a technician pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner stating that the technician was acting under the practitioner's direction;

Criminal Code, s. 258(1)(*h*)

(*f*) where samples of a person's blood have been taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner stating that before each sample was taken the practitioner was of the opinion that taking the blood sample would not endanger the person's life or health; and

Criminal Code, s. 258(1)(*h*)

(*g*) where samples of a person's blood have been taken pursuant to a warrant, a certificate of a medical practitioner stating that before each sample was taken the practitioner was of the opinion that the person was unable to consent to the taking of the blood sample because of a physical or mental condition resulting from the consumption of alcohol, the accident with respect to which the warrant was issued or an occurrence related to or resulting from the accident.

Criminal Code, s. 258(1)(*h*)

COMMENT

Section 123 reworks and simplifies paragraphs (*e*) through (*i*) of subsection 258(1) of the present *Criminal Code*. The provision allows certain evidence of analysts, technicians and doctors to be given by certificates rather than personal appearance. The use of certificate evidence is appropriate, because routinely requiring the personal presence in court of analysts, technicians and medical practitioners would add little, if anything, to the probative value of their evidence, while causing inconvenience, creating difficult administrative problems and adding unnecessary complexity to trials. Therefore, provided that the conditions established in this section are strictly observed (and provided that the proceeding is one "in respect of a crime committed under section 58 of our proposed Criminal Code . . ."), section 123 continues to allow certificates to be used.

The ability to require the analyst, technician or doctor to attend for cross-examination, now provided by *Criminal Code* subsection 258(6), is preserved. (See subsection 124(2).)

Notice of intention to tender certificate

124. (1) No certificate is admissible in evidence in a proceeding unless the party intending to tender it has, before the proceeding, given to the other party reasonable notice of that intention and a copy of the certificate.

Leave to cross-examine on certificate

(2) A party against whom a certificate is tendered may, with leave of the court, require the attendance of the medical practitioner, analyst or technician for the purpose of cross-examination.

Criminal Code, s. 258(6), (7)

COMMENT

Section 124 reproduces the essence of subsections 256(6) and (7) of the current *Criminal Code*. The object of this provision is fairness. Since the accused is normally entitled to expect that there will be a right to cross-examine any witness who testifies for the Crown, fairness dictates that reasonable notice should be given of any intended derogation from that right. Upon being given such notice (together with a copy of the certificate) the accused who wishes to question the validity of the certificate may seek leave to have the witness attend at court for cross-examination.

PART FIVE

ELECTRONIC SURVEILLANCE

DERIVATION OF PART FIVE

LRC PUBLICATIONS

Writs of Assistance and Telewarrants, Report 19 (1983)

Electronic Surveillance, Working Paper 47 (1986)

Classification of Offences, Working Paper 54 (1986)

Public and Media Access to the Criminal Process, Working Paper 56 (1987)

Recodifying Criminal Law, Report 31 (1987)

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

LEGISLATION

Criminal Code, ss. 183-196

INTRODUCTORY COMMENTS

Part VI of the present *Code*, entitled *Invasion of Privacy*, describes how private communications may be lawfully intercepted. The choice of this title is somewhat misleading because Part VI protects only one aspect of privacy.

The Ontario Commission on Freedom of Information and Individual Privacy[154] has identified three sorts of privacy: territorial, personal and informational. Territorial privacy is privacy in a spatial sense and involves the right to be free from uninvited entries or unwarranted intrusions into one's home. Privacy of the person protects the dignity of the person and encompasses freedom from physical assault. Privacy in the information context concerns a person's claim to control over personal information.

The criminal law has for centuries protected certain privacy interests, for example, by limiting the police power to search a person's home and by forbidding murder and assault. Until recently, however, the *Criminal Code* did not protect the privacy interest inherent in a person's oral communications. In large part, this was because such protection was unnecessary. It is only since the turn of this century that the technology has been developed by which private communications can be readily intercepted.[155] This development, in turn, has increased the public's awareness of the need to better protect privacy. Thus, in 1974, Parliament enacted what is now Part VI of the *Criminal Code*, which generally prohibits the interception, by means of a surveillance device, of private (generally oral) communications, subject to limited exceptions. In addition, advances in protecting privacy have been made in other areas of law.[156]

The present law on wiretapping mixes both crimes and procedural sections. The crimes set out in the present *Criminal Code* are: unlawful interception of a private communication (s. 184); unlawful disclosure of an intercepted private communication (s. 193); and unlawful possession, sale or purchase of a device knowing that its design renders it primarily useful to intercept surreptitiously a private communication (s. 191).

Some procedural sections provide that a judge may authorize an interception of a private communication. They cover: who may apply for the authorization; the grounds on which a judge may grant an authorization; the contents of an authorization; the time period for which an authorization is valid; and how an authorization may be renewed for a longer period.

Other procedural sections cover:

(a) the sealing in a packet of the documents in support of the application for an authorization;

(b) the granting of emergency authorizations having a limited time span of up to thirty-six hours;

(c) the admissibility of the intercepted private communications as evidence;

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154. The Report of the Commission on Freedom of Information and Individual Privacy, *Public Government for Private People*, vol. 3, *Protection of Privacy* (Toronto: The Commission, 1980) at 498-500.

155. A.F. Westin, *Privacy and Freedom* (New York: Atheneum, 1970) at 330-349.

156. See, *e.g.*, the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 5; the *Privacy Act*, S.C. 1980-81-82-83, c. 111, Sch. II; the *Access to Information Act*, S.C. 1980-81-82-83, c. 111, Sch. I.

(*d*) the trial judge's power to order particulars of the private communication;
(*e*) forfeiture of a surveillance device on conviction for unlawful possession of it or for unlawful interception of a private communication;
(*f*) damages on conviction for unlawful interception or disclosure of a private communication;
(*g*) annual reports made by the appropriate minister about the number of authorized wiretaps; and
(*h*) the notification of a person whose private communications were intercepted under an authorized wiretap.

We have examined the present law on wiretapping in three previous publications. In Report 31 (at 72 to 74), we proposed crimes relating to the unlawful interception of private communications that were modelled largely, but not exclusively, on the present law.[157] Then, in Working Paper 47 on *Electronic Surveillance*, and Working Paper 56 on *Public and Media Access to the Criminal Process*, we proposed numerous reforms to the present *Code* procedures.[158] These were designed to better protect the fundamental value of privacy. Many of these changes are in this draft legislation.

This draft legislation also takes into account Supreme Court of Canada decisions that have examined the present wiretap law in light of the *Canadian Charter of Rights and Freedoms*. Most notable in this regard are the recent decisions of *R.* v. *Duarte*[159] and *R.* v. *Wiggins*,[160] which ruled that an interception of private communications, even if made with the prior consent of a party to the communications who is a peace officer or an informer acting on behalf of the police, requires prior judicial authorization in order to meet constitutional requirements.

The structure of this draft legislation is modelled on that found in other Parts of this Code, in particular Part Two (*Search and Seizure*). In the interest of clarity, this legislation uses simpler language and avoids cross-references wherever possible.

However, there are four important matters that this legislation does not presently address. First, there are no provisions regulating the installation of optical devices. The extent to which the criminal law should prohibit or regulate the use of optical devices is an issue that requires further study. Second, the draft legislation contains no

157. The Commission's proposed crimes are as follows:
(*a*) intercepting a private communication without the consent of a party to it or without prior judicial authorization;
(*b*) entering private premises to install, service or remove a surveillance or optical device without the consent of the owner or occupier or without prior judicial authorization;
(*c*) searching such premises while installing, servicing or removing the device;
(*d*) using force against a person for the purpose of gaining entrance onto, or exiting from, such premises; and
(*e*) possession of a device capable of being used to intercept a private communication.

158. For other works examining the present law on electronic surveillance and offering proposals for reform, see S.A. Cohen, *Invasion of Privacy: Police and Electronic Surveillance in Canada* (Toronto: Carswell, 1983); D. Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell, 1979); D.A. Bellemare, *L'écoute électronique au Canada* (Montreal: Les Éditions Yvon Blais, 1981).

159. [1990] 1 S.C.R. 30.

160. [1990] 1 S.C.R. 62.

provisions on the admissibility of evidence. The rules governing the admissibility of evidence for the entire Code of Criminal Procedure will be studied separately later. We will determine in that study to what extent special admissibility provisions are needed in this context. Third, there are no provisions regarding the forfeiture of a surveillance device or the payment of damages when a person is convicted for some of these crimes. These issues will be explored more fully in forthcoming Parts of this Code dealing with remedies. Fourth, this legislation, like the present law, does not cover the interception of private communications made in the course of investigating a threat to the security of Canada.[161]

CHAPTER I
INTERPRETATION

Definitions

125. In this Part,

"federally designated" (*désigné par les autorités fédérales*)

"federally designated" means designated by the Solicitor General of Canada for the purpose of applying for warrants under this Part or intercepting private communications under a warrant;

Criminal Code, ss. 185(1)(*a*), 186(5), (6), 188(1)(*a*)

"general interception clause" (*clause d'interception d'application générale*)

"general interception clause" means a clause in a warrant authorizing the interception of private communications of persons who are not individually identified or authorizing the interception of private communications at unknown places;

"intercept" (*intercepter et interception*)

"intercept", in relation to a private communication, means listen to, record or acquire the contents, substance or meaning of the communication;

Criminal Code, s. 183

"private communication" (*communication privée*)

"private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for a party to it to expect that it will not be intercepted by a person other than a party to the communication, even if any party to it suspects that it is being intercepted by such a person;

Working Paper 47, recs. 4, 5
Criminal Code, s. 183

"provincial minister" (*ministre provincial*)

"provincial minister" means, in the Province of Quebec, the Minister of Public Security and, in any other province, the Solicitor General of the province or, if there is no Solicitor General, the Attorney General of the province;

161. Such interceptions continue to be governed by the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 21-28.

"provincially designated" (*désigné par les autorités provinciales*)

"provincially designated" means designated by a provincial minister for the purpose of applying for warrants under this Part or intercepting private communications under a warrant;

Criminal Code, ss. 185(1)(*b*), 186(5), (6), 188(1)(*b*)

"solicitor" (*avocat*)

"solicitor" means, in the Province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor;

Criminal Code, s. 183

"surveillance device" (*dispositif de surveillance*)

"surveillance device" means any device capable of being used to intercept a private communication.

Report 31, s. 65
Working Paper 47, rec. 7
Criminal Code, s. 183

COMMENT

Section 183 of the present *Code* contains many terms, the meanings of which must be understood before an understanding of how private communications may be lawfully intercepted is achievable. Most of these terms are now set out in this interpretation section.

Throughout this Part, the term "warrant" replaces the term "authorization" which is now employed in the *Criminal Code*.[162] This is consistent with our use of the term "warrant" throughout this Code. "Warrant" is a term that describes the authority, conferred on the police by judges or justices in the course of criminal investigations, to intrude on or invade privacy interests. Because there is no difference in terms of form or function between an "authorization" or a "warrant", in some places in this text the term "warrant" will be used instead of the term "authorization" in order to avoid the needless repetition of the two terms together. There is no reason to define a warrant to intercept private communications because its meaning will be clear from its use in other sections of this Part.

The term "federally designated" is also new. It is part of a plan to set out more simply the power that the federal Solicitor General has under present *Code* paragraph 185(1)(*a*) and subsection 186(5), respectively, to designate: (a) persons who may apply for authorizations (warrants) to intercept private communications; or (b) persons who may intercept private communications under authorizations (warrants).

The term "general interception clause" is new. It is preferable to the pejorative term "basket clause" that is in common usage in discussions of the wiretap law. The general rule is that an authorization to wiretap should identify the persons whose private communications are to be intercepted under it or name the specific place or places where those private communications are to be intercepted. However, under the present law and, indeed, under this legislation, an authorization can, subject to certain

162. It is of interest to note that the *Canadian Security Intelligence Service Act*, *supra*, note 161, also employs the term "warrant" in preference to the *Criminal Code* term "authorization."

limitations, contain a "basket" clause allowing either the interception of "unknown" persons or the interception of private communications at any unspecified place that a known person resorts to or uses. (This latter basket clause is sometimes referred to as an "itinerant interception clause.")

The term "intercept" has a definition similar to that in the present *Code*.

The term "provincial minister" is new. It describes the provincial minister who is responsible for the conduct of police forces within each province. The purpose of this definition is to clarify the present law. The present *Code*, in paragraph 185(1)(*b*) and subsection 186(5), sets out the authority of the Attorney General of a province personally to designate agents who may apply for an authorization to intercept private communications and who may intercept private communications under warrants. By section 2 of the present *Code*, the provincial Attorney General may be the Attorney General or the Solicitor General. This is ambiguous where, as in Ontario, a province has both an Attorney General and a Solicitor General.[163] At the stage when an application to intercept a private communication is made, the aim is to investigate the impending or actual commission of a crime. Therefore, the minister responsible for choosing these agents should be the minister responsible for the investigation of crimes, rather than the minister responsible for prosecuting crimes.

The term "provincially designated" is to be read with the term "provincial minister."

The definition "private communication" has been significantly altered from that appearing in the current *Code*. The present definition focuses on the expectation of the originator of a private communication that the communication will not be listened to by any person other than the intended recipient.[164] This definition has created problems, since its effect is to break a conversation between two people into a series of private communications. The interpretation clause presented here avoids this somewhat artificial distinction. Instead of referring to the reasonable expectation of privacy of the "originator" of the communication, it makes a communication private if it is made under circumstances in which it is reasonable for a "party" to expect that it will not be intercepted by someone other than a party. The effect is to clarify that a private communication means not the individual statements that together make up a conversation, but the conversation as a whole.

Further, this interpretation clause more clearly adopts an objective test to determine if the communication is private. Despite the reference in the present definition to the originator's reasonable expectation of privacy, the case law focuses initially on the originator's subjective expectation of privacy. The person must first be found to have a subjective expectation of privacy before a determination may be made as to whether that expectation is objectively reasonable.[165] Specifically, this raises the issue of

163. Quebec recently changed the title of its Solicitor General to the Minister of Public Security. This change came into effect by the *Décret Concernant le Ministre et le Ministre de la Sécurité Publique* (1988), 120 G.O. II, 4704.

164. See *Goldman* v. *The Queen*, [1980] 1 S.C.R. 976.

165. *R.* v. *Sanelli* (1987), 38 C.C.C. (3d) 1 (Ont. C.A.), appeal dismissed on other grounds by the Supreme Court of Canada in *R.* v. *Duarte*, *supra*, note 159.

whether a suspicion, held by one party to a private communication, that the communication is being intercepted should be allowed to defeat any claim to a reasonable expectation of privacy. The danger in requiring a subjective expectation of privacy as an initial threshold to be met is that it permits the subjective fears of a person to erode any reasonable expectation of privacy. For example, if the government were to announce tomorrow that it would monitor all private communications to discover who intended to commit crimes, it would then be possible to argue that no one could reasonably expect that telephone conversations are private. To prevent such a result, this interpretation clause clearly provides that a reasonable expectation of privacy is not made unreasonable "even if one party to the communication suspects that the communication is being intercepted."

The definition "solicitor" is identical to that in the present *Code*.

The term "surveillance device" replaces the definition "electro-magnetic, acoustic, mechanical or other device" found in the present *Code*. While many elements of the present definition are retained, our term is broader. Hearing-aids are no longer excluded. The ordinary use of hearing-aids would not be a crime. However, if a hearing-aid were used purposely to intercept a private communication surreptitiously, that act would be criminal under section 66 of our proposed Criminal Code.

One term, defined in the present *Code*, that is not defined here is "sell." The definition of this term aids in the interpretation of present section 191, creating the crime of possessing, selling, or purchasing a surveillance device. (Selling such a device amounts to the furthering or attempted furthering of the crime of unlawful possession of a surveillance device under paragraph 84(*b*) of our proposed Criminal Code.)

CHAPTER II
INTERCEPTING PRIVATE COMMUNICATIONS WITHOUT A WARRANT

Interception with consent

126. A peace officer or agent of a peace officer may, by means of a surveillance device, intercept a private communication without a warrant if all the parties to the communication consent to the interception.

COMMENT

Both the present *Code*, in section 184, and our proposed Criminal Code, in subsection 66(1), make the interception of private communications by means of a surveillance device a crime. However, one broad and noteworthy exemption from criminal liability provides that it is not a crime to intercept communications in this way if the interception is made with the consent of a party to the private communication.

A separate issue from that of criminal liability, however, is that of the admission in evidence of private communications that have been obtained by means of an inter-

ception by a single party impliedly consenting to the interception of the communications. Here, one important aspect of our legislative scheme should be noted. We do not seek to regulate interceptions of private communications made by a party who is a private citizen acting independently and without police involvement. Our legislative scheme regulates only the activities of state officials seeking to employ electronic surveillance techniques in the investigation of crime.

Until recently, the *Criminal Code* provided for a course of action whereby, if a surreptitious interception of private communications was to be made by a party at the behest of the police, there was no need to go before a judge to obtain an authorization to wiretap. This meant that the police had a largely unfettered discretion as to how and when to intercept the private communications. Although this state of affairs has persisted for many years, it was, on occasion, criticized:

> Judicial review and control over the official resort to electronic surveillance techniques and technology lies at the very core of the legislation. Consent, in the legislation as presently structured, is a vehicle whereby judicial oversight may be avoided. As such it has from the outset possessed a clear potential for exploitation and abuse. It has been alleged that these statutory provisions "encourage the police to use 'consenting agent provocateurs' under a tacit grant of immunity from prosecution." The consent provisions allow for *ex post facto* validation of unauthorized electronic eavesdropping and as such are inconsistent with the overall scheme of the legislation.[166]

These criticisms have been given apparent approval by the Supreme Court of Canada in the cases of *R.* v. *Duarte*[167] and *R.* v. *Wiggins*.[168] These cases hold that the simple consent of one party to the interception of his or her private communications cannot serve as a device for bypassing the need to obtain prior judicial approval in the form of an authorization. Failure to obtain the necessary authorization constitutes unreasonable search and seizure under section 8 of the *Charter*.

Our draft legislation conforms to the holding in *Duarte* and *Wiggins*, and addresses a number of important policy implications raised by those cases. Section 126 answers the policy question, When may a peace officer or an agent of a peace officer intercept private communications by means of a surveillance device without having to obtain a warrant? The answer is that this is permissible if *all* parties to the private communications consent to their interception. If an interception by means of a surveillance device is sought to be made with the consent of just one party to the communications, a warrant must first be obtained, subject to the limited exception set out in section 127. The requirements for obtaining a warrant are set out in Chapter III of this Part.

Interception to protect life or safety

127. A peace officer may, without a warrant, use a surveillance device to listen to but not record a private communication to which a peace officer or agent of a peace officer is a

166. Cohen, *Invasion of Privacy*, *supra*, note 158 at 176-177. See also G. Killeen, "Recent Developments in the Law of Evidence" (1975) 18 C.L.Q. 103 at 108.

167. *Supra*, note 159.

168. *Supra*, note 160.

party if it is reasonable to believe that the life or safety of the officer or agent may be in danger.

COMMENT

In the cases of *Duarte* and *Wiggins*, the Supreme Court of Canada rejected consent interceptions of private communications made in the absence of a prior judicial warrant. According to the Court, the surreptitious recording by the state of a person's private communications is an unjustifiable invasion of privacy. In both cases, the avowed purpose of the surreptitious interceptions was to obtain reliable evidence of the commission of a crime.

However, the Supreme Court did not consider in the cases before it the possibility that it might on occasion prove necessary to listen to private communications, not for evidentiary purposes, but in order to protect the life or safety of an undercover peace officer or an informer. This might occur, for example, where a peace officer is working undercover to investigate the activities of drug traffickers and a meeting is suddenly arranged between the officer and the traffickers. This is a highly dangerous circumstance that might emerge without sufficient time to arrange for the obtaining of a judicial warrant. In our view, in such emergency circumstances, legitimate concern for the peace officer's safety should preclude the need to obtain a warrant, in order to monitor for protective reasons the conversations between the undercover operative and the drug traffickers. However, the section is carefully drafted to be consistent with the concern for privacy expressed by the Supreme Court. The authority to intercept is restricted here to one kind of interception only – that of *listening* to the private communications. There is no authority to *record* the communications. For this, a warrant is required, since the purpose of recording communications is evidentiary and not protective. (As noted previously, rules governing the admission of evidence – and a rule will be required here – will be examined separately in a future volume of this Code.)

CHAPTER III
WARRANT TO INTERCEPT PRIVATE COMMUNICATIONS

DIVISION I
GENERAL RULE FOR WARRANTS

1. Application for Warrant

Federal applicant

128. (1) A federally designated agent designated in writing personally may apply for a warrant to intercept, by means of a surveillance device, a private communication if the crime under investigation is one in respect of which proceedings may

be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada.

Criminal Code, s. 185(1)(*a*)

Provincial applicant

(2) A provincially designated agent designated in writing personally may apply in the province of designation for a warrant to intercept, by means of a surveillance device, a private communication if the private communication is to be intercepted in that province and the crime under investigation is one in respect of which proceedings may be instituted at the instance of the government of a province and conducted by or on behalf of the Attorney General of a province.

Working Paper 47, rec. 20
Criminal Code, s. 185(1)(*b*)

COMMENT

This section sets out the general rule as to who may apply for a warrant to intercept a private communication by means of a surveillance device. It is modelled in large part on the procedure set out in paragraphs 185(1)(*a*) and (*b*) of the present *Code*, albeit with necessary changes.

Subsection (1) focuses on the "federally designated agent," that is, an agent designated in writing personally by the Solicitor General of Canada. Such an agent may apply for a warrant so long as the crime in relation to which the application is sought may be prosecuted by the federal Attorney General.

Subsection (2) focuses on the "provincially designated agent," that is, an agent designated in writing personally by (in Quebec) the Minister of Public Security or (in any other province) the Solicitor General or otherwise the Attorney General. It is designed to fill a major gap in the present law. As we noted in Working Paper 47, the wording of present paragraphs 185(1)(*a*) and (*b*) permits provincial authorities to apply for an authorization only when a crime is being committed or was committed in the province in which the application was sought. However, there is no power enabling provincial authorities to apply for an authorization to intercept a private communication in their province where the crime is being committed in another province, even though the suspects are living in their province.[169] Subsection (2) implements Recommendation 20 of Working Paper 47 (at 34) that remedies this problem.

These two subsections alter the present law in another way. Since it is unlikely that a responsible minister would ever personally apply for a warrant (although the *Code* presently allows such personal applications), these subsections state that only the agents whom the minister designates may bring applications.

Manner of making application

129. (1) An application for a warrant shall be made unilaterally, in person and in private, orally or in writing.

169. Working Paper 47 at 33.

Form of written application

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

Working Paper 47, rec. 18
Criminal Code, s. 185(1)

COMMENT

To understand the warrant application procedure that governs wiretaps, it is necessary to read these provisions with the application procedures for other warrants set out in sections 10 to 12. These procedures relate to the evidence to be heard or received at the application, the recording of evidence and the procedure on issuing a warrant after an application has been made by telephone or other means of telecommunication.

Section 129, to some extent, changes the present *Code*'s application procedures for regular authorizations under Part VI. Currently, applications must be made in writing. In this legislation, consistent with the approach adopted in Part Two (*Search and Seizure*), Part Three (*Obtaining Forensic Evidence*) and Part Four (*Testing Persons for Impairment in the Operation of Vehicles*), electronic surveillance warrant applications may be made either orally or in writing. Because there will be a record made of the application in all cases,[170] there is no need to require these applications to be in writing. However, where an application is made in writing it must be in the prescribed form.

Applications for wiretap warrants would generally be made in person to the judge. Under our regime, "telewarrant" applications are not ordinarily permitted. (The only time such applications are allowed is when a warrant is urgently needed. This eventuality is dealt with in section 160.)

Place of application

130. An application for a warrant shall be made to a judge of the province in which the private communication is to be intercepted.

Criminal Code, s. 185(1)

COMMENT

This provision has two salient aspects. First, an application must be made to a judge, not to a justice of the peace. The judge would be a judge of the proposed Unified Criminal Court.[171] Second, the application may be made to any judge in any province in which the private communication is to be intercepted.

Presentation of application

131. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

170. See s. 11.

171. See Working Paper 59.

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation, and the facts and circumstances of that crime and their seriousness;

(*d*) the type of private communication to be intercepted;

(*e*) a general description of the means of interception to be used;

(*f*) the names of all persons whose private communications are to be intercepted or, if the names cannot be ascertained, a description or other means of identifying those persons individually or, if that is not possible, the class of those unidentified persons;

(*g*) the places, if known, at which the interception would occur;

(*h*) whether any privileged communications are likely to be intercepted;

(*i*) the grounds for believing that the interception may assist in the investigation of the crime;

(*j*) the period for which the warrant is requested;

(*k*) any other investigative method that has been tried without success or, if no other method has been tried, the reasons why no other method is likely to succeed or why the urgency is such that no other method is practicable;

(*l*) a list of any previous applications for a warrant in respect of the same crime and the same persons or class of persons indicating the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted;

(*m*) if the applicant requests authority to make a surreptitious entry to install, service or remove a surveillance device,

(i) why the entry is required and why other less intrusive means of installation, service or removal are unlikely to be effective, and

(ii) the place where the entry would be made; and

(*n*) if the applicant requests an assistance order referred to in section 139, the nature of the assistance required.

Working Paper 47, recs. 24, 33, 40
Criminal Code, s. 185(1)

COMMENT

Under subsection 185(1) of the present *Code*, the application made by the designated agent is a separate document from the affidavit that is sworn by a peace officer or public officer in support of the application. Under our proposed Code, however, the application itself, rather than any accompanying affidavit, becomes the primary means by which to present evidence that supports the issuance of a warrant. Subsection (1) provides that the contents of the application must be sworn by a peace officer, and only appropriate designated agents may actually present the application. In addition, we propose that only a "peace officer" (a more restricted category than a "public officer") may swear to such contents.[172]

Subsection (2) states what the application must disclose. Paragraphs (*a*) and (*b*) are self-explanatory. Paragraph (*c*) replaces paragraph 185(1)(*c*) of the current *Code* which requires that the application disclose "the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence." This is too ambiguous. The issue is not whether the peace officer believes that a warrant should be issued. It is whether the peace officer has provided sufficient information to satisfy the judge that a warrant should be granted. Critical to this issue are the facts and circumstances of the crime under investigation, and how serious the particular crime is, given those circumstances.

The other paragraphs in subsection (2) require other relevant information that enables the judge to decide whether to issue the warrant.

Paragraph 185(1)(*e*) of the present *Code*, which states (among other things) that the police should give the names (if they know them) of persons whose private communications they want to intercept, has been altered somewhat for greater clarity. Our paragraph (*f*), instead of referring to "known" persons, refers to persons who can be identified by any means, such as by name or description. It is designed to avoid the confusion inherent in talking, as the case law pertaining to the present *Code* provision does, about "known" unknown persons.[173] Paragraph (*f*) also refers specifically to a class of unidentified persons. This phrase is designed to describe those who fall within a general interception clause (*i.e.*, a basket clause) as to persons.

Paragraphs (*d*), (*e*), (*g*) and (*i*) continue the law as set out in paragraphs 185(1)(*d*) and (*e*) of the present *Code*. It should be noted that paragraph (*e*) takes an additional meaning where a warrant is being asked for in situations in which has consented to the interception of the private communications. Here, it is our view that the "general description of the means of interception to be used" should include not only the type of device to be used in order to carry out the interception, but also the fact that a party to the communications has consented to the interception.

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172. By s. 10(1) of this Code, the peace officer can swear to the contents of the application on information and belief.

173. See S.D. Frankel, "The Relationship of 'Known' and 'Unknown' Persons to the Admissibility of Intercepted Private Communications" (1978-79) 21 C.L.Q. 465; M. Rosenberg, "Chesson: Implications for Privacy in the Supreme Court's Latest Plunge into the Unknown of Wiretap Law" (1988), 65 C.R. (3d) 211.

Paragraph (*h*) is new. The present law, in subsections (2) and (3) of section 186 of the *Code*, sets out a procedure to protect privileged communications between solicitor and client. This, however, raises a question of policy. Should other privileged communications also be protected, assuming that the issuing judge is satisfied that a valid ground of privilege is engaged? We have decided that they should be. Accordingly, to alert the judge that a question of privilege may arise, the application should, if circumstances warrant it, contain a statement that privileged communications are likely to be intercepted. The measures that a judge may take to prevent the interception of privileged statements is addressed in later sections.

Paragraph (*j*) continues the present law set out in paragraph 185(1)(*g*) of the *Code*.

Paragraph (*k*), with minor wording changes, continues the present law set out in paragraph 185(1)(*h*) of the *Code*.

Paragraph (*l*) continues the present law set out in paragraph 185(1)(*f*) of the *Code* with one important change. It is now clearly worded so as to require the applicant to disclose whether each previous relevant application was allowed, rejected or withdrawn, in order to afford better judicial accountability.

Paragraph (*m*), in the main, is new.[174] It relates to the power of a judge expressly to grant the police, in a warrant to intercept, authority to enter a place surreptitiously to install, service or remove a surveillance device. This power is more fully described and justified in section 138. We believe it to be desirable that this power of entry be subject to restrictions similar to those imposed on the power to intercept private communications. In order to obtain the authority to enter for purposes of installing, servicing or removing a surveillance device, the applicant must now provide the judge with all relevant information at the time of application.

Paragraph (*n*) is also new. Working Paper 47 had recommended that a judge be able to order that any person provide reasonable assistance to the police in order to accomplish the interception pursuant to the warrant.[175] This recommendation now finds expression in section 139 of this Part. To give effect to this proposal, the applicant would, at the time of application, specify what kind of assistance is required, so that the judge would have information available to him or her upon which to make this order.

Procedure on hearing application

132. Sections 10 and 11 apply to an application for a warrant under this Division.

Criminal Code, s. 185(1)

2. Issuance of Warrant

Grounds for issuing warrant

133. (1) A judge may, on application, issue a warrant authorizing the interception of a private communication by means of a surveillance device if the judge is satisfied that

174. See, in this regard, Working Paper 47, rec. 31 at 48.

175. Recommendation 75 at 95.

(*a*) there are reasonable grounds to believe that

(i) a crime punishable by more than two years' imprisonment, or a conspiracy to commit, an attempt to commit, a furthering of or an attempted furthering of such a crime, has been or is being committed, and

(ii) the interception of the private communication will assist in the investigation of the crime;

(*b*) other investigative methods have been tried without success, no other method is likely to succeed or the urgency is such that no other method is practicable; and

(*c*) it would be in the best interests of the administration of justice, having regard to the seriousness of the facts and circumstances of the crime under investigation.

Undercover investigation

(2) The judge shall not refuse to issue a warrant on the basis that a peace officer or an agent of a peace officer will be a party to the communication.

Working Paper 47, recs. 19, 21
Criminal Code, s. 186(1)

COMMENT

Subsection 133(1) sets out the things in respect of which a judge must be satisfied before issuing a warrant. As already noted, the requirement to obtain a warrant now generally applies to surreptitious interceptions made with the consent of a party to the private communications, where the party is a peace officer or an agent of a peace officer.

Paragraph (*a*) changes the present law in two major ways. The first change is seen in subparagraph (1)(*a*)(i). It replaces the definition "offence" in section 183 of the present *Code*. One of the most perplexing tasks, when trying to understand the present wiretap legislation, is to discern an underlying principle justifying the long list of wiretappable crimes.[176]

Our Working Paper 47, while accepting most of this list of crimes, criticized and urged the deletion of the organized crime definition (*i.e.*, "part of a pattern of criminal activity . . .") on the ground that it adds little to the established definition of conspiracy. It also recommended that some of the present crimes be deleted from the list (*e.g.*, advocating genocide), while some new crimes be added to it (*e.g.*, criminal interest rate).[177]

176. "Offence" under s. 183 of the *Code* is now defined as including numerous *Criminal Code* crimes ranging from high treason to pool-selling and some non-*Code* crimes such as trafficking (under the *Narcotic Control Act*, *supra*, note 21) and spying (under the *Official Secrets Act*, R.S.C. 1985, c. O-5). It also applies to any crime under the *Code* for which a punishment of five years or more in jail may be imposed or a crime in s. 20 of the *Small Loans Act*, R.S.C. 1970, c. S-11 where "there are reasonable grounds to believe [that the crime] is part of a pattern of criminal activity planned and organized by a number of persons acting in concert." Finally, it also applies to conspiracy, attempt, being an accessory after the fact or counselling in relation to these crimes.

177. Working Paper 47, recs. 1 to 3 at 16.

Subparagraph (1)(*a*)(i) is based on a simpler, equally sound policy. It dispenses with the need to adopt a long list of crimes. This limit on the crimes for which a warrant may be obtained is largely adapted from the Commission's plan for the classification of offences.[178]

The second change is seen in subparagraph (1)(*a*)(ii). It sets out the condition that an interception may only be authorized if it is reasonably believed that the interception will assist in the investigation of the crime. This marks a change from both the present statutory law and the recommendations in Working Paper 47.

The present law was clarified in the seminal case of *R.* v. *Finlay and Grellette.*[179] The "will assist" standard was first articulated in that case by Martin, J.A., in the context of a constitutional challenge to then Part IV.1 (now Part VI) of the *Code*, based on an alleged violation of section 8 of the *Charter* (unreasonable search or seizure). In *Finlay*, the validity of the impugned *Code* provision (allowing an authorization to be granted if, among other things, the judge to whom the application is made is "satisfied . . . that the granting of the authorization would be in the best interests of the administration of justice to do so . . .") was upheld. Speaking for the Court, Martin J.A. expressed the view that this *Code* provision imports "at least" the American Title III standard of "reasonable ground [probable cause] to believe that communications concerning the particular offence will be obtained through the interception sought,"[180] a standard that he appeared to equate with the "will assist" standard.[181]

Thus, our statutory formulation in subparagraph (*a*)(ii), employing the "will assist" criterion, now corresponds with the entrenched common law standard.

The standard articulated in subparagraph (*a*)(ii) also seeks to clarify some of the ambiguity with respect to basket clauses (what we refer to as "general interception clauses") that was engendered by the recent Supreme Court of Canada decision in *R* v. *Chesson.*[182] To appreciate the significance of the proposed reform, it is first necessary to say a few words about these clauses and the interception of the communications of unknown persons. In *Chesson*, the Court had ruled that the communications of one particular accused, gathered under the ostensible authority of a basket clause allowing the

178. *Supra*, note 108. The punishment for attempting, conspiring or attempted furthering may be imprisonment for less than two years. By virtue of the proposals at 45-46 of Report 31, the maximum penalty for such conduct would be one-half the penalty for the complete crime.

179. (1985) 48 C.R. (3d) 341 (Ont. C.A.)

180. *Ibid.* at 366.

181. *Ibid.* These formulations have now been approved by the Supreme Court of Canada in the recent case of *R.* v. *Duarte*, *supra*, note 159 at 45, where La Forest, J., per majority, summarizes the *Finlay* standard as requiring the issuing judge to be "satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of [the] offence."

182. [1988] 2 S.C.R. 148.

interception of communications of "unknown persons,"[183] were inadmissible as evidence against her because she had not been specifically named in the authorization. According to the Court, she should have been named in it because her identity was known to the police and because the police were aware, when applying for the authorization, that the interception of her private communications in the circumstances "might" (not would) be of assistance in the investigation of the crime.

Superficially, since the applicant was successful in challenging the admission of the intercepted conversations, the decision in *Chesson* seems to protect individual rights. However, the decision has been criticized for the standard it was thought to have set on authorizing interceptions. This standard, it has been argued, is too low.[184] In *Chesson*, the Court seemingly held that the interception of private communications can be authorized where it is possible that the interception "may" provide evidence.

There is some question as to whether the critics are correct in their reading of *Chesson*. The Court's reference to the "may assist" standard may have been limited simply to an assertion of what an applicant must disclose when seeking an authorization, rather than to the standard that a judge must address when granting an authorization. In any event, in our view there is sufficient uncertainty to justify clarification and reform. Our standard for the issuing judge in subparagraph (*a*)(ii) is higher than that which the critics have attacked as the creation of the Court in *Chesson*.[185] As in other areas of police powers, judicial grants of power to the police should be based on a reasonable probability of criminal activity, not on a mere suspicion or possibility of such activity. Thus, subparagraph 133(1)(*a*)(ii) requires that the judge be satisfied that there are reasonable grounds to believe that the interception of the private communication will assist in the investigation of the crime.

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183. Lawfully to authorize the interception of the private communications of an "unknown" person, a warrant must contain a specific clause allowing such interception. For example, a warrant may state that interceptions may be made of the private communications of "any other persons" residing at the specific addresses set out in it. This clause is commonly called a "basket clause" and under this legislation is referred to as a "general interception clause." The case law has had to sort out the extent to which these basket clauses are valid. A major issue is whether a basket clause can be used only to intercept the private communications of "known unknowns", *i.e.*, persons who are known to exist but whose identity is unknown. In *R.* v. *Samson* (1983), 36 C.R. (3d) 126 (Ont. C.A.) it was held that basket clauses should not be restricted in this manner and could be used to intercept the private communications of persons of whose existence the police later became aware.

184. See Rosenberg, *supra*, note 173.

185. Note that this standard is a lower one than that proposed in Working Paper 47. There we recommended (in recs. 26 and 27 at 42) that an interception of private communications authorized by a judge should be restricted to occasions when it is reasonably believed that the interception may assist the investigation of the crime by reasons of the person's "involvement" in the crime. In fact, the Commission forcefully argued that a lower standard may violate Canada's obligations under the *International Covenant on Civil and Political Rights* and even sections of the *Canadian Charter of Rights and Freedoms*. (See Working Paper 47 at 35.) However, this point was made in discussing minimization. Such concerns are addressed in s. 140 of this legislation, which proposes a list of conditions that a judge may impose in order to better ensure that only relevant private communications will be intercepted. However, a problem was identified with respect to the term "involvement." Consultants pointed out that this test was too narrow since there may be occasions when private communications should be intercepted even though the person is not involved in committing a crime. For example, the person could be an innocent agent passing on or receiving information from a person involved in the crime.

Subparagraph 133(1)(*a*)(ii) restricts the scope of basket or general interception clauses. It applies the same standard for obtaining a warrant in relation to "unknown" persons (for greater clarity, referred to in this draft as unidentified persons) as for "known" persons (referred to now as identified persons) — *i.e.*, whether interception of the private communications will assist in the investigation of the crime. This means that an unidentified person must be someone whose existence is known to the police at the time of the application, not someone whose existence the police later become aware of. This in effect accepts the reasoning of Judge Borins of the Ontario District Court in *R.* v. *Samson (No. 4),*[186] in preference to the position articulated by the Ontario Court of Appeal[187] when reversing that decision.

Paragraph (1)(*b*) continues the present law set out in paragraph 186(1)(*b*) of the *Code*.

Paragraph (1)(*c*) is based on paragraph 186(1)(*a*) of the *Criminal Code*, which provides that the judge can authorize the interception if satisfied "that it would be in the best interests of the administration of justice to do so."[188] In Working Paper 47,[189] we observed that, given the wide range of crimes for which an authorization may be obtained, authorizations should not be granted in relation to minor manifestations of those crimes. Paragraph (1)(*c*) is consistent with this policy. In considering whether or not it would be in the best interests of the administration of justice, the judge is directed by this paragraph to have regard to the seriousness of the facts and circumstances of the crime under investigation. In effect, the issuing judge must determine, in each case, whether the interest in protecting society from harmful criminal activity outweighs the interest in protecting the privacy of the individual.

Subsection 133(2) addresses a possible interpretation difficulty that may arise where a warrant is applied for in circumstances in which a party is prepared to consent to the interception of private communications. One arguable interpretation of subsection 133(1) is that the grounds set out there effectively preclude obtaining a warrant to intercept in those circumstances. It may be argued that, where the police have a consenting party, they will be unable to obtain a judicial authorization to tap because under the legislation other investigative techniques (*i.e.*, the use of unwired or untapped informants) will not have been tried or failed. In our view, the mere fact that a peace officer or an agent is a party to the private communications should not preclude the issuance

186. (1982), 37 O.R. (2d) 26 (Co. Ct).

187. *Supra*, note 183.

188. In *R.* v. *Finlay and Grellette*, *supra*, note 179 at 366, Martin, J.A. discussed this standard in the following terms which also explain our use of the same phrase in this legislation:

> "The judge must . . . be satisfied that the granting of the authorization would be in the 'best interests of the administration of justice.' The language used by Parliament, as previously indicated, requires the judge to balance the interests of effective law enforcement against privacy interests and, in my view, imports at least the requirement that the judge must be satisfied that there is reasonable ground to believe that communications concerning the particular offence will be obtained through the interception sought. The 'particular offence,' of course, includes the inchoate offences of conspiracy, attempt or incitement to commit the offence."

189. Recommendation 19 at 32-33.

of a warrant. Subsection 133(2) is designed to prevent needless litigation over this point of interpretation.

Office of solicitor

134. A judge shall not issue a warrant to intercept a private communication at the office of a solicitor or any place ordinarily used by a solicitor for the purpose of consulting with clients, unless the judge is satisfied, in addition, that there are reasonable grounds to believe that the solicitor or any of the solicitor's partners, associates or employees

(*a*) is or is about to become a participant in the crime under investigation; or

(*b*) is the victim of the crime under investigation and has requested that the interception be made.

Criminal Code, s. 186(2)

COMMENT

See the comment to section 135.

Home of solicitor

135. A judge shall not issue a warrant to intercept a private communication at the home of a solicitor, unless the judge is satisfied, in addition, that there are reasonable grounds to believe that the solicitor or any member of the solicitor's household

(*a*) is or is about to become a participant in the crime under investigation; or

(*b*) is the victim of the crime under investigation and has requested that the interception be made.

Criminal Code, s. 186(2)

COMMENT

The power to intercept private communications has the serious potential to erode the protection provided by the law of solicitor-client privilege. This important privilege safeguards the confidentiality of communications made between lawyers and their clients.

Subsection 186(2) of the present *Code* takes special measures (repeated here in paragraphs 134(*a*) and 135(*a*)) to protect solicitor-client privilege. To ensure clarity, we have divided the *Code* provision into two parts. Paragraph 134(*a*) deals with interceptions of private communications at a solicitor's office or any place ordinarily used by a solicitor for the purpose of consulting with clients. Paragraph 135(*a*) deals with interceptions of private communications at a solicitor's home. In both cases, there is no protection available to a solicitor who is involved in committing the crime under investigation.

Paragraphs 134(*b*) and 135(*b*) are new. They are added as a result of the general requirement that a warrant be obtained even when a party to the private communications consents to their interception. Without this provision it would be impossible for a lawyer to obtain the assistance of the police to wiretap or trace an extortionist's telephone calls or other communications. Thus, paragraphs 134(*b*) and 135(*b*), in a carefully drafted manner, allow the police, at the request of a lawyer who is the intended victim of a crime, to obtain a warrant to intercept private communications at the office or home of the lawyer.

It should be noted that section 140 permits a judge to impose minimization conditions. In the context of wiretaps at a lawyer's office or home, we expect that a judge would impose conditions to minimize the intrusions so that, as much as possible, the interception of private communications would be restricted to relevant communications. For example, one condition which could be imposed is live-monitoring, which is explained in the comment to section 140.

Unknown places

136. A judge shall not issue a warrant to intercept private communications at unknown places, unless the person whose private communications are to be intercepted is individually identified in the warrant.

Working Paper 47, rec. 29

COMMENT

The courts, in the absence of statutory guidance, have had to struggle to place effective limits on an "itinerant interception" clause. This is a basket clause that permits the interception of private communications at places other than those specifically named in the warrant — *i.e.*, at any place used by or resorted to by the person whose private communications may be intercepted pursuant to the warrant. The courts have ruled that such a clause is valid only as regards identified persons. If it were otherwise, the power given to the police to intercept private communications would be very nearly unfettered.

This provision adopts the policy set out in Working Paper 47,[190] and limits the use of the "itinerant interception" basket clause (referred to as a "general interception clause" in this legislation) to persons identified in the warrant.

Unidentified persons

137. A judge shall not issue a warrant to intercept private communications of persons who are not individually identified, unless the places at which the interception is to occur are identified in the warrant.

Working Paper 47, rec. 28

190. Recommendation 29 at 42.

COMMENT

This provision directly addresses the issue of whether a "general interception clause" as to places is available to assist in the interception of private communications of unidentified persons. It adopts the policy of the present law that it is unlawful to authorize the interception of the private communications of unknown persons at unspecified locations.[191]

However, to permit flexibility in the use of a warrant to intercept, section 157 allows a warrant to be amended from time to time during an investigation, to specify places previously unnamed.

Authority to make surreptitious entry

138. At the request of the applicant, the judge may, by the warrant, grant authority to enter any place surreptitiously to install, service or remove a surveillance device, if the judge is satisfied there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective.

Working Paper 47, recs. 31, 32

COMMENT

The present *Code* expressly authorizes only the interception of private communications. It does not expressly authorize the police to enter a place surreptitiously in order to install, service or remove a surveillance device. In the cases of *Lyons* v. *The Queen*[192] and *Wiretap Reference,*[193] the Supreme Court of Canada ruled that the authority to intercept private communications includes the ancillary power to enter a place surreptitiously to install a surveillance device. These decisions apply even in the post-*Charter* era.[194]

We accept that there is a legitimate need to permit surreptitious entry in order to install, service or remove a surveillance device. However, because this power presently exists only by implication through the decisions of the courts, it has been inadequately structured. Entering a person's premises without consent, for example, is a serious invasion of the person's privacy. Consequently, any power to enter surreptitiously should be subject to prior express judicial approval. Section 138 ensures this. Before the authority to enter a place covertly (for example, a person's house or car) is to be conferred, the judge must be satisfied there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective. This approach, in our view, strikes the appropriate balance between crime prevention and the protection of privacy, and does so in a manner that is consonant with the demands of the rule of law.

191. See *R.* v. *McLeod* (1988), 63 C.R. (3d) 104 (N.W.T.C.A.).

192. [1984] 2 S.C.R. 631.

193. [1984] 2 S.C.R. 697.

194. See *R.* v. *Chesson*, *supra*, note 182.

Assistance order

139. (1) When issuing a warrant, the judge may, at the request of the applicant, make an order directing any person engaged in providing a communication or telecommunication service, or the owner of or any person engaged in managing or taking care of the place in which a surveillance device is to be installed, to give such assistance as the judge may specify in the order.

Compensation

(2) The order may provide that reasonable compensation be paid for the assistance.

Working Paper 47, rec. 75

Form of order

(3) The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

(4) The order shall be directed to a named person or organization and shall disclose

(*a*) the applicant's name;

(*b*) the nature of the assistance to be given;

(*c*) the date and place of issuance; and

(*d*) the name and jurisdiction of the judge.

Warning in order

(5) The order shall contain a warning that failure to obey the order is a crime under paragraph 121(*b*) of the proposed Criminal Code (LRC) (disobeying a court order).

COMMENT

In Working Paper 47 (at 95), we reported that there have been occasions when, although an authorization was obtained to intercept a private communication, the interception could not be carried out because the necessary assistance was not forthcoming from the appropriate communications company. This section remedies this problem. Subsection (1) empowers a judge separately to order appropriate persons to assist the police in setting up the surveillance device.

Subsection (2) is self-explanatory.

Subsections (3) and (4) state the form and content of an order to assist, and are self-explanatory.

Failure to comply with an order would constitute the crime of disobeying a lawful court order under paragraph 121(*b*) of our proposed Criminal Code. Because it is appropriate, in our view, that the order contain a warning to that effect, it is provided in subsection (5).

Imposition of conditions to minimize intrusion

140. A judge who issues a warrant may include in it any of the following conditions:

(*a*) that the interception be monitored by a person at all times;

(*b*) that, so far as is reasonably practicable, only the communications of persons individually identified or encompassed by a general interception clause in the warrant be intercepted;

(*c*) where private communications at a telephone available to the public will be intercepted, that the interception be monitored by a person at all times and that, where practicable, the telephone be observed at all times;

(*d*) that reasonable steps be taken not to intercept communications between persons in such privileged or confidential relationships as may be specified by the judge;

(*e*) that the interception stop when the objective of the investigation, as disclosed in the application for the warrant, is attained;

(*f*) where private communications on a party line will be intercepted, that the interception be monitored by a person at all times;

(*g*) where authority is given to enter a place surreptitiously, that the entry be made or not be made by certain means;

(*h*) that periodic reports be made to the judge identifying any person who is not individually identified in the warrant but whose private communications are being intercepted;

(*i*) that periodic reports be made to the judge identifying any place that is not identified in the warrant but where interceptions are occurring;

(*j*) that any application for a renewal of the warrant, for an amendment to the warrant or for a separate warrant in respect of the same investigation be made to the same judge who issued the original warrant; and

(*k*) any other conditions that the judge considers advisable to minimize interceptions that would not assist in the investigation of the crime.

Working Paper 47, recs. 22, 23, 25, 30, 36
Criminal Code, s. 186(3)

COMMENT

This section focuses on the issue of minimization. "Minimization" is "the procedure by which only those communications which are the proper subject of the investigation are intercepted and recorded."[195]

195. Working Paper 47 at 34.

The present *Code* contains no express provisions to guide a judge in deciding whether terms or conditions are necessary to minimize the extent of the interception of the private communication or the recording of it.

In Working Paper 47 (at 35) we objected to the absence of any minimization provisions in the present *Code*. We argued that failure to include such provisions raised serious questions about Canada's meeting its obligations to protect privacy under international law, and perhaps even under the *Canadian Charter of Rights and Freedoms*. Nonetheless, the Working Paper was sensitive to criticisms that mandatory minimization would result in too costly a process and would frustrate criminal investigations. Consequently, a compromise was recommended: judges would have the discretion to impose certain minimization conditions where it was considered necessary to do so.

The list set out in section 140 covers a broad range of conditions. The broadest is that set out in paragraph (*k*). Other conditions are more specific. For example, paragraph (*c*) addresses minimization in the context of intercepting private communications at a public telephone booth.

While most of these conditions are self-explanatory, two of them merit special mention. Paragraph (*a*) permits a judge to require live-monitoring of the private communication. This means that a person must listen to the live private communication and decide whether continued listening is justified and whether it should be recorded. Thus, the condition, if imposed, prevents prolonged overhearing as well as the recording of irrelevant private communications. Paragraph (*d*) is designed to ensure that privileged or confidential private communications are not intercepted. If the judge believes that the communications to be intercepted may be privileged or confidential, he or she may order that reasonable steps be taken not to intercept them. This protects not only solicitor-client privilege, but also other potentially privileged communications, such as those between husband and wife. This better ensures the confidentiality of all privileged communications (even those that are not currently recognized but that may be legally recognized in the future) than does the present law.

Form of warrant

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

Contents of warrant

142. The warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the type of private communication that may be intercepted;

(*d*) a general description of the means of interception that may be used;

(*e*) as precisely as possible, the persons or class of persons whose private communications may be intercepted;

(*f*) the places, if known, at which the interception may occur;

(*g*) if authority to make a surreptitious entry is being granted, the place that may be entered;

(*h*) any conditions imposed by the judge;

(*i*) the date the warrant expires;

(*j*) the date and place of issuance; and

(*k*) the name and jurisdiction of the judge.

Working Paper 47, recs. 26-29
Criminal Code, s. 186(4)

COMMENT

Subsection 186(4) of the present *Code* sets out what an authorization must contain: the crime in respect of which the private communication may be intercepted; the type of private communication that may be intercepted; the identity of the persons, if known, whose private communications are to be intercepted; a general description, if possible, of the places at which the private communications may be intercepted; a general description of the means of interception that may be used; such terms and conditions as the judge considers advisable in the public interest; and a specified period of validity not exceeding sixty days.

The contents of a warrant in this Part, although altered for purposes of clarity and consistency, are modelled largely on subsection 186(4). However, additional information is included in order to correspond more fully to the judge's authority to issue the warrant. For example, paragraph 142(*e*), by using the phrase "class of persons," now refers to a basket clause as to persons. Also, paragraph 142(*g*) provides that, if a judge decides to authorize surreptitious entry in order to install, service or remove a surveillance device, the warrant must contain a clause to that effect. Since the warrant must specify the known places at which interceptions of private communications are to be made, it is logical for the warrant also to specify the places at which a surreptitious entry is authorized.

Expiration period

143. The judge shall set out in the warrant an expiry date not more than sixty days after the date of issue.

Criminal Code, s. 186(4)(*a*)

COMMENT

By paragraph 186(4)(*e*) of the present *Code*, the maximum period of an authorization is sixty days. This section continues that policy.

3. Renewal of Warrant

INTRODUCTORY COMMENT

Although a warrant to intercept is valid for the period not exceeding sixty days specified in it, if the investigation is ongoing, that period may prove to be inadequate. For this reason, present *Code* subsections 186(6) and (7) and now the following provisions provide for the renewal of the warrant to intercept a private communication.

Applicant

144. An application to renew a warrant may be made by the designated agent who applied for the warrant or any other agent of the same designation.

COMMENT

Section 144 states who may make an application to renew. The designated agent who made the original application for the warrant to intercept would be able to apply for a renewal. In addition, a different agent would be able to apply for a renewal so long as that agent had been designated as a person capable of applying for a warrant by the same federal or provincial minister who had designated the agent making the original application.

Manner of making application

145. (1) The application shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

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

Working Paper 47, rec. 18
Criminal Code, s. 186(6)

COMMENT

Subsection 186(6) of the present *Code* provides a cursory description of the application process for obtaining a renewal. In contrast, this section clarifies the procedure by providing more elaborate details of the manner and form of the application for a renewal.

Time and place of application

146. An application to renew a warrant shall be made before the warrant expires, and shall be made to a judge of the province in which the warrant was issued.

Criminal Code, s. 186(6)

COMMENT

This section states when and to whom the application must be made. The application for a renewal must be brought before the warrant expires. Otherwise, there is nothing to renew.

Presentation of application

147. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the reasons for requesting a renewal of the warrant;

(*e*) full particulars, including dates and times, of any interception made or attempted under the warrant;

(*f*) any information that was obtained by interception under the warrant;

(*g*) a list of any previous applications to renew the warrant, including the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted;

(*h*) whether the warrant being renewed contains a general interception clause;

(*i*) whether an application to amend the warrant is being brought, together with the application for a renewal, to add new persons whose private communications may be intercepted or new places at which interceptions may occur;

(*j*) the period for which the renewal is requested; and

(*k*) if the applicant requests that the warrant be renewed for a period exceeding thirty days, the grounds for believing that the longer period is necessary.

Working Paper 47, rec. 18
Criminal Code, s. 186(6)

COMMENT

Subsection (1) applies, to an application for a renewal of a warrant to intercept private communications, the same procedure as exists for presenting and swearing an application for a warrant to intercept private communications.

Subsection (2) sets out the contents of a renewal application. Paragraphs (*d*) to (*g*) and (*j*) reflect what the present law, in paragraphs 186(6)(*a*) to (*c*) of the *Criminal Code*, states must be disclosed. However, instead of making a vague reference to "such other information as the judge may require" as the present law does, this section provides greater detail. Paragraph (*h*) requires the peace officer to disclose whether the

warrant being renewed contains a "general interception clause." This information is necessary so that a judge may ascertain in respect of this application whether persons or places previously unidentified must now be identified in the renewed warrant. (See section 150, which requires that a renewed warrant identify such persons or places where possible.) Paragraph (*i*) relates to paragraph 157(*d*), which permits an amendment to the warrant to add persons or places not encompassed by the original warrant. Where such an amendment is sought at the renewal stage, it must be disclosed in the application. Paragraph (*k*) is also new. It relates to the power of the judge under subsection 151(2) to allow the warrant to be renewed for a period longer than the usual thirty-day validity period.

Procedure on hearing application

148. Sections 10 and 11 apply to an application to renew a warrant.

COMMENT

By virtue of this provision, the same rules governing the hearing and recording of evidence on an application for a warrant to intercept private communications also apply at the application for a renewal of a warrant.

Grounds for renewal

149. A judge who, on application, is satisfied that the grounds on which a warrant was issued still exist may renew the warrant by endorsing it, signing the endorsement and indicating the date and place of renewal.

Criminal Code, s. 186(7)

COMMENT

Clearly, a renewal should only be granted if the circumstances that gave rise to the granting of the warrant still apply. Subsection 186(7) of the *Criminal Code* provides that a renewal may be given if the judge to whom the application is made is satisfied that any of the circumstances justifying the issuance of a warrant under subsection 186(1) still obtain. Section 149 adopts this policy but uses clearer language. We anticipate that the renewal will be made by simply endorsing the original warrant with the new period during which it is valid, then signing it and indicating the date and place of renewal.

Restriction on renewal of warrant containing general interception clause

150. A warrant that contains a general interception clause may not be renewed unless the warrant is amended, in accordance with the amendment procedure, to specify the identities of persons or locations of places previously encompassed by the clause but since ascertained.

COMMENT

The case law in this area suggests that if a warrant authorizes interception of the private communications of persons who are unidentified, or permits the interception of private communications made at unspecified places, those persons or places should be disclosed at the time of an application for a renewal of the warrant if they have since been identified or specified.[196] Section 150 codifies and thus endorses this approach.

Expiration period

151. (1) A warrant expires thirty days after the date of renewal.

Extending expiration period

(2) A judge who is satisfied that the investigation will probably take more than thirty days to complete and that it would be impracticable for the applicant to apply for a further renewal may renew the warrant for a period of more than thirty days but not more than sixty days after the date of renewal.

Working Paper 47, rec. 45
Criminal Code, s. 186(7)

COMMENT

The total maximum period allowed by the present *Code* for an authorization (sixty days) and just one renewal (sixty days) is one hundred and twenty days. In Working Paper 47[197] we argued that, given the increasingly intrusive nature of such ongoing police investigations, greater judicial scrutiny was required. Thus, we recommended that the normal time period for a renewal should be thirty days. Subsection (1) implements this proposal. However, to permit flexibility in circumstances where it is obvious that the thirty-day period is inappropriate, we also proposed giving the judge the power, where special cause is shown, to extend this period to a maximum of sixty days. Subsection (2) permits this longer period of renewal. In such cases, we expect that the judge would endorse on the appropriate document the reasons for the extension.[198]

4. Amendment of Warrant

INTRODUCTORY COMMENT

At present, one cannot amend an authorization at the renewal stage. In *R.* v. *Badovinac*,[199] it was held that a renewal could not be used to modify or extend the terms of an authorization beyond extending the period for which it is effective. Even for minor changes to the authorization, a new authorization must be obtained.

196. *R.* v. *Blacquiere* (1980), 57 C.C.C. (2d) 330 (P.E.I.S.C.); *R.* v. *Crease* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.).

197. Recommendation 45 at 51.

198. *Ibid.*

199. (1977), 34 C.C.C. (2d) 65 (Ont. C.A.).

In Working Paper 47,[200] we proposed allowing greater powers to amend an authorization. We advocated a power to amend an authorization during its currency so as to allow for the identification of persons or places not previously identified. We also supported allowing minor amendments to an authorization at the renewal stage. These included: naming persons previously provided for in the authorization (*e.g.*, as "unknowns") but unnamed in it and including additional places at which interceptions of persons provided for in the authorization may be made; providing different or more accurate descriptions of persons or places; describing different or additional means of interception to be employed; as well as stipulating different or additional crimes (provided they are clearly related to the crimes in the original authorization and part of the same investigation).[201] We also supported the inclusion of a power, available at the renewal stage, to insert conditions designed to minimize the interception of the private communication.[202]

Such a power to amend a warrant to intercept private communications would assist peace officers in their investigations and would assist the court in carrying out the limited, but important, supervisory role entrusted to it under this legislation. However, we would emphasize that the renewal is not the appropriate device for securing an amendment. This is the proper function of amendment rules. Amendment should be obtained by means of a separate application. Thus, under our scheme a renewal would continue to be restricted to expanding the time period for which a warrant is valid.

Applicant

152. An application to amend a warrant may be made by the designated agent who applied for the warrant or any other agent of the same designation.

COMMENT

Consistent with the way in which an application for a renewal is made, an application to amend must be brought by the designated agent who applied for the warrant or any other agent designated as a person who may apply for a warrant by the same federal or provincial minister who designated the original applicant.

Manner of making application

153. (1) The application shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

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

200. See at 42, 51.

201. Working Paper 47, recs. 41-43 at 51-52.

202. *Ibid.*, rec. 44 at 51.

Time and place of application

154. An application to amend a warrant shall be made before the warrant expires, and shall be made to a judge of the province in which the warrant was issued.

Presentation of application

155. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the amendment being requested;

(*e*) the reasons for requesting the amendment;

(*f*) full particulars, including dates and times, of any interception made or attempted under the warrant;

(*g*) any information that was obtained by interception under the warrant; and

(*h*) a list of any previous applications to amend the warrant, including the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted.

Procedure on hearing application

156. Sections 10 and 11 apply to an application to amend a warrant.

COMMENT

This section ensures that the provisions on hearing and receiving evidence of the application and making a record of the application in sections 10 and 11 apply to an application to amend a warrant to intercept private communications.

Grounds for and nature of amendment

157. A judge may, on application, amend a warrant to provide for any of the following if the judge is satisfied that the amendment relates to the investigation of the same crime disclosed in the warrant:

(*a*) a more accurate description of individually identified persons whose private communications may be intercepted under the warrant;

(*b*) the identity of persons, previously encompassed by a general interception clause but since ascertained, whose private communications may be intercepted under the warrant;

(*c*) the places, previously encompassed by a general interception clause but since ascertained, at which the interception may occur under the warrant;

(*d*) the addition of new persons whose private communications may be intercepted or new places at which interceptions may occur, if the judge is satisfied, in addition, that the grounds for issuing a warrant to intercept private communications of such persons or at such places exist;

(*e*) the deletion of persons whose private communications may be intercepted or places at which the interception may occur;

(*f*) authority to enter a place surreptitiously to install, service or remove a surveillance device, if the judge is satisfied, in addition, that there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective;

(*g*) a change in the means of interception that may be used;

(*h*) changes in the conditions of the warrant; and

(*i*) any condition that a judge may include when issuing a warrant.

Working Paper 47, recs. 29, 41-44

COMMENT

Section 157 sets out the power of a judge to grant an amendment. This power is limited. An amendment must relate to the investigation of the same crime as that for which the warrant to intercept was granted. It cannot be used as a pretext to investigate other crimes.

Section 157 also describes the kinds of amendments that the judge may make. Paragraphs (*a*) and (*b*) deal with amendments to better identify persons. Paragraph (*a*) permits a more accurate identification of persons who were previously identified in the warrant. For example, a person may have been identified earlier by means of a description, but without being named. Once that person's name is known, an amendment can be used to name him or her in the warrant.

Paragraph (*b*) permits the identification of persons previously unidentified whose private communications were allowed to be intercepted under a "general interception clause." After so identifying the person, the police would be able to use any "general interception clause" as to places to expand their authority to wiretap. (See section 136 and the comment thereto.)

Paragraph (*c*), paralleling paragraph (*b*), permits a description of places that were previously encompassed by a "general interception clause" as to places.

Paragraph (*d*), subject to certain safeguards, permits the amendment power to be used to add new persons or places in relation to whom or to which private

communications could not have been intercepted at all under the previous warrant. Such an amendment power is, in our view, more efficient than requiring that a new warrant be obtained for adding new persons or places.

Paragraph (*e*) allows an amendment to delete persons or places previously named but which have been found to be of little or no assistance, while paragraph (*f*) permits amending a warrant to allow a surreptitious entry onto a place to install, service or remove a surveillance device.

Paragraphs (*g*) to (*i*) permit various kinds of amendments that involve changing the means of interception, changing any conditions previously imposed or adding new conditions.

While this section permits the use of an amendment to change the terms or conditions of a warrant, it is not designed to be the exclusive means by which such a change may be accomplished. If the applicant believes that obtaining a new warrant is preferable, this is permissible under our scheme.

Making the amendment

158. A judge may amend a warrant by endorsing an amendment on it and signing the endorsement, or by signing an amendment and appending it to the warrant, and indicating the date and place of the amendment.

COMMENT

Section 158 describes how an amendment is to be documented. Where practicable, the amendment should be endorsed on the warrant and then signed by the judge. However, where an endorsement is impracticable (for example, where the amendments are lengthy or numerous), the amendment may be set out on a separate page, signed by the judge and appended to the warrant.

Assistance order

159. On an application to amend a warrant, a judge may, at the request of the applicant, make an assistance order pursuant to section 139.

DIVISION II
WARRANT UNDER URGENT CIRCUMSTANCES

INTRODUCTORY COMMENT

Section 188 of the current *Criminal Code* permits a judge to grant an emergency authorization if the urgency of the situation requires interceptions to be made before a regular authorization could, with reasonable diligence, be obtained. It may only be applied for by specially designated peace officers and is only valid for a period up to thirty-six hours. Sections 160 to 165 of this legislation deal with such urgent cases. Those sections largely retain the present law but alter it, where necessary, to promote efficiency and accountability.

Grounds for urgent warrant

160. (1) A judge of the province in which a private communication is to be intercepted who is designated by the Chief Justice of the Criminal Court to hear applications for warrants in urgent circumstances may, on application, issue a warrant authorizing the interception, by means of a surveillance device, of the private communication if the judge is satisfied that the grounds for issuing a warrant exist and that there are reasonable grounds to believe that the warrant is urgently required and cannot with reasonable diligence be obtained under Division I.

Additional ground if application by telephone

(2) The judge may issue the warrant on an application made by telephone or other means of telecommunication if the judge is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person.

Criminal Code, s. 188(1), (4)

COMMENT

Subsection (1) sets out before which judge an application for this warrant may be made. Present *Code* subsection 188(1) requires that this application be brought before a judge of a superior court of criminal jurisdiction or a judge referred to in section 552. This section of our Code requires, instead, that the application be made to a judge of the Criminal Court of the province in which the private communication is to be intercepted who is designated as a judge who may hear these applications by the Chief Justice of that Court. As noted, this reflects our support for the concept of a Unified Criminal Court (Working Paper 59). Subsection (1) also incorporates the grounds for issuing this warrant which are at present set out in subsection 188(2) of the *Criminal Code*. In addition to the grounds required for a regular warrant, the judge must have reasonable grounds to believe that the warrant is urgently required and cannot otherwise be obtained with reasonable diligence.

Subsection (2), in the interests of efficiency, changes the present law by allowing a judge, in an emergency, to receive an application made by telephone or other means of telecommunication.[203]

Federal applicant

161. (1) A federally designated peace officer designated in writing may make the application if the crime under investigation is one in respect of which proceedings may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada.

203. This adopts the policy in Working Paper 47, which suggested that the telewarrant procedure be used here. See rec. 53 at 65-66.

Provincial applicant

(2) A provincially designated peace officer designated in writing may make the application in the province of designation if the private communication is to be intercepted in that province and the crime under investigation is one in respect of which proceedings may be instituted at the instance of the government of a province and conducted by or on behalf of the Attorney General of a province.

Working Paper 47, rec. 20
Criminal Code, s. 188(1)

COMMENT

Section 161 sets out the power of a federally or a provincially designated peace officer to apply for this kind of warrant.[204] This section provides that the power of a specially designated peace officer to apply for this kind of warrant is the same as that given specially designated agents in relation to regular warrants. This section also reflects the policy of the present law that the designation of these peace officers must be made in writing by an appropriate official.

Application in person or by telephone

162. (1) The application 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 orally, unilaterally, in private and on oath.

Working Paper 47, rec. 53
Criminal Code, s. 188(1)

COMMENT

Subsection (1) of this provision is self-explanatory. Subsection (2) states that, unlike other unilateral applications made in private, this one must be made orally. This is justifiable in light of the urgent circumstances that require the bringing of these special applications.

Additional contents of application

163. In addition to disclosing the information required to be disclosed in an application for a warrant under subsection 131(2), the application shall disclose

(*a*) the time the application is made;

(*b*) the grounds for believing that the warrant is urgently required and cannot with reasonable diligence be obtained under Division I; and

204. See the definitions "federally designated" and "provincially designated" in s. 125.

(*c*) 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.

Working Paper 47, rec. 53

COMMENT

Section 163 sets out the additional information that the designated peace officer must provide to the judge when applying for an urgent warrant. It must be read with subsection 131(2), which sets out the contents of an application for a regular warrant. It adds clarity to the law by more fully describing the information that the peace officer must provide.

Application of general rules for warrants

164. Sections 10 to 12 apply to an application for a warrant under this Division and sections 134 to 142 apply to the issuance of a warrant.

COMMENT

This section makes it clear that the procedure on hearing applications for warrants set out in sections 10 to 12 and the safeguards applicable to the issuance of regular warrants to wiretap set out in sections 134 to 142 apply as well to these urgent warrants.[205]

Expiration period

165. (1) The judge shall set out in the warrant an expiry date and time not more than thirty-six hours after the time of issue.

Renewal or amendment of warrant

(2) The warrant may not be renewed or amended.

Criminal Code, s. 188(2)

COMMENT

This section sets out the policy of the present law that these warrants have a life span of up to thirty-six hours. They cannot be renewed or amended. Instead, a regular warrant must be obtained if the police wish to intercept the private communications over a longer period.

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205. This procedure changes the present law in one important way. Working Paper 47 pointed out that a major problem with the present law is the absence of a record of what has taken place. As a result, it was impossible subsequently to review this application. The Working Paper therefore recommended (rec. 53 at 66) the creation of a record of the application. This is accomplished by incorporating here s. 11, which requires that oral information provided by the applicant be recorded verbatim.

Some subsections of present *Code* section 188 have been omitted. Subsection (3) of section 188 provides that, for the purposes of admissibility of evidence, an interception of a private communication under this kind of warrant is deemed not to be lawfully made unless the issuing judge (or, if that judge is unable to act, a judge of the same jurisdiction) certifies that if the application had been made in relation to a regular authorization he or she would have given the authorization. However, because subsection 160(1) of this legislation requires the judge to be satisfied that the grounds for granting a regular warrant exist, and because a record is to be made of the application proceedings, the certification requirement is no longer necessary.

Also, subsection (5) of section 188 is not incorporated here. That subsection provides that, where an emergency authorization was issued after an earlier, regular authorization was issued, the trial judge may deem inadmissible the evidence obtained under the emergency authorization if it is based on the same facts and involved the interception of the same person or persons, or related to the same crime, as the original authorization. This is a matter going to admissibility of evidence which, as noted, will be addressed in another Part of this Code, pertaining to remedies.

CHAPTER IV
CONFIDENTIALITY OF MATERIALS AND OBSCURING INFORMATION

Confidential documents

166. The following material is confidential:

(*a*) a warrant;

(*b*) an order extending the time for giving notice of an interception or a surreptitious entry;

(*c*) an application to issue, renew or amend the warrant or to make the order extending time, or the record of the application and its transcription;

(*d*) any evidence received by a judge when hearing the application, and the record of any oral evidence received and its transcription;

(*e*) an assistance order made pursuant to section 139; and

(*f*) an order to obscure information.

Criminal Code, s. 187(1)

COMMENT

Because of the need for secrecy when covertly intercepting a person's private communications, the present *Criminal Code*, in subsection 187(1), protects the confidentiality of the authorization documents. It provides that all of the documents relating to an application for a regular authorization, for a renewal or for an extension of time to give a person notice that an interception of his or her private communications was made are confidential. Section 166 pursues the same policy and extends it to other material which

we feel should be treated as confidential. It should be noted that the reference to "warrant" in this provision means that it has application to urgent as well as regular warrants. This contrasts with the present law which, owing to the informal and often undocumented nature of emergency applications, makes no such provision. Since *all* applications under our scheme must be recorded, it was thought necessary to extend confidentiality to emergency applications. Moreover, this provision improves on the present law by more clearly and precisely stipulating exactly which materials are to be treated as confidential.

Order to obscure information

167. (1) A judge may, on the request of an applicant at the time an application to issue, renew or amend a warrant or to make an order extending the time for giving notice of an interception or a surreptitious entry is made, obscure or order obscured any information contained in confidential material.

Grounds for obscuring information

(2) The judge may obscure the information or order it obscured if the judge is satisfied that the information, if revealed, would

(*a*) pose a risk to anyone's safety;

(*b*) frustrate an ongoing police investigation;

(*c*) reveal particular intelligence gathering techniques that ought to remain secret; or

(*d*) cause substantial prejudice to the interests of innocent persons.

Working Paper 47, rec. 50
Working Paper 56, rec. 9(5)

COMMENT

The present law on how an accused is to obtain access to the confidential documents contained in the sealed packet is explained in more detail in the comment to paragraph 194(2)(*c*). Essentially that section changes the present law by requiring what is, in effect, full disclosure, unless the court orders otherwise. At the time that a person is given notice of the prosecutor's intention to adduce evidence of the person's private communications, he or she must also be given a copy of (a) the warrant (as renewed or amended), and (b) any material relating to an application to issue, renew or amend the warrant.

Under this provision a judge may prevent a person's receiving a full copy of that material by obscuring the material or ordering that certain information be obscured.[206]

Subsection (1) allows an applicant, at the time of an application to issue, renew or amend a warrant or for an order extending the time for giving notice of an interception

206. This section is based largely on recommendations made in both Working Paper 47 (rec. 50 at 65) and Working Paper 56 (rec. 9(5) at 60).

or surreptitious entry, to request that the judge obscure information contained in any confidential material received at or resulting from the application hearing.

Subsection (2) states (as alternatives) the things of which the judge must be satisfied before obscuring the information.[207] Paragraph (*a*) would apply, for example, to prevent disclosure of the identity of police informers. Paragraph (*b*) protects ongoing police investigations which ordinarily would continue after the interception of a private communication has been accomplished. Paragraphs (*c*) and (*d*) add grounds which have been approved in recent Ontario decisions as valid reasons for refusing access to the documents in the packet.[208]

Should the judge refuse to obscure the information, the applicant has two options: to continue with the application and later, as required, serve the person whose private communications have been intercepted with the notice to tender evidence, accompanied by the information formerly in the sealed packet that is required to be disclosed; or to withdraw the application.

Form and contents of order

168. An order to obscure information shall be in writing, in the prescribed form and signed by the judge who issues it, and shall disclose

(*a*) the applicant's name;

(*b*) the information to be obscured;

(*c*) the date and place of issuance; and

(*d*) the name and jurisdiction of the judge.

Copy of material

169. (1) Where information is to be obscured, a copy shall be made of the material that contains the information.

Obscuring information on copy

(2) The information shall be obscured on the copy, leaving the information on the original material unobscured.

COMMENT

This section sets out the procedure to be followed once a judge has decided that certain material should be obscured. For obvious and practical reasons, the original material should not be obscured. Under this provision, if it is necessary to obscure material, this is to be done on a copy made for that purpose.

207. The grounds described in s. 167(2)(*a*) and (*b*) were first proposed in Working Paper 56, rec. 9(5) at 60.

208. See *R.* v. *Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.) at 281-282; *R.* v. *Rowbotham* (1988), 63 C.R. (3d) 113 (Ont. C.A.) at 150-151.

Sealed packet

170. (1) Immediately after determining an application to issue, renew or amend a warrant or to make an order extending the time for giving notice of an interception or surreptitious entry, the judge shall seal in a packet

(*a*) the original of all the confidential material; and

(*b*) the copy of any material on which information has been obscured.

Working Paper 47, rec. 18
Criminal Code, s. 187(1)

Custody of packet

(2) The sealed packet shall be kept in the custody of the court in a place, specified by the judge, to which the public has no access.

Criminal Code, s. 187(1)

COMMENT

Subsection 187(1) of the current *Criminal Code* provides in part that, with the exception of the authorization, all documents relating to an application for a regular authorization, a renewal or an extension of the time to give notice of an interception must be placed in a packet and sealed immediately after the application is determined. In addition, the packet must be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize.

Subsections (1) and (2) largely adopt the present law. Subsection (1) re-creates the judge's duty to seal in a packet all information in support of an application. However, there are modifications consistent with our proposed application procedures. This section applies to all applications made unilaterally and in private pursuant to this Part, including an application for a warrant in urgent circumstances. Although not expressly stated, it also applies to requests for orders made ancillary to an application, such as a request for an assistance order or an order to obscure. The original of the warrant or of any order made by the judge must be included in the packet. (However, an official copy of the warrant or order issued by the judge would be retained by the police for purposes of execution. This is the effect of section 171.) A copy of any material on which information has been obscured must also be sealed.

Subsection (2) ensures that the sealed packet is, at all times, kept in the custody of the court in a place to which the public does not have access.

Copy of packet

171. The applicant may keep a copy of all the materials contained in the sealed packet.

Working Paper 47, rec. 48(*b*)

COMMENT

Section 171 expands upon a recommendation, made in Working Paper 47,[209] that the special agent applying for a warrant or for a renewal of it should be able to retain

209. Recommendation 48(*b*) at 64.

a true copy of all documents relating to any of those applications. This section applies to all applications in this Part made unilaterally and in private. The applicant needs a copy of the material for two reasons. First, he or she needs to keep a full record of events. Second, the applicant needs the material in order to carry out his or her duty properly. For example, as already noted, a copy of the warrant is needed in order to be able to execute it. Also, a copy of all the material in support of the application (meaning a copy of the material on which information has been obscured if there has been a decision to obscure) must be given to the person whose private communications have been intercepted if the person has been notified of an intention to tender evidence of the interception.

Prohibition

172. No one shall open or remove the contents of a sealed packet except as directed by a judge.

Criminal Code, s. 187(1)

COMMENT

Section 172 incorporates part of subsection 187(1) of the present *Code*. Its object is to preserve secrecy.

Examining contents on hearing other applications

173. A judge may have the sealed packet opened and may examine the contents in dealing with any application if the judge considers it necessary to do so in order to determine the application.

Working Paper 47, rec. 48(*a*)
Criminal Code, s. 187(1)

COMMENT

Section 173 states when a judge may have a packet opened. A judge may open the packet to deal with any application made pursuant to this Part. The need for the section is obvious. For example, on an application to renew a warrant, access to the material in support of the original warrant is needed in order to consider properly whether a renewal should be granted.[210]

Opening packet to prepare transcript

174. A judge may direct that the sealed packet be opened and the contents removed to have a transcript prepared of any oral record contained in the packet.

210. The section also incorporates a recommendation, made in Working Paper 47 at 48, that access to the material in the sealed packet be allowed to deal with an application for an authorization in related investigations.

COMMENT

This section ensures that the packet may be opened in order to prepare a transcript of the record of any application made in this Part.

This Chapter, however, does not incorporate paragraph 187(1)(*b*) of the present *Code*, which provides that the contents of a sealed packet must not be destroyed, except by order of a judge. This is unnecessary because such conduct would already be prohibited by the general crime of obstructing justice in section 125 of our proposed Criminal Code.[211]

CHAPTER V
INTERCEPTING AND ENTERING

Person who may intercept

175. Where the interception of a private communication is authorized under a warrant, the communication may be intercepted by

(*a*) a federally designated person, if the application for the warrant was made by a federally designated applicant;

(*b*) a provincially designated person, if the application for the warrant was made by a provincially designated applicant; or

(*c*) a person who is a party to the communication.

Criminal Code, s. 186(5)

COMMENT

Subsection 186(5) of the present *Code* provides that the Solicitor General of Canada or the Attorney General, as the case may be, may designate a person or persons who may intercept private communications under authorization. Section 175, in paragraphs (*a*) and (*b*), continues this policy with appropriate modifications to ensure that any designation will be made by the appropriate federal or provincial minister. Paragraph 175(*c*) is new. It is needed in the interests of completeness and because, as noted, surreptitious interceptions of private communications made with the consent of a party on the basis of recent Supreme Court of Canada jurisprudence now require the prior issuance of a warrant. In investigations involving the use of wired informants, situations may arise where the only person accomplishing the actual interception of the communications is the consenting informant and not some third-party applicant.

Repair and compensation for entry

176. Where, as a result of an entry to install, service or remove a surveillance device, property is damaged, the govern-

211. See Report 31 at 204.

ment or agency whose servant or agent caused the damage shall take prompt and reasonable steps to repair it and, after notice of the entry is given, compensate the owner of the property for any unrepaired damage.

Working Paper 47, rec. 38

COMMENT

This section largely implements Recommendation 38 of Working Paper 47 (at 49), which was made in the context of surreptitious entry. This provision ensures accountability, in the form of repair or compensation or both, for any entry, whether or not the entry is made surreptitiously or with consent.

CHAPTER VI
NOTIFICATION OF INTERCEPTION AND SURREPTITIOUS ENTRY

DIVISION I
GIVING NOTICE

Written notice

177. The Solicitor General of Canada or the provincial minister on whose behalf an application for a warrant was made shall notify in writing

(*a*) any person who was the object of an interception made pursuant to the warrant unless the person has already been given notice of an intention to tender evidence of the interception; and

(*b*) any person whose place was entered surreptitiously pursuant to the warrant.

Working Paper 47, recs. 37, 69
Criminal Code, s. 196(1)

COMMENT

Section 196 of the *Criminal Code* provides, in effect, that the Attorney General of the province in which the application for the authorization was made, or the Solicitor General of Canada, as the case may be, must give written notice to any person who has been the object of an interception made pursuant to the authorization. There are a variety of periods within which this notification must be made. The general rule under subsection 196(1) is that the notification must be made within ninety days after the period for which the authorization was issued or renewed. However (by subsections 185(2) and (3)), at the time the application for the original authorization was made, or (by subsections 196(2) and (3)) after an authorization or renewal has been

granted,[212] the applicant may apply to substitute for this time period a longer period of up to three years. There are various grounds of which the judge must be satisfied before granting an extension under these provisions. The fact that the person has received such notice must be certified to the court in a manner prescribed by regulations.

The courts have ruled that the only notice to be given under this section 196 is the fact that an interception was made. It does not require that the person receive notice of the date or period of the interception or a copy of the authorization or have access to the tape recordings.[213]

Section 177 sets out to whom notice should be given. It alters the present law in two ways. First, it requires that notice be given of any surreptitious entry to install a surveillance device.[214] This promotes accountability in the use of this power.

Second, paragraph (*a*) provides that a notice of interception need not be given where a person has already received notice of the prosecutor's intention to adduce evidence.[215] The person in such a case would have received earlier notice and fuller details than would be the case under this notice.

Time of notice

178. The notice shall be given within ninety days after the warrant expires.

Criminal Code, s. 196(1)

COMMENT

Section 178 clarifies the present law by setting out the general rule that service must be made within ninety days after the period for which the warrant (or any renewal of it) was valid. However, sections 181 to 183 allow for this ninety-day period to be extended by order of the court.

Contents of notice of interception

179. (1) A notice of an interception, shall disclose the date of the interception, and shall be accompanied by a copy of the warrant.

Working Paper 47, rec. 69

Contents of notice of entry

(2) A notice of a surreptitious entry shall disclose the place that was entered and the date of the entry, and shall be accompanied by a copy of the warrant.

212. Where the extension is sought, it must be brought before the statutorily fixed time periods expire.

213. *Re Zaduk and The Queen* (1979), 46 C.C.C. (2d) 327 (Ont. C.A.).

214. This policy was recommended by Working Paper 47, rec. 37 at 49.

215. *Ibid.*, rec. 69 at 93.

COMMENT

Section 179 requires that interception and entry notices supply more information than is the case under present law. The notice should disclose, not just the fact that interceptions of the person's private communications were made, but also the date of the interceptions. As well, it should be accompanied by a copy of the warrant authorizing the interception. (The warrant may be obscured to prevent the person from knowing about other persons whose private communications were also authorized to be intercepted). As we stated in Working Paper 47 (at 91), this better accords with the principles of reviewability and accountability. Since section 40 requires the police to give a copy of a search warrant to a person whose property has been searched (or to leave a copy), in our view it is logical to require that a "search" for private communications be treated in a similar manner.

Service of notice

180. (1) Service of the notice shall be made and proof of its service shall be given in accordance with such regulations as the Governor in Council may make for the purpose.

Criminal Code, s. 196(1)

Inability to serve notice

(2) Where the notice cannot be served, a peace officer with knowledge of the facts shall provide the court with an affidavit setting out the reason why the notice was not served and the efforts that were made to locate the person.

Working Paper 47, rec. 73

COMMENT

Section 180 describes how interception and entry notices must be served. Subsection (1) re-enacts subsection 196(1) of the present *Code* and sets out the power to prescribe by regulation the manner and proof of service.

Subsection (2) is self-explanatory.[216]

DIVISION II
APPLICATION TO EXTEND TIME FOR NOTICE

Power to extend time of notice

181. (1) A judge who, on application, is satisfied that

(*a*) the investigation of the crime to which a warrant relates, or a subsequent investigation of another crime referred to in subparagraph 133(1)(*a*)(i) commenced as a result of the earlier investigation, is continuing, and

(*b*) it would be in the best interests of the administration of justice

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216. *Ibid.*, rec. 73 at 93.

may order that the time for giving notice of an interception or surreptitious entry be extended.

Successive extensions

(2) A judge may grant more than one extension of time as long as the total extra time granted does not exceed three years.

Working Paper 47, rec. 72
Criminal Code, s. 196(3)

COMMENT

Sections 181 to 183 set out the power to extend the time for giving notice. Subsection 181(1) lists the grounds on which a judge must be satisfied in order to grant such an extension. With minor changes in wording, these grounds are the same as those set out in subsection 196(3) of the present *Code*.

Subsection 181(2) sets out the maximum time period of extension. The present law appears to allow the notice period to be extended indefinitely, provided each separate period of extension is itself not longer than three years.[217] This is inconsistent with a policy which favours accountability. Thus, subsection 181(2) puts a cap of three years on the period of successive extensions.[218]

Applicant

182. An application for extension may be made by the Solicitor General of Canada or the provincial minister who is required to give notice of the interception or surreptitious entry.

Criminal Code, s. 196(2)

Manner of making application

183. (1) The application shall be made to a judge unilaterally, in person and in private, orally or in writing, before the ninety-day period or an extension of that period ends and shall be supported by an affidavit of a peace officer.

Criminal Code, s. 196(2), (4)

Contents of affidavit

(2) The affidavit shall disclose

(*a*) the facts relied on to justify the granting of an extension; and

(*b*) a list of any previous applications for extensions in respect of the same warrant indicating the date each previous application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted.

Criminal Code, s. 196(4)

217. See Watt, *supra*, note 158 at 193.

218. See Working Paper 47, rec. 72 at 93.

COMMENT

Section 183 describes the nature and timing of an application to extend time for giving notice of an interception or surreptitious entry. These sections change the present law in one important way. Under them there is no longer the power (presently found in subsections 185(2) and (3) of the *Code*) to apply for an extension, or to grant it, at the time the application for a warrant is made. Under this provision, an extension may be applied for only after a warrant is issued. The application for extension of the notice should ordinarily be based on circumstances that can only be known or would only arise after the granting of a warrant. Privacy is better protected by proceeding in this way, since the court will have a more informed basis upon which to decide that the extension is truly necessary. Nevertheless, in unusual or extremely complex investigations, we recognize that the applicant for the warrant will be better positioned to predict that an extension will be required, and to justify that prediction to a judge. In such cases, the wording in this provision can accommodate extension applications brought immediately after the warrant is granted.

CHAPTER VII
APPLICATION FOR DETAILS OF INTERCEPTION

Applicant and notice

184. An accused who discovers that a private communication to which the accused was a party has been intercepted by means of a surveillance device may apply in writing to a judge on two clear days' notice to the prosecutor for an order requiring the prosecutor to disclose details of the intercepted private communication.

Working Paper 47, rec. 70

COMMENT

See the comment to section 191 for a full explanation of this kind of application.

Contents of application

185. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime with which the applicant is charged;

(*d*) the nature of the order requested; and

(*e*) the reasons for requesting the order.

Affidavit in support

(2) The application shall be supported by an affidavit.

COMMENT

This section sets out the contents of an application to disclose details of a private communication and requires that the application be accompanied by an affidavit in support. This is consistent with the procedure used for applications for orders brought on notice to other persons appearing elsewhere in this Code — for example, in Part Six (*Disposition of Seized Things*).

Service of notice

186. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on the prosecutor.

COMMENT

This section, modelled on section 216 of this Code, requires that a notice of the application, together with the application itself and supporting affidavit, be served on the prosecutor.

Hearing evidence

187. A judge to whom an application is made may receive evidence, including evidence by affidavit.

COMMENT

This section is modelled on paragraph 218(*c*) (disposition of seized things).

Service of affidavit

188. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on the prosecutor.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

189. The evidence of any person shall be on oath.

Recording evidence

190. (1) Any oral evidence heard by the judge shall be recorded verbatim, either in writing or by electronic means.

Identification of record

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

Certification of transcript

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

Disclosure of further details

191. A judge who, on application, is satisfied that details of an intercepted private communication are relevant to the crime with which the applicant is charged and are necessary for the applicant to make full answer and defence may order the prosecutor to disclose such details as can be ascertained by due diligence.

Working Paper 47, rec. 70

COMMENT

The police ordinarily intercept private communications with the intention of obtaining evidence against a person for eventual use at that person's trial on a charge involving the crime for which the warrant to intercept was granted. However, not all targets of interceptions end up being prosecuted for that crime. The private communication may reveal that the person was not involved in committing a crime at all, or was committing a different crime, or that someone else entirely was involved.

For example, the private communication of "A," an innocent conduit, may be evidence that "B," not "A," was involved in committing a crime. Consequently "A" would not be charged with a crime as a result of the electronic surveillance. Since no evidence of the private communications would be tendered in evidence against "A," "A" would not receive a notice of intention to tender evidence under section 194. However, it is conceivable that "A" may need to obtain a record of the private communications in order to make full answer and defence to a different charge for which the prosecutor did not intend to tender the intercepted communications as evidence. "A" might nevertheless still wish to have access to the wiretapped evidence, since it might provide corroboration of his or her alibi or support some other aspect of the defence.

Accused persons who do not receive notice of an intention to introduce private communications in evidence against them may become aware, either formally or informally, of the fact that their private communications have been intercepted. The formal method is that set out in paragraph 177(*a*), by which the person would receive a notice of any authorized interceptions of his or her private communications. However, this notice need not include the contents of the intercepted communications. The informal or unofficial method occurs where the person learns, or is informed, usually from a reliable source, that an interception took place.

Sections 184 to 193 codify the proposals that we first set forth in Working Paper 47 [219] to rectify the shortcomings of the present *Criminal Code* provisions. Section 184 states that an application for this order may be made by an accused who was a party to the intercepted private communication on two clear days' written notice to the prosecutor. Sections 185 to 190 detail certain procedural elements of the application such as the contents of the application, service of the application, notice of the application and what evidence will be heard on the application. Section 191 sets out the grounds on which a judge must be satisfied to order disclosure of details of the private communication.

219. Recommendation 70 at 93.

Form of order

192. The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

193. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime with which the applicant is charged;

(*c*) the decision of the judge;

(*d*) the date and place of issuance; and

(*e*) the name and jurisdiction of the judge.

CHAPTER VIII
PROCEDURE FOR TENDERING EVIDENCE AND OBTAINING ADDITIONAL INFORMATION

DIVISION I
NOTICE OF INTENT TO TENDER EVIDENCE

Notice

194. (1) A prosecutor who intends to tender evidence of a private communication that was intercepted by means of a surveillance device shall give the accused reasonable notice of that intention.

Working Paper 47, rec. 57
Criminal Code, s. 189(5)

Accompanying documents

(2) The notice shall contain

(*a*) a transcript of any private communication that will be tendered in the form of a recording, or a statement giving full particulars of any private communication that will be tendered by a witness;

(*b*) the time, date and place of the private communication and the names of all parties to it, if known; and

(*c*) if the private communication was intercepted pursuant to a warrant, a copy of the warrant and any material relating to an application to issue, renew or amend the warrant.

Working Paper 47, rec. 49
Criminal Code, s. 189(5)

COMMENT

Subsection 189(5) of the *Criminal Code* requires, as a condition of admissibility of a lawfully intercepted private communication, that the party intending to adduce it as evidence give the accused reasonable notice of such intention, together with: (a) a transcript of the private communication (where it will be adduced in the form of a recording) or a statement setting out full particulars of the private communication (where evidence of the private communication will be given orally); and (b) a statement respecting the time, place and date of the private communication and the parties to it, if known.[220]

Section 194 incorporates many aspects of the present *Code* provision, but it also introduces reforms designed to promote better disclosure to the accused.

Subsection (1) requires that notice be given whenever the prosecutor intends to tender evidence of an intercepted private communication. This is meant to cover not only private communications that are lawfully intercepted pursuant to this Part (under a warrant or with the consent of all parties), but also private communications that are unlawfully intercepted, but that may nevertheless be admissible in the overall interests of justice in the case. Under the present law, the notice requirement is not applicable where the evidence is adduced with the consent of one of the parties.[221] In Working Paper 47 we observed that this restriction was inconsistent with full disclosure, which requires that notice be given in all these situations.[222]

Subsection (1) is not drafted in terms of excluding evidence where a failure to give proper notice occurs. Rather, the likely remedy would be an adjournment of the proceedings.

Paragraphs (*a*) and (*b*) of subsection (2) in large measure reflect the present law. However, paragraph (*c*) is new. It reflects a policy of disclosure to the accused of most of the material contained in the sealed packet (including the information in support of the application for a warrant, its renewal or amendment, as well as the warrant or, if separate, the amendment itself). Under the present law, such information, with the exception of the authorization and any renewal, is sealed and the accused must seek a court order to obtain access to it. Although the courts are now more readily recognizing the accused's right to have access to material in the sealed packet in order to make full answer and defence, the procedure is complicated and the onus is still on the accused to seek access. We have concluded that better disclosure would be achieved by obliging the prosecutor to disclose all such matters, subject to the prosecutor's obtaining a judge's order allowing material to be obscured as provided for in section 167. (Note that an order obscuring information is reviewable under Division III of this Chapter on

220. The requirement to give notice is not restricted, under *Code* s. 189, to situations where the prosecutor wishes to tender evidence of the private communications against the accused directly. It also applies where the prosecutor tries indirectly to have the private communications tendered in evidence against the accused — for example, where the prosecutor wishes to use the private communications as part of the cross-examination of the accused's witness in order to destroy the accused's alibi defence. See *R.* v. *Nygaard*, [1989] 2 S.C.R. 1074.

221. See *R.* v. *Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224 (Ont. H.C.).

222. Working Paper 47 at 73; rec. 57 at 87.

grounds that access to the information is believed necessary in order to make full answer and defence.)

DIVISION II
APPLICATION FOR FURTHER PARTICULARS

Applicant and notice

195. An accused who has received notice of the prosecutor's intention to tender evidence of an intercepted private communication may apply in writing to a judge on two clear days' notice to the prosecutor for further particulars of the private communication.

Criminal Code, s. 190

COMMENT

Section 190 of the present *Code* allows a judge of the court in which the trial of the accused is being or is to be held to order that further particulars be given of the private communication intended to be adduced in evidence pursuant to the notice given the accused. Sections 195 to 197 incorporate this policy in a more logical manner by specifying separately the procedure by which the application is made (sections 195 and 197) and the power of the judge to grant the application (section 196).

Order for further particulars

196. A judge who, on application, is satisfied that further particulars are necessary for the accused to make full answer and defence may order that further particulars be given.

Criminal Code, s. 190

Additional procedures

197. Sections 185 to 190, 192 and 193 apply to this application.

COMMENT

This section incorporates, for purposes of these applications, the same procedural mechanisms that govern applications for orders to obtain details (see sections 185 to 190 and sections 192 to 193). These relate to the contents of the application, service of the notice of the application and the application itself. Also these procedures regulate what evidence is to be heard, how the evidence is to be recorded and the form and contents of any resulting order.

DIVISION III
APPLICATION TO REVEAL OBSCURED INFORMATION

Applicant

198. An accused who has received notice of the prosecutor's intention to tender evidence of an intercepted private communication may apply in writing for an order to reveal information obscured in the material that accompanied the notice.

Working Paper 56, rec. 9(6)

COMMENT

If a decision has been made to obscure information, the accused, on receiving notice of the prosecutor's intention to adduce evidence under section 194, would receive a copy of the information in its obscured state.

In Working Paper 56, *Public and Media Access to the Criminal Process*,[223] we recommended that there be a mechanism for revealing obscured information in order for the accused to make full answer and defence to the charge. This policy of better facilitating the right to make full answer and defence has been recently recognized in several cases involving access to sealed material.[224] Section 198 thus permits applications to reveal obscured information and describes who may apply for this order.

Manner of making application

199. The application shall be made in person to a judge on two clear days' notice to the prosecutor.

Hearing the application

200. On hearing the application, the judge shall examine the material contained in the sealed packet in the presence of the accused and the prosecutor without allowing the accused to examine it.

Order to reveal information

201. A judge who, on application, is satisfied that information that has been obscured in any material given to the accused relating to the warrant is necessary for the accused to make full answer and defence may order that the information be revealed to the accused.

Working Paper 56, rec. 9(6)

223. Recommendation 9(6)(*a*) at 61.

224. See, *e.g.*, *R.* v. *Rowbotham*, *supra*, note 208; and *R.* v. *Parmar*, *supra*, note 208.

Additional procedures

202. Sections 185 to 190, 192 and 193 apply to this application.

Appeal

203. The judge's decision may be appealed to a judge of the court of appeal.

CHAPTER IX
EVIDENTIARY RULES

Affidavit evidence

204. Evidence of the following matters may be tendered by affidavit:

(*a*) the times when and the places at which a private communication was intercepted;

(*b*) the means by which a private communication was intercepted;

(*c*) the history of the custody of any recording of an intercepted private communication; and

(*d*) service of a notice of intention to tender evidence.

Working Paper 47, rec. 66

COMMENT

Wiretap cases have the potential to become quite protracted. Much technical but often non-contentious evidence, such as testimony as to installation of the device, monitoring of the device, preparation of tapes and transcripts, and so forth, has to be called. In Working Paper 47[225] we proposed, in the interests of making proceedings more efficient and expeditious, that these non-contentious matters be more easily received in evidence. This section gives expression to our proposals.

Status of applicant

205. The recital in a warrant that a person is a designated agent or a designated peace officer is, in the absence of evidence to the contrary, proof of that fact.

Working Paper 47, rec. 68

COMMENT

Section 205 dispenses with the need to prove, as a matter of course, that a person described as such in a warrant is in fact a special agent or a designated peace officer.

225. Recommendations 66 and 67 at 89.

Absence of original warrant

206. In any proceeding in which it is material for a court to be satisfied that an interception of a private communication 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 interception was not authorized by a warrant.

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

COMMENT

Section 206 is a provision similar to that found in other Parts of this Code (such as section 41 in Part Two (*Search and Seizure*)). It again emphasizes our preference for the production of original warrants (rather than copies) where the warrants have been applied for by telephone or other means of telecommunication, since the original warrants clearly establish that the authority to act has been conferred.

CHAPTER X
ANNUAL REPORT

Preparation of report

207. (1) The Solicitor General of Canada and each provincial minister shall, as soon as possible after the end of each year, prepare a report on the electronic surveillance activity conducted on each of their behalf during the year.

Criminal Code, s. 195(1), (5)

Laying before Parliament

(2) The Solicitor General of Canada shall have the report laid before Parliament without delay.

Criminal Code, s. 195(4)

Publication

(3) Each provincial minister shall publish the report or otherwise make it available to the public without delay.

Criminal Code, s. 195(5)

COMMENT

To create a measure of political accountability for the use of this wiretap legislation, section 195 of the *Criminal Code* requires that the Solicitor General of Canada or the provincial Attorney General, as the case may be, must annually publish a detailed report on the wiretapping applications and authorizations made on his or her behalf during each year. Sections 207 and 208 continue these reporting requirements, with minor alterations to promote readability and to ensure consistency with other proposals in this Part.

Contents of annual reports

208. The annual reports shall set out

(*a*) the number of applications for warrants, renewals and amendments, listed separately;

(*b*) the number of warrants, renewals and amendments that were issued, refused or issued with judicially- imposed conditions;

(*c*) the number of persons identified in warrants who were prosecuted by the Attorney General of Canada or of the province, as a result of interceptions made under warrants, for

(i) a crime specified in the warrant,

(ii) a crime referred to in subparagraph 133(1)(*a*)(i) that was not specified in the warrant, and

(iii) a crime other than a crime referred to in subparagraph 133(1)(*a*)(i);

(*d*) the number of persons not identified in warrants who, because of information obtained from intercepted private communications made under warrants, were prosecuted by the Attorney General of Canada or of the province for

(i) a crime specified in a warrant,

(ii) a crime referred to in subparagraph 133(1)(*a*)(i) that was not specified in a warrant, and

(iii) a crime other than a crime referred to in subparagraph 133(1)(*a*)(i);

(*e*) the average period for which warrants and renewals were issued;

(*f*) the number of warrants that, when renewed, were valid for periods of

(i) sixty to one hundred and nineteen days,

(ii) one hundred and twenty to one hundred and seventy-nine days,

(iii) one hundred and eighty to two hundred and thirty-nine days, and

(iv) two hundred and forty days or more;

(*g*) the crimes specified in warrants and the number of warrants, renewals and amendments issued for each crime;

(*h*) a description of all classes of places specified in warrants and the number of warrants issued for each class of place;

(*i*) a general description of the means of interception specified in warrants;

(*j*) the number of persons arrested because of information obtained from a private communication intercepted under a warrant;

(*k*) the number of notices of interception of private communications or of surreptitious entry given;

(*l*) the number of criminal proceedings, commenced by the Attorney General of Canada, or of the province, in which private communications intercepted under a warrant were tendered as evidence and the number of those proceedings where the accused was convicted;

(*m*) the number of investigations in which information obtained from a private communication intercepted under a warrant was used, although the private communication was not adduced in evidence in criminal proceedings;

(*n*) the number of prosecutions commenced against officers or servants of Her Majesty for crimes under section 66 (interception of private communications), 67 (entry to install instrument) or 68 (disclosure of private communications) of the proposed Criminal Code (LRC); and

(*o*) a general assessment of the importance of the interception of private communications for the investigation, prevention and prosecution of crimes in Canada or the province.

Criminal Code, s. 195(2), (3)

COMMENT

See the comment to section 207.

PART SIX

DISPOSITION OF SEIZED THINGS

DERIVATION OF PART SIX

LRC PUBLICATIONS

Search and Seizure, Report 24 (1984)

Post-Seizure Procedures, Working Paper 39 (1985)

Disposition of Seized Property, Report 27 (1986)

Public and Media Access to the Criminal Process, Working Paper 56 (1987)

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

LEGISLATION

Criminal Code, ss. 487-492, 605

INTRODUCTORY COMMENTS

This Part establishes a largely comprehensive scheme to govern the handling, detention and disposition of "objects of seizure"[226] after they have been seized in accordance with Part Two (*Search and Seizure*) or Three (*Obtaining Forensic Evidence*). (In the latter case, this Part has application only if the thing seized is an object of seizure removed from inside a person's body.) The means of determining a claim of privilege and of disposing of seized things that are found to be privileged (such as documents seized from a lawyer's files) are not described here but rather are governed by the procedures in Part Seven (*Privilege in Relation to Seized Things*) of this Code.

Post-seizure procedures leading to the ultimate disposition of seized things are currently governed by complex *Criminal Code* provisions and, particularly in the case of things seized without warrant, by the diverse administrative policies and practices of individual police forces. In contrast, this Part establishes clear, uniform and simple rules to govern these matters.

Persons having an interest in seized things are given the means to locate them, track their movement and be informed of the person or persons responsible for their custody. The authorities are encouraged to consider promptly whether detention of anything seized is necessary. If it is determined at an early stage that detention is not required, and no conflicting claims to ownership or possession are apparent, the administrative requirements of this Part may be avoided and the things may be expeditiously returned to those persons entitled to possession. The process as a whole is subject to judicial supervision. Those responsible for a seizure are made fully accountable.

Accountability is promoted by requiring those responsible for a seizure to prepare a detailed inventory of the things seized, give copies to specified persons affected and attach a copy to a detailed post-seizure report that is submitted to a justice. Initial responsibility for the preservation and safeguarding of seized things rests with the peace officer making the seizure, but justices in the judicial district where the post-seizure report is filed have overall power to supervise and control the detention, conditions of custody and disposition of anything seized.

If detention of a seized thing is required, victims and others who claim a right to ownership or possession are provided with understandable, accessible and effective restoration procedures.

At the same time, the broader public interests in the effective enforcement of criminal laws and conduct of criminal trials are preserved. Investigators and prosecutors are given the powers reasonably necessary to detain, safeguard and ultimately tender evidence in criminal proceedings.

Special procedures are established to deal with seizures of things that are dangerous or perishable.

This Part completes the reforms begun with the proclamation in force, on December 2, 1985, of the *Criminal Law Amendment Act*.[227] That Act, in turn, was partly

226. The meaning of "objects of seizure" is set out in section 2.

227. S.C. 1985, c. 19.

modelled on our draft recommendations in Working Paper 39. The 1985 reform did not purport comprehensively to regulate the area. Rather, its provisions were expressly made subject to the provisions of any other Act of Parliament,[228] and so the post-seizure provisions in, for example, the *Narcotic Control Act*[229] and the *Food and Drugs Act*[230] continued in force. In contrast, this Part of our Code is far more comprehensive. It governs the detention and disposition of all things seized as "objects of seizure" (*a*) under Part Two (*Search and Seizure*) or (*b*) under Part Three (*Obtaining Forensic Evidence*) where the objects have been removed from inside a person's body, and in the result affects the manner in which seized things will be dealt with under all federal crime-related statutes.

While more complete in its coverage than the present *Code* and related statutes, this Part does not purport to regulate the handling and disposition of: (1) body samples, residues or things taken under Part Three, unless, as mentioned, the things have been seized as "objects of seizure" by removing them from inside a person's body (for example, drugs hidden in a person's body cavity); (2) things seized in relation to which a claim of privilege has been made; (3) breath or blood samples taken under Part Four; (4) things seized for purposes unrelated to criminal investigations or prosecutions (for example, things that are found); (5) things seized (otherwise than as the "objects of seizure" set out here) under the rules and regulations of custodial institutions; (6) things seized for the purpose of determining the legality of their possession without reference to specified crimes or the title of individual claimants;[231] or (7) "proceeds of crime."[232]

CHAPTER I
INTERPRETATION

Application of Part

209. (1) This Part applies to anything seized under Part Two (*Search and Seizure*) as an object of seizure or seized under Part Three (*Obtaining Forensic Evidence*) as an object of seizure that was removed from inside a person's body.

Exception if privilege claimed

(2) If a claim of privilege is made in respect of the seized thing or information contained in it, the seized thing shall be

228. See, *e.g.*, s. 489.1(1) of the *Criminal Code*.

229. *Supra*, note 21.

230. R.S.C. 1985, c. F-27.

231. This refers to *in rem* proceedings applicable to weapons, etc. (*Criminal Code*, s. 103), hate propaganda (*Criminal Code*, s. 320) and crime comics and obscene publications (*Criminal Code*, s. 164). We have elsewhere recommended that sections 103, 164 and 320 of the *Code* be moved into federal regulatory legislation. See Report 24 at 51-54.

232. Inclusion of rules designed to regulate their seizure and disposition is temporarily deferred while we carefully consider recent legislation on this subject. See *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, *supra*, note 13. Our conclusions as to the extent to which this new legislation should be incorporated into this Code will be set out in forthcoming papers.

dealt with in accordance with Part Seven (*Privilege in Relation to Seized Things*).

COMMENT

The purpose of this provision is to specify clearly the scope of application of this Part. "Objects of seizure" is defined in section 2.

Rules relating to the disposition of things (other than "objects of seizure" removed from inside a person's body) obtained under the forensic evidence regime of Part Three will be addressed in a later volume to this Code, while the rules relating to the disposition of blood and breath samples taken under Part Four (*Testing Persons for Impairment in the Operation of Vehicles*) are to be partially found in that Part. If a claim of privilege is made in relation to a seized thing or information contained in it, the procedure for access to and disposition of the thing is governed by Part Seven (*Privilege in Relation to Seized Things*).

CHAPTER II
DUTIES OF PEACE OFFICER ON SEIZURE

DIVISION I
INVENTORY OF SEIZED THINGS

Preparation and offer of inventory

210. (1) A peace officer shall, at the time of seizure or as soon as practicable after the seizure,

(*a*) prepare and sign an inventory of any seized things that describes them with reasonable particularity; and

(*b*) offer to provide a copy of the inventory to any person who was in apparent possession of the seized things at the time of the seizure, and shall, at the person's request, provide a copy of the inventory.

Inventory for copied information

(2) If a copy of information contained in a seized thing is taken by a peace officer, the inventory shall indicate that fact.

Posting copy of inventory

(3) If no one was in apparent possession of the seized things, the peace officer may post a copy of the inventory where the seizure was made.

Copy to person with ownership or possessory interest

(4) A peace officer who seizes anything shall, where practicable, offer to provide a copy of the inventory to any other

person who the officer believes has an ownership or a possessory interest in the seized thing and shall, at the person's request, provide a copy of the inventory.

Report 27, rec. 2(1)
Criminal Code, ss. 487.1(9), 489.1

COMMENT

Under section 489.1 of the present *Code*, if a thing seized under a warrant is not returned to the person lawfully entitled to possession,[233] the peace officer or other person who made the seizure is required to take the thing before "the justice who issued the warrant or some other justice for the same territorial division."[234] As an alternative to transporting the seized thing, the officer or other person may report the seizure and detention to the justice.[235] If no warrant has been issued and the thing has not been returned, the thing must be brought before, or the report made to, "a justice having jurisdiction in respect of the matter."[236] In the case of a seizure under a telewarrant, the officer must file a report of the seizure "with the clerk of the court for the territorial division in which the warrant was intended for execution."[237]

The *Code*'s current provisions do not require the preparation of a post-seizure report in all cases where something has been seized and has not been returned. Nor do they require that an inventory be prepared and offered to persons having an interest either in the thing itself or in premises or vehicles from which the thing is seized.

The provisions in this Chapter differ from those of the present *Code*.

Section 210 enhances accountability by requiring the timely preparation and attempted distribution of an inventory of seized things. It enables inventory recipients to take action to protect their own interests by, for example, seeking access to the thing, applying for restoration or challenging the validity of the seizure itself.

DIVISION II
RETURN OF SEIZED THINGS BY PEACE OFFICER

Return to person lawfully entitled to possession

211. (1) A peace officer may, before a post-seizure report is given to a justice, return a seized thing to the person who is believed to be lawfully entitled to possession if, to the knowledge of the peace officer, there is no dispute as to possession

233. Under paragraph 489.1(1)(*a*).

234. *Criminal Code*, s. 489.1(1)(*b*)(i), (2)(*a*).

235. *Criminal Code*, s. 489.1(1)(*b*)(ii), (2)(*b*). Subsection 489.1(3) requires the report to be in Form 5.2 which specifies that the report contain, among other things, a description of each thing seized.

236. *Criminal Code*, s. 489.1(1)(*b*), (2).

237. *Criminal Code*, s. 487.1(9). Subsection 489.1(3) also prescribes use of Form 5.2 with the addition of the statements referred to in subsection 487.1(9).

and the thing is no longer required for investigation or use in any proceeding.

Receipt

(2) The officer shall get a receipt for anything returned.

Report 27, rec. 2(6), (7)
Criminal Code, s. 489.1(1)(*a*)

COMMENT

Section 211 continues the essence of paragraph 489.1(1)(*a*) of the *Criminal Code*.

The basic common law power that allows investigators a reasonable amount of time to assess whether an investigation will be enhanced by the continued detention of a seized thing, or whether it will provide useful evidence in subsequent proceedings,[238] continues. Often, investigators come to realize soon after a seizure that further detention of a seized thing for such purposes is unnecessary. If a post-seizure report has not yet been presented to a justice and there is no apparent dispute as to who is entitled to possession, subsection 211(1) allows for its prompt return to the person who the officer believes is lawfully entitled to possession.

This power is not intended to involve the peace officer in assessing the legal validity of claimed property rights in a seized thing. Return under this section does not create or extinguish such rights. If, to the knowledge of the officer, there is a dispute as to who is entitled to possession, the formal requirements of this Part should be followed.

Where something is returned under the authority of subsection 211(1), the administrative and accountability requirements are simply that a receipt be obtained (subsection 211(2)) and attached to any post-seizure report prepared (subsection 212(3)).

DIVISION III
POST-SEIZURE REPORT

Preparation of report

212. (1) A peace officer shall prepare a post-seizure report for anything that was seized and not returned.

Contents of report

(2) The post seizure report shall disclose

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

(*b*) the name of the officer who made the seizure and the name of the police force or other organization that the officer acted for when making the seizure;

238. See *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.); *Lavie* v. *Hill* (1918), 29 C.C.C. 287 (N.S.S.C.). See also the remarks of Galligan, J., in *In Re Famous Player's Ltd.* v. *Director of Investigation and Research* (1986), 29 C.C.C. (3d) 251 at 263 (Ont. H.C.).

(c) the name of any person who was given a copy of the inventory;

(d) where anything not referred to in a search warrant was seized in the course of executing the warrant, or where anything was seized without a warrant, the reasons for seizing it;

(e) the names of any persons who, to the officer's knowledge, may have an ownership or a possessory interest in anything seized; and

(f) where the search was carried out pursuant to a warrant issued for more than one object of seizure, and not all of the objects of seizure were searched for, the reasons why a search was not carried out for each object of seizure.

Inventory and receipt to be attached

(3) The peace officer shall attach to the report the inventory of seized things and the receipt for anything that was returned.

Report 27, rec. 2(2) to (4)
Criminal Code, ss. 487.1(9), 489.1

COMMENT

Before 1985, the *Criminal Code* did not provide for the submission of a written report as an alternative to bringing before a justice things seized under (or incidental to) a warrant. Under the *Code*, seized things generally had to be physically taken before either the justice who issued the warrant or some other justice within the same territorial division. The 1985 reform introduced the report as an alternative[239] to taking the things seized with or without warrant before a justice. The *Narcotic Control Act* and the *Food and Drugs Act* still do not require returns or reports in relation to things seized under those Acts.

Section 212 implements our view that, whenever a peace officer officially seizes something (*i.e.*, when it is seized and is not returned), a report that briefly but accurately details the facts and circumstances surrounding the seizure should be made to a judicial official.[240]

To simplify administration, sections 212 and 213 do not give the officer an initial option of carrying seized things before the justice; rather, they require the preparation, submission and filing of a post-seizure report in all cases in which seized things are retained. Subsection 212(2) clearly specifies the information the report must contain. Subsection 212(3) requires the inventory prepared under section 210 to be attached to it. If something seized has been returned under section 211, subsection 212(3) requires the receipt for it to be attached as well.

239. The alternative to a report is not always available under the *Code*. See *Criminal Code*, ss. 102(3), 199(1), (2), 395(2), 447(2).

240. Report 27 at 12-13.

The report and inventory both serve the goal of accountability.

Return of post-seizure report

213. (1) A post-seizure report shall be given, as soon as practicable after the seizure, to a justice in the judicial district in which the seizure was made.

Receipt and filing of post-seizure report

(2) The justice who receives the post-seizure report shall have it filed with the clerk of the court for the judicial district in which the seizure was made.

Report 27, rec. 2(5)
Criminal Code, ss. 487.1(9), 489.1(1)

COMMENT

Subsection 489.1(1) of the *Criminal Code* now states, in part, that where a seizure is made by a peace officer, where no warrant has been issued and the seized thing is not returned, the officer must bring the seized thing or the report of seizure to a "justice having jurisdiction in respect of the matter." This may reasonably be interpreted as applying to seizures made without a warrant. However, the identity of "a justice having jurisdiction in respect of the matter" may not always be clear.

We have concluded that all seizures should be reported and that, after a seizure occurs, public access to documents relating to the seizure and related disposition proceedings would not significantly interfere with criminal investigations or effective law enforcement. Accordingly, with certain exceptions, such access should be permitted.[241] The goal of all filing requirements in this Code is to facilitate, wherever possible, access to the material and documents recording and justifying intrusions against the privacy and security of persons and property.[242] This goal may be realized only if the place of filing of relevant material is clearly specified and easily ascertained. Section 213 sets out this filing procedure.

241. Working Paper 56, rec. 11 and comment at 71-72.

242. This is subject, of course, to any overriding public or law enforcement interest in maintaining the confidentiality or security of documents relating to the conduct of criminal investigations and protecting legally recognized privileges. Where such interests are important, this Code clearly recognizes and protects them. See, for example, ss. 166 to 174 requiring confidentiality and sealing of material relating to wiretap applications; s. 53 (search and seizure); and Part Seven which regulates the manner of handling and disposing of material with respect to which a privilege is claimed.

CHAPTER III
CUSTODY AND DISPOSAL OF SEIZED THINGS

DIVISION I
GENERAL PROVISIONS DEALING WITH ORDERS

1. Making an Application

Manner of making application

214. An application for an order shall be made in writing to a justice in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

COMMENT

Under this Part, applications may be made for a variety of orders in relation to seized things. These applications should be distinguished from applications for warrants. Warrant applications are unilateral applications not requiring notice to interested parties. The applicant for a warrant must present reasonable grounds for belief in facts justifying the warrant's issuance, but need not have personal knowledge of those facts. In contrast, most of the applications for orders under this Part require that interested parties be given notice. These applications may be contested and the decision to issue an order must be based on evidence on oath deriving from the personal knowledge of witnesses or deponents.

The present *Criminal Code* allows most of these orders to be obtained by way of "summary application" on notice to specified parties.[243] Others, for example subsections 490(5) and (6), involve "applications" on notice (in which case the *Code* provides that, before making an order, the judge or justice must give specified persons an "opportunity to establish" certain matters). The distinction between "applications" and "summary applications" is far from clear.[244]

243. *Criminal Code*, s. 490(2)(*a*), (3)(*a*), (7), (10), (15).

244. In addressing this matter, we asked whether the term "summary" is intended to signify that the proceedings are to be characterised by abruptness, expedition or informality. Or is it intended to signify restrictions on the kinds of evidence that can be tendered? In the view of the British Columbia Court of Appeal, "summarily" signifies an intention to give a right to proceed *ex parte*: *Suttles* v. *Cantin*, [1915] 8 W.W.R. 1293 (B.C.C.A.). In the view of another court, the words "summary application" do not mean without notice, but simply signify that the proceedings are not to be conducted in the "ordinary" way, but in a concise way: *Re Freeman Estate*, [1923] 1 D.L.R. 378 at 380-381 (N.S.S.C.A.D.). Perhaps "summary" is intended to signify certain characteristics of the decision-making process: for example, that "instinct," rather than legal principle, is to be applied; or that decisions are to issue orally, immediately upon completion of the hearing rather than in written form after more thorough deliberation. *Criminal Code* paragraph 488.1(4)(*d*) requires a judge, in deciding whether a solicitor-client privilege attaches to documents, to "determine the question summarily." In short, the "summary" proceeding is nowhere defined and its intended nature can only be the subject of speculation. Yet, it is the most commonly used term to describe pre-trial applications in the *Criminal Code*. It is therefore obvious to us that the present vagueness of the legislation is unsatisfactory.

It is our view that all applications for orders in criminal proceedings should have a uniform structure that is fully and clearly defined. Applicants, counsel and those presiding should all have the same understanding of: (1) the conditions to be satisfied before the application may be heard; (2) the disclosures to be made and notice given to other parties and the court before the proceedings may begin; and (3) the nature and characteristics of the hearing itself, including the evidence that may be received. Imposing a uniform structure on these applications need not make them more cumbersome or time-consuming. Rather, as is the case in civil motions practice, setting these matters out clearly in legislation should result in more concise proceedings concentrating directly on the important and relevant issues. Further, mechanisms are available to expedite applications in appropriate circumstances; for example, normal time periods for the giving of notice may be shortened and orders may issue on consent if the justice approves.

In this Division are found the procedures to be followed for contested applications for orders in relation to the custody and disposal of things seized as objects of seizure under Part Two (*Search and Seizure*) or Part Three (*Obtaining Forensic Evidence*) where the object of seizure is removed from inside a person's body. The procedure for other contested orders in relation to other police powers is set out in other Parts. For example, Part Seven (*Privilege in Relation to Seized Things*) sets out the procedure to determine a claim of privilege. The application procedure set out here may not be ultimately located here in the final consolidated version of the Code. Given the existence of other contested applications elsewhere in this volume and given that we anticipate that similar applications will also be provided for in future volumes of this Code, it may prove desirable to consolidate the common provisions within a revised Chapter in Part One (*General*).

Section 214 states the basic features of applications for orders: they must be in writing and be heard by a justice. The place of application is flexible to account for the various locations that may be convenient for the applicant.

The persons to be given notice of an application and the length of notice required are set out in the specific sections describing each application.

Contents of application

215. (1) An application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian;

(*g*) the nature of the order requested;

(*h*) the reasons for requesting the order; and

(*i*) any additional information required by this Part for the application.

Affidavit in support

(2) The application shall be supported by an affidavit.

COMMENT

Paragraphs (*a*) to (*h*) of subsection (1), which are self-explanatory, set out the mandatory basic ingredients common to all applications for orders under this Part. Paragraph (*i*) alludes to the fact that other ingredients, peculiar to particular applications, are required by specific provisions in this Part.

Submission of an affidavit with the application ensures that the basic facts asserted in the application are supportable.

Notice of application

216. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on all parties to whom notice is required to be given.

COMMENT

This section is designed to inform the parties of the fact of the application and provides a suitable period within which to prepare for it.

Transferring file for hearing

217. If an application is brought in a judicial district other than the judicial district in which the post-seizure report is filed, the clerk of the court for the judicial district in which the post-seizure report is filed shall, on the written request of the applicant, have the post-seizure report and all accompanying material transferred to the clerk of the court for the judicial district in which the application is to be heard.

COMMENT

Section 217 authorizes the clerk of the court for the judicial district in which the post-seizure report was filed, on the written request of an applicant, to transfer relevant files and material to the place of application. Under sections. 225 and 229, a justice may, if satisfied that it is in the best interests of justice to do so, order that the application be made in a more convenient judicial district and then have relevant material transferred to the appropriate court clerk.

2. The Hearing

Power of justice

218. A justice to whom an application is made or who is authorized to make an order without an application being made may, in determining whether to make an order,

(*a*) compel the attendance of, and question, the custodian;

(*b*) examine a seized thing or require it to be produced for examination; and

(*c*) receive evidence, including evidence by affidavit.

COMMENT

This provision is designed to provide a broad base of information to a justice who is asked to make an order (or, where permitted by the relevant provision, who contemplates making an order without an application first being made). The justice may receive relevant information in the form ordinarily allowed in court proceedings (*i.e.*, testimony on oath) as well as by affidavit. The presiding justice is thus given the means to "go behind" an application in order to ascertain, in an active and effective manner, whether the requirements for making an order have been met.

Paragraph (*a*) recognizes the potential importance of the custodian in providing information to the justice charged with making a special order affecting the disposition of anything seized.

Although applications for orders will generally be based on evidence or information tendered by the parties or by other interested persons who have been given notice of the application, the justice is here given an unfettered discretion to compel the attendance of and to question the custodian.

Paragraph (*b*) complements the justice's discretionary power under paragraph (*a*). It is in keeping with our view that the justice, before making an order in relation to any thing seized, should have access to all necessary information, including information that may be derived from an examination of anything seized.

Paragaph (*c*) allows a justice to receive both oral testimony and affidavit evidence. Allowing affidavit evidence to be received provides a mechanism for avoiding unnecessary attendances and the inconveniencing of witnesses. This should reduce the cost of litigation and save court time. On balance, these benefits outweigh the delay that may be caused in occasional cases when cross-examination on an affidavit is required on the hearing of an application.[245]

Service of affidavit evidence

219. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on all parties who received notice of the application.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

245. See *Re Senechal and The Queen* (1980), 52 C.C.C. (2d) 313 (Ont. H.C.), *per* Linden J. If affidavit evidence may be received upon the "hearing" of an application, cross-examination by the party adverse in interest must be allowed.

COMMENT

This section addresses the procedure relating to affidavit evidence. The parties who receive notice of the application should also receive any affidavits that are to be tendered as evidence within a reasonable time of the hearing of the application in order to be able to prepare for the hearing and thereby expedite the process. In addition, the deponent of an affidavit may be questioned about it.

Evidence on oath

220. The evidence of any person shall be on oath.

Recording evidence

221. (1) 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 oral evidence shall be identified as to time, date and contents.

Certification of transcription

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

COMMENT

This provision parallels one governing warrant applications (section 11). It is designed to ensure the maintenance of records sufficient to allow for subsequent review[246] and thus serves the general aim of accountability.

3. Issuance of Order

Form of order

222. An order shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of order

223. An order shall disclose

(*a*) the applicant's name if the order is made on application;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the justice and any conditions imposed;

(*g*) the date and place of issuance;

246. See also the comment to section 11.

(*h*) the name and jurisdiction of the justice; and

(*i*) any additional information required by this Part for the order.

COMMENT

Paragraphs (*a*) to (*h*) of this provision enumerate the mandatory elements common to all orders. Paragraph (*i*) refers to the fact that other unique ingredients of particular orders are required by specific provisions in this Part.

4. Filing

Filing application, evidence, order

224. (1) The justice shall, as soon as practicable after the hearing, have the following filed with the clerk of the court for the judicial district in which the post-seizure report was filed:

(*a*) the notice of the application;

(*b*) the application;

(*c*) the record of any oral evidence heard by the justice or its transcription;

(*d*) any other evidence received by the justice; and

(*e*) if an order is issued, the original of the order.

Return of material

(2) If the post-seizure report and any accompanying material were transferred for a hearing from the judicial district in which they were filed, the justice shall have them returned after the hearing.

COMMENT

This provision has the same object as the filing requirements for warrant applications:[247] to ensure the maintenance and availability of the material upon which an application is based, so that those affected can later ascertain whether the order was properly issued.

Although under section 214 an applicant is given a number of alternative places in which to bring an application, subsection (1) of this section requires the justice to ensure that, after the hearing, all application material is filed in the judicial district in which the post-seizure report was filed.[248] Ordinarily this location is likely to be the most convenient and accessible to those directly affected by the seizure. Further, under subsection 224(2), any post-seizure report and accompanying material transferred to the court where the application was heard pursuant to section 217 must be returned to the

247. See s. 13.

248. The place for filing the post-seizure report (the judicial district where the seizure has been made) is specified in s. 213. See also the comment to s. 213.

judicial district in which they were filed in the first place. Thus, all documentation may ultimately be found in one location.

5. Changing Place of Application

Order changing place of application

225. (1) Where an application is filed and notice given, the justice before whom the application is to be brought may, on separate application, order that the application be transferred to and heard, or that a new application be made, in another judicial district if the justice is satisfied that it would be in the best interests of justice, having regard to the interest of the witnesses and the parties.

Different judicial districts

(2) The justice may order that the application be transferred to or that a new application be made in the judicial district in which the post-seizure report was filed, the thing is in custody or the charge in relation to which the thing is being held was laid.

COMMENT

This provision gives the justice the power, on application, to ensure that applications for orders are heard and determined in the place that is most convenient to all of the parties. This power is provided because of the flexibility given to the applicant, under section 214, in deciding where to apply initially.

Application for changing place of application

226. An application for change of place may be made by any person who received notice of the application for which a change of place is requested.

Notice

227. The application shall be made on three clear days' notice to

(*a*) the person who made the application for which a change of place is requested; and

(*b*) anyone else who received notice of that application.

Additional contents of application

228. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the reasons for believing that a change of place for the application would be in the best interests of justice, having regard to the interest of the witnesses and the parties.

Transferring file

229. A justice who orders that an application be transferred to or made in another judicial district shall have the file transferred to the clerk of the court for that judicial district.

DIVISION II
PRESERVATION AND SAFEGUARDING

Custodian

230. A peace officer who seizes anything and does not return it shall act as its custodian by taking steps to ensure its preservation and safeguarding.

Report 27, rec. 3(1), (3)
Criminal Code, s. 489.1(1), (6)

COMMENT

We originally recommended[249] that in all cases the seizing authorities should be required to apply for a "custody order," to regulate the storage and supervision of seized articles. This application for an order was to be initiated automatically when an endorsed warrant or post-seizure report was taken before a justice. The procedure would have required the attendance of at least one officer familiar with the seizure.[250]

Upon reflection, we now believe that the goals of the custody order can more efficiently be realized by a simpler procedure not automatically requiring the initiation of a formal hearing and time-consuming attendances at judicial proceedings. Thus, section 230, as drafted, codifies procedures now employed by many police officers and forces as a matter of good practice. The provision requires the peace officer who effects a seizure to act, at least initially, as custodian of the seized thing. This more simply imposes the responsibility and informs persons affected where the responsibility lies.

Under paragraph 490(1)(*a*) of the present *Code*, the burden is initially placed on the "prosecutor" to satisfy the justice "that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding." On being so satisfied, the justice may order the detention and preservation of the seized thing that may initially extend to a maximum of three months from the date of the seizure.[251]

In this scheme, the process is simplified. The early involvement of the prosecutor is not required and the seized thing may automatically be detained and preserved under section 230. Changes to the basic requirements of section 230 must be authorized under powers conferred in this Part. In fact, the remainder of this Part basically outlines the circumstances in which such changes may be made.[252]

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249. Report 27, rec. 3.

250. *Ibid.* at 15-16.

251. *Criminal Code*, s. 490(1)(*b*), (2).

252. Section 270 continues the present *Code*'s basic three-month limitation on the initial detention period. Sections 273 and 274 specify the manner of applying for, and the grounds justifying, an extension.

Entrusting seized thing to another

231. The custodian may entrust a seized thing to any person, including a person from whom it was seized, on such reasonable conditions as are consistent with its preservation and safeguarding.

COMMENT

This section relates to the custodian's ability to take control (rather than physical possession) of something seized. It builds on section 20, which provides that the power to seize means the power to take possession or control of a thing and the power to take control over funds in a financial account. In many cases, "taking control" will necessarily require that the seized thing be left in the physical possession of someone other than the custodian. This section makes it clear that the custodian may entrust anything seized to another person (even the person from whom it is seized), if the thing can be effectively preserved and safeguarded and provided it remains under the overall supervision of the custodian.

Further, this section provides flexibility in the means of preserving and safeguarding unusual items such as perishables or large articles that cannot be stored in locations under the direct physical control of the custodian.

Order on application

232. A justice may, on application, make an order for the preservation and safeguarding of a seized thing, including an order substituting or adding custodians.

COMMENT

Section 232 establishes the power of a justice, on application, to order variations in the basic conditions of detention of seized things mentioned in the post-seizure report.[253] This ensures an overall independent judicial supervision of the process.

Applicant

233. An application may be made by a peace officer, the accused, the prosecutor or any person who claims an ownership or a possessory interest in a seized thing.

COMMENT

Section 233 clearly specifies the persons who may apply for an order to change the conditions of custody of seized things. The list of possible applicants (for this as well as some other orders under this Part)[254] includes persons who claim either "an ownership or a possessory interest" in something that has been seized. This provision therefore recognizes the potentially broad range of persons who can have a valid claim to

253. The peace officer who seizes a thing that is not returned is the initial custodian of it. See s. 230 and the accompanying comment.

254. See ss. 248 and 261.

assert in a seized thing. Persons such as bailees, unpaid sellers, chattel mortgagees, lienholders or pawnbrokers could fall within this category.

Notice by applicant

234. The applicant shall give three clear days' notice to any person who, to the knowledge of the applicant, may have an ownership or a possessory interest in the seized thing and to any other person named by the justice hearing the application.

COMMENT

Section 234 is designed to ensure that persons other than the applicant who may have an ownership or possessory interest in the seized thing are notified and given adequate time to prepare to make representations to better protect the thing or their interests, if they so desire.

Additional contents of application

235. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the applicant is a peace officer, the accused, the prosecutor or a person who claims an ownership or a possessory interest in the seized thing; and

(*b*) if the applicant is a person who claims an ownership or a possessory interest in the seized thing, the nature of that interest.

Report 27, rec. 3(2)
Criminal Code, s. 490(1)(*b*), (15), (16)

COMMENT

As noted, subsection 215(1) sets out the required contents of all applications for orders made under this Part and, in paragraph (*i*), provides for the inclusion of "any additional information required by this Part for the application." Section 235 states the additional matters that must be specified in an application for an order under sections 232 to 235.

Order without application

236. (1) A justice who receives a post-seizure report may, without an application being made, make an order for the preservation and safeguarding of a seized thing that is the subject of the report, including an order substituting or adding custodians.

Notice by justice

(2) A justice who is considering making the order without an application being made shall give three clear days' notice of a hearing to determine the issue to the prosecutor and to any person

who, to the justice's knowledge, may have an ownership or a possessory interest in the seized thing.

Report 27, rec. 3

COMMENT

Once a post-seizure report is filed, a justice who reads the report may question whether the steps taken by the police to safeguard and preserve a seized thing are adequate. This section creates a justice's power to commence a hearing, on his or her own initiative, to determine whether or not to make an order to preserve and safeguard a seized thing (for example, by substituting a different custodian) should be made. As a result, there is no application procedure. However, the justice must notify the interested parties of the hearing.

Additional contents of order

237. In addition to disclosing the information required by paragraphs 223(*a*) to (*h*), the order shall disclose the name of any added or substituted custodian.

DIVISION III
TESTING OR EXAMINATION

Release for analysis

238. A peace officer may have a seized thing examined, tested or analyzed, and the custodian shall release it for that purpose.

COMMENT

This provision, included here for clarity, recognizes an accepted practice that is often necessary in order for the evidentiary value of the seized thing to be assessed.

Order for release

239. A justice who, on application, is satisfied that it is necessary to do so to enable the accused to make full answer and defence may order that a seized thing be released for examination, testing or analysis, subject to any conditions that the justice considers necessary to preserve and safeguard it.

Criminal Code, s. 605

COMMENT

Investigators and prosecutors have an unrestricted right to have any seized thing scientifically examined, tested or analyzed from the moment of seizure. However, the right of the accused to have seized things released for the purpose of examination or analysis is limited to that provided by subsection 605(1) of the *Criminal Code*. Under subsection 605(1), either the prosecutor or the accused may apply for the release of

"exhibits" for scientific testing or examination. We believe that the authority given by this section is too narrow and requires simplification.

The *Code*'s restriction on testing to "exhibits,"[255] and its requirement that release applications be made to the higher courts,[256] may result in unnecessary delay and thereby prejudice an accused person's defence. Moreover, in our view, there is no need to burden higher courts with these release applications. Accordingly, section 239 allows an accused person to apply to any justice for an order, and the application may be made any time after a seizure, whether or not the seized thing has been formally entered as an exhibit in proceedings.

Combining the power to release with the power to impose conditions, as this section does, helps ensure the continuity of possession and the integrity of the thing, thereby preserving its evidentiary value.

Notwithstanding this section, there remains a need to allow both the prosecution and the defence to apply for the release of trial exhibits for examination or testing. Additional provisions of this kind will be included in a forthcoming Part of this Code regulating the conduct of the trial.

Application for release

240. The application may be made by an accused on three clear days' notice to the prosecutor.

Criminal Code, s. 605

DIVISION IV
ACCESS TO SEIZED THINGS

Asking for access

241. (1) A person who has an interest in a seized thing may ask the custodian for permission to examine it at the place of custody.

Power of custodian

(2) A custodian who believes

(*a*) that the person has an interest in the seized thing, and

(*b*) that giving permission would not frustrate an ongoing police investigation, pose a risk to anyone's safety, interfere with an ownership or a possessory interest in the seized thing or jeopardize its preservation and safeguarding

may give permission, subject to any conditions that the custodian considers necessary to preserve and safeguard the seized thing.

255. However, see *R.* v. *Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.).

256. See *R.* v. *Walsh* (1981), 59 C.C.C. (2d) 554 (Ont. Prov. Ct.), holding that a justice presiding at a preliminary inquiry may not order the release of exhibits under this section.

COMMENT

A number of provisions in the *Criminal Code* now regulate various aspects of the question of access to seized things. Subsection 490(15) of the *Code* allows a person with "an interest in what is detained [under subsection 490(1), (2) or (3)]" to apply, on three clear days' notice to the Attorney General, to "a judge of a superior court of criminal jurisdiction or a judge as defined in section 552"[257] for an order permitting its examination. In making such an order, the judge, under subsection 490(16), may set terms to safeguard and preserve the thing.

In this Part, sections 241 to 246 regulate general issues involving access.

As noted, under subsection 605(1) of the *Criminal Code*, an application may also be made for the release of an "exhibit" for the purpose of a scientific test or other examination. Applications for the release of seized things for examination, testing or analysis (as opposed to access to them) are regulated by sections 239 and 240 of this Part.

Further, a person claiming a solicitor-client privilege in respect of detained documents may, under subsection 488.1(9) of the current *Code*, be allowed to examine them or make copies. Access in such cases is regulated by sections 301 to 310 of our proposed Code.

We have concluded that access to seized things should be restricted to persons with an interest in the things.[258] (Normally the public has no discernible interest in such things.) We also believe that the present process for obtaining access is overly cumbersome and formal.[259]

Subsection 241(1) replaces the current *Code*'s subsection 490(15) requirement that a summary application be brought to a judge "[w]here anything is detained pursuant to subsections (1) to (3) [of section 490] . . ." with the requirement that a simple request for access be made to the custodian. Sections 243 to 246 provide for an application to a justice in cases where the custodian denies access.[260]

Subsection (2) specifies the criteria to be applied by the custodian in deciding whether to allow access. There have been both narrow and broad interpretations by the courts of the present *Code*'s requirement that the applicant have "an interest in what is detained."[261] The courts have extended the meaning of "interest" beyond strict property confines to include a legal concern in the matters referred to in seized documents.[262] Too narrow an interpretation works so as to frustrate the purpose of this scheme. Paragraph (*a*) of subsection (2) is premised on the assumption that custodians and, if

257. "[S]uperior court of criminal jurisdiction" is defined in section 2 of the *Criminal Code*.

258. Report 27 at 19.

259. *Ibid.* at 20.

260. *Ibid.*, rec. 4, and at 20.

261. See Working Paper 39 at 35-36.

262. Report 27 at 19.

necessary, the justices, will ensure that persons who have a real need for access will be given it.

Paragraph (*b*) of subsection (2) alludes to factors that may justify a refusal of access. A refusal for any of these reasons should be rare once a charge has been laid in relation to anything seized.

Asking for copies

242. (1) A person who has an interest in information contained in a seized thing that is capable of being reproduced may ask the custodian to provide copies of the information.

Power of custodian

(2) A custodian who

(*a*) believes that the person has an interest in the information,

(*b*) believes that providing copies would not frustrate an ongoing police investigation, pose a risk to anyone's safety, interfere with an ownership or a possessory interest in the seized thing or jeopardize its preservation and safeguarding, and

(*c*) is able to provide copies of the information

may provide the copies on payment of a prescribed fee.

COMMENT

This provision establishes a procedure and criteria, similar to those applicable when general access is sought, for obtaining copies of information contained in a seized thing, such as information in a written document or information stored on a computer disk. In the case of a computer disk, access to the thing itself — the disk — may be of little value. Meaningful access may require permitting the information stored on the disk to be printed out and copied.

Subsection (2) also addresses the question of the cost of reproduction. A fixed fee for reproduction is to be established by regulation. However, under subsection 243(2) a justice may, on application, order that the fee be dispensed with if the justice is satisfied that financial hardship or other inequity would result. The goal of these provisions is to ensure that necessary access is available and is not frustrated by administrative, financial or bureaucratic barriers.

Order dealing with access

243. (1) A justice who, on application, is satisfied that a person should be given permission to examine a seized thing, or that a person should be provided with copies, may make an order requiring the custodian to permit the applicant to examine the seized thing or to provide copies of the information, subject to any conditions that the justice considers necessary to preserve and safeguard the seized thing.

Dispensing with fee

(2) A justice who, on application, is satisfied that the fee fixed for copies would result in financial hardship to the applicant or would be inequitable in the circumstances may make an order dispensing with the fee.

Report 27, rec. 4(1)
Criminal Code, s. 490(15), (16)

COMMENT

Section 243 enables anyone who has been refused access or copies, or who is unable or unwilling to pay the fee fixed for such copies, to pursue the matter further by means of a fresh application to a justice.[263]

Application for access, copies, or dispensing with fee

244. An application may be made by any person who has been refused permission to examine a seized thing, who has been denied copies of information contained in a seized thing or who has been allowed copies but for whom payment of the fee would result in financial hardship or would be inequitable.

Report 27, rec. 4(1)
Criminal Code, s. 490(15)

Notice

245. An application shall be made on three clear days' notice to the prosecutor.

Report 27, rec. 4(1)
Criminal Code, s. 490(15)

Additional contents of application

246. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the nature of the applicant's interest in the seized thing.

DIVISION V
RELEASE OR SALE OF PERISHABLE THINGS

Order on application

247. A justice who is satisfied that a seized thing is perishable or likely to depreciate rapidly in value may, on application, order that it be

(*a*) released, with or without conditions, to its lawful possessor if there is no dispute as to the right to possession; or

263. Our original recommendation was that an application following a denial of access should be made to the "court of appeal." However, such a review of an essentially administrative decision would impose an unnecessary burden on the court of appeal at a preliminary stage of the proceedings. The approach adopted here is more in keeping with our stated desire to make these proceedings less cumbersome and formal. See Report 27, rec. 4(2).

(*b*) sold on such conditions as the justice directs if there is a dispute as to the right to possession.

COMMENT

The *Criminal Code* does not now clearly specify procedures to govern the handling and disposition (including the sale) of seized perishable things. Instead, an application for the return of anything seized may be made before the expiry of a period of detention if a judge or justice is satisfied that its continued detention would result in "hardship."[264]

Sections 247 to 250 specifically permit a justice, on application, to make an order for the release or sale of perishable things or things likely to depreciate rapidly in value. They are designed to minimize the hardship, particularly to crime victims, caused by unnecessary detention of such things. These sections and sections 266 to 269 (which allow photographs or other representations of seized things to be admitted in evidence) protect the interests of persons entitled to possession while causing little, if any, interference with the state interest in having access to evidence in criminal proceedings.

Applicant

248. An application may be made by a peace officer, the accused, the prosecutor or any person who claims an ownership or a possessory interest in anything seized.

COMMENT

Section 248 says who may apply for an order for the release or sale of things that are "perishable or likely to depreciate rapidly in value." Since an application will ordinarily be made in urgent circumstances, the section is drafted broadly to enable it to be made by a wide range of interested persons having knowledge that deterioration or devaluation may be imminent.

Notice by applicant

249. An applicant shall give one clear day's notice to any person who, to the knowledge of the applicant, may have an ownership or a possessory interest in the seized thing and to any other person named by the justice hearing the application.

COMMENT

Section 249 states who must receive notice of the application. Persons known to have an ownership or a possessory interest in any seized perishable or rapidly depreciating thing are entitled to receive notice of any application for its return. Because of the urgent circumstances, minimal notice is required.

264. *Criminal Code*, s. 490(7), (8).

Additional contents of application

250. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the applicant is a peace officer, the accused, the prosecutor or a person who claims an ownership or a possessory interest in the seized thing; and

(*b*) if the applicant is a person who claims an ownership or a possessory interest in the seized thing, the nature of that interest.

Report 27, rec. 3(3), (4)
Criminal Code, s. 490(1)(*b*), (7), (8), (9), (10), (11)

Order without application

251. (1) A justice who receives a post-seizure report and who is satisfied that a seized thing is perishable or likely to depreciate rapidly in value may, without an application being made, order that it be

(*a*) released, with or without conditions, to its lawful possessor if there is no dispute as to the right to possession; or

(*b*) sold on such conditions as the justice directs if there is a dispute as to the right to possession.

Notice by justice

(2) A justice who is considering making the order without an application being made shall give one clear day's notice of a hearing to determine the issue to the prosecutor and to any person who, to the justice's knowledge, may have an ownership or a possessory interest in the seized thing.

Report 27, rec. 3(3), (4)
Criminal Code, s. 490(1)(*b*), (8), (9), (11)

COMMENT

This section gives a justice who receives a post-seizure report the power, exercisable on his or her own initiative, to commence a hearing to determine whether or not a seized thing that appears to be perishable or rapidly depreciating in value should be returned or otherwise sold. Thus, there is no application procedure. However, appropriate notice should be given to interested parties so that they may attend the hearing.

Proceeds of sale

252. Where a seized thing has been sold, the custodian shall deposit the proceeds of the sale in an interest-bearing account on such conditions as the justice directs.

COMMENT

Section 252 specifies how the custodian is to deal with the proceeds of a sale ordered under paragraphs 247(*b*) or 251(1)(*b*). It protects the interests of the person eventually found to be entitled to possession of a perishable thing or a thing "likely to depreciate rapidly in value." The assumption here is that the justice, by means of the

order made, will cautiously endeavour to maximize the revenue generated from the proceeds of the sale.

DIVISION VI
REMOVING DANGEROUS THINGS

Duty of peace officer

253. A peace officer who believes that a seized thing poses a serious danger to public health or safety shall, as soon as practicable, remove it or have it removed to a place of safety.

Report 27, rec. 3(6)
Criminal Code, s. 492

COMMENT

Divisions VI and VII of this Chapter establish special powers concerning the handling of "dangerous" seized things, such as weapons or explosives.

If a seized thing is believed by a peace officer to pose a serious danger to public health or safety, section 253 requires it to be removed to a place of safety.[265] The belief may prove wrong or even be unreasonable, but out of caution and in the interest of public health and safety the section imposes a duty to act to eliminate the apprehended danger.

The mere movement of a seized thing to a place of safety without prior judicial screening need not irreparably interfere with the interests of anyone lawfully entitled to possession. Judicial screening will occur under section 254 if an application is made to have the thing destroyed or disposed of and wrongful or negligent action can be identified at that point. With these safeguards, there is no need for a requirement of prior screening.

Order dealing with dangerous things

254. A justice who, on application, is satisfied that a seized thing poses a serious danger to public health or safety, may order that it be destroyed or otherwise disposed of, subject to any conditions that the justice considers necessary to eliminate or alleviate the danger.

Report 27, rec. 3(6)
Criminal Code, ss. 491, 492

Applicant and notice

255. An application may be made by a peace officer on reasonable notice to any person who the peace officer believes

265. The grounds for acting under this section should be contrasted with the more onerous conditions for the exercise of the exceptional power to destroy or otherwise dispose of anything believed on reasonable grounds to pose an imminent and serious danger to pubic health or safety. See s. 257.

may have an interest in the seized thing and to any person named by the justice hearing the application.

COMMENT

This section is designed to ensure that affected persons have the opportunity to make representations before drastic steps are taken under section 254.

Preparing report

256. (1) A report confirming that the order was carried out and explaining how the seized thing was destroyed or otherwise disposed of shall be prepared and given as soon as practicable to a justice in the judicial district in which the order was issued.

Filing report

(2) The justice shall have the report filed with the clerk of the court for the judicial district in which the post-seizure report was filed.

DIVISION VII
DESTROYING THINGS POSING IMMINENT AND SERIOUS DANGER

Power of peace officer

257. A peace officer who believes on reasonable grounds that a seized thing poses an imminent and serious danger to public health or safety may destroy or otherwise dispose of it.

Report 27, rec. 3(6)

COMMENT

Section 257 gives a peace officer an exceptional power to destroy seized things in certain circumstances. Sections 258 and 259 couple this power with stringent after-the-fact reporting requirements.

When questions of "imminent and serious danger . . ." are involved, we believe that the safety of the public should outweigh property interests. The need to protect the public obviously demands that an officer take immediate action. The delay otherwise necessary to obtain prior judicial approval or review is an unwarranted luxury in these circumstances.

Destruction of a seized thing under section 257 necessarily affects those with a legal interest in it. Where the officer acts wrongfully or negligently, he or she may be exposed to civil liability. The threshold requirement — the officer "believes on reasonable grounds that a seized thing poses an imminent and serious danger to public health or safety . . ." — is therefore justified, not only to prevent unnecessary destruction of property, but to protect the officer.

Notice and report

258. After the thing is destroyed or otherwise disposed of, the peace officer shall

(*a*) notify the person from whom the thing was seized and any other person who the peace officer believes has an ownership or a possessory interest in it; and

(*b*) prepare a report describing the seized thing and explaining why and how it was disposed of.

Return of report

259. (1) The report shall be given, as soon as practicable, to a justice in the judicial district in which the post-seizure report was filed.

Filing

(2) The report shall be filed with the post-seizure report.

DIVISION VIII
RESTORATION ORDERS

Restoration

260. A justice shall, on application, order that a seized thing or the proceeds of its sale be restored to the applicant if the justice is satisfied that

(*a*) there is no dispute as to the right to possession of the thing or the proceeds;

(*b*) possession by the applicant would be lawful;

(*c*) the thing or the proceeds are not subject by statute to forfeiture; and

(*d*) it is not necessary for the thing or the proceeds to be kept in custody for investigation or use in any proceeding.

Report 27, recs. 9, 12
Criminal Code, ss. 490(5), (9), (11); 491(2), (3)

COMMENT

This scheme for the restoration of seized things or of the proceeds of sale of seized things is designed to accommodate sometimes conflicting interests in one simplified proceeding that may be easily invoked at any time after a seizure. In this one proceeding, all claims of entitlement to anything seized or the proceeds of sale will be considered, restoration will be expeditiously ordered where warranted and the public interest and individual interests will be accommodated wherever possible.

In restoration proceedings three basic interests must be balanced. First, the public interest in the effective administration of justice requires that the authorities have adequate powers to detain and preserve seized things as long as reasonably necessary for the purpose of criminal investigation, for use as evidence, or for possible forfeiture where the power to order forfeiture of the seized things is provided by statute. (The

latter applies as well to proceeds of sale.) This interest must initially take precedence over the interest of individuals in having their property restored.[266]

Second, individuals who have had their property seized from them have an obvious interest in not being deprived of the use and enjoyment of their property. This interest often conflicts with the first.

Third, victims of crime (whose property may have been seized from an alleged offender) have an interest in securing the earliest possible return of their property. This interest must also be juxtaposed against the need to ensure that the offender is effectively prosecuted.

Subsection 490(9) of the *Criminal Code* now provides that an order of restoration to the person from whom property has been seized may be made if the judge or justice is satisfied of two things: first, "that the periods of detention provided for or ordered under subsections (1) to (3) . . . have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4) . . ."; and secondly, that "possession of it by the person from whom it was seized is lawful . . . ." Subsection 490(9) also provides that "if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known," the judge or justice may "order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession . . . ." Moreover, "if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known . . .," the judge or justice may "order it to be forfeited to Her Majesty . . . ."

If the applicant is someone other than the person from whom the property has been seized and essentially the same conditions are met, an order for restoration to this applicant may be made under subsection 490(11). If the seized thing, by virtue of subsection 490(9), has already been "forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant . . .," an order may be made under paragraph 490(11)(*d*) that "the applicant be paid the proceeds of sale or the value of the thing seized." Other statutes have similar procedures, with some differences in detail.[267]

Section 260 consolidates and simplifies the basic law.

Even if detention is required initially, restoration may subsequently be ordered if the procedures set out in Division IX of this Chapter are followed. That Division allows photographs or other representations of a seized thing to be admitted in evidence,

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266. Where contraband is involved, even if the thing is no longer needed for investigation or evidence, a public interest in forfeiture of the thing to the state may take precedence over a claim for restoration.

267. Under the *Narcotic Control Act*, s. 15(2), and the *Food and Drugs Act*, ss. 43(2), 51(1), for example, restoration of certain things "forthwith . . ." may be ordered if the court "is satisfied that the applicant is entitled to possession . . . and that the thing seized is not or will not be required as evidence . . . ." See *Fleming* v. *The Queen*, [1986] 1 S.C.R. 415. The *Narcotic Control Act*, s. 16(2), also uniquely provides for the punitive forfeiture of "any conveyance seized under section 11 that has been proved to have been used in any manner in connection with [certain offences under the Act]."

instead of the thing itself, for the purpose of identifying the thing. This alternative approach has only very recently been fully recognized in the *Criminal Code*.[268]

The present law allows applications for restoration under the *Criminal Code* to be made to various judicial officers depending on the circumstances. In some cases, the application may be considered by a judicial officer having no necessary connection with the seized thing or its location at the time of the application. The *Narcotic Control Act*, subsection 15(1), and the *Food and Drugs Act*, subsection 43(1), provide that applications must be made "to a [provincial court judge] within whose territorial jurisdiction the seizure was made . . . ." This requirement applies even if the seized things have long been within the jurisdiction of another court, for example, as a result of an accused's election.

Section 260 clearly and simply provides that all restoration applications may be made to a justice. In section 2, "justice" is defined to mean a justice of the peace or a judge. Under our proposed Unified Criminal Court structure, things seized in criminal investigations will remain within the jurisdiction of one court throughout and thus the administrative difficulties that may now be caused by allowing courts having no real connection with the seized things to order restoration is avoided. Flexibility in choosing the place of application is provided by section 214.[269] The provisions of Division I of Chapter III ensure that all applications under this Part will proceed in the location most convenient for the parties involved.

Applicant

261. An application may be made by any person claiming an ownership or a possessory interest in the seized thing or in the proceeds of its sale.

Report 27, rec. 7
Criminal Code, s. 490(7), (10)

COMMENT

The *Criminal Code*, in subsections 490(7) and (10), now cumbersomely provides for separate applications by persons from whom anything is seized and by others who claim to be lawfully entitled to possession. Yet, in each application, the factors and interests to be considered are basically the same. The *Narcotic Control Act* and the *Food and Drugs Act* establish different, even more complex, procedures for restoration, although here again the basic purpose of the proceedings and interests to be considered are similar.

Section 261 is designed to simplify the law.

268. *An Act to amend the Criminal Code (victims of crime)*, S.C. 1988, c. 30, s. 2; now *Criminal Code* s. 491.2.

269. The application may be brought in the judicial district in which the post-seizure report was filed, the thing is in custody or the charge in relation to which the thing is being held was laid.

Notice

262. The applicant shall give eight clear days' notice to the prosecutor, the accused, any person who, to the applicant's knowledge, may have an ownership or a possessory interest in the seized thing and any other person named by the justice.

Report 27, rec. 8
Criminal Code, s. 490(7), (10)

COMMENT

The present requirements as to the timing and notice of restoration applications under section 490 of the *Criminal Code* are unnecessarily complex and confusing. "Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) . . . the prosecutor determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4) . . .," he or she must bring an application under subsection 490(5). "Where the periods of detention provided for or ordered under subsections (1) to (3) . . . have expired and proceedings have not been instituted in which the thing detained may be required . . .," an application must be made by the prosecutor under subsection 490(6). Neither of these provisions stipulates a period for giving notice to interested parties. A person from whom anything is seized may bring an application "on three clear days notice to the Attorney General . . ." *after* the expiration of the detention period (s. 490(7)) but may apply earlier in circumstances where prolonged detention will result in hardship (s. 490(8)). An application by a person other than one from whom the thing has been seized may be brought "summarily" pursuant to subsection 490(10) "at any time, on three clear days notice to the Attorney General and the person from whom the thing was seized . . . ." Other statutes contain different requirements.[270]

The scheme proposed here is simpler. Under section 262 of our proposed Code, all restoration applications may be brought at any time on eight clear days' notice to the parties specified. Section 5 in Part One (*General*) allows the notice period to be shortened on consent of the person to be notified or by order of a justice. An eight-day notice period is provided for here because the scheme contemplates notification of all known persons with the type of interest specified; the presence of such persons may lead in turn to a fuller and more complicated hearing than is ordinarily the case.

Additional contents of application

263. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the nature of the applicant's interest in the seized thing.

Condition

264. A justice may, as a condition to making a restoration order, require the applicant to return the seized thing when required by the court, and may impose any other conditions that

270. Under s. 15(1) of the *Narcotic Control Act* and s. 43(1) of the *Food and Drugs Act*, application may be made by "any person . . . within two months after the date of seizure, on prior notification being given to the Crown in the manner prescribed by the regulations . . . ."

the justice considers necessary to preserve and safeguard it for investigation or use in any proceeding.

Report 27, rec. 10(3)

COMMENT

Subsection 490(16) of the *Criminal Code* now allows a judge to impose conditions to safeguard and preserve a seized thing in an order allowing access to it. However, no authority is given to impose conditions in a restoration order. Section 264 rectifies this situation by creating a new power to order restoration, subject to conditions imposed to preserve or safeguard the seized thing. Its purpose is to strike a better balance between the prosecutorial interests of the state and the individual's interest in using and enjoying his or her property.

Effect of restoration order

265. A restoration order does not affect an ownership or a possessory interest in a seized thing or in the proceeds of its sale.

Report 27, rec. 13

COMMENT

Section 265 is new. It makes clear that the purpose of the restoration order is merely to return the seized thing (or the proceeds from its sale) to the custody of someone with an uncontested right to possession. It does not purport to decide authoritatively ownership or possessory rights. If there is a dispute as to the right to possession at the hearing to determine restoration, the custodian retains possession until proper disposition of the thing or the proceeds from its sale can be determined under sections 278 to 282. The scheme reflects our belief that disputes as to lawful possession are more appropriately resolved in civil rather than criminal proceedings.

DIVISION IX
REPRODUCTION OF SEIZED THINGS

Photograph of seized thing

266. (1) A peace officer may have a photograph taken of a seized thing.

Admissibility of photograph

(2) The photograph, when accompanied by a certificate described in subsection 268(1), is admissible in evidence for the purpose of identifying the seized thing and has, in the absence of evidence to the contrary, the same probative force for the purpose of identification as the seized thing.

Report 27, rec. 11
Criminal Code, s. 491.2(1), (2)

COMMENT

This Division has three basic purposes: (1) to facilitate the prompt return of anything seized if the prosecution can preserve its evidentiary value by means other than detention; (2) to reduce the administrative and supervisory obligations of police and courts to store large quantities of seized items; and (3) to encourage the use and acceptance of alternative forms of evidence in the criminal justice system.

The current *Criminal Code*, in subsections 490(13) and (14), allows for the making, retention and admissibility of copies of documents "returned or ordered to be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11) . . . ." A recent amendment, section 491.2,[271] has now adopted an approach recommended by this Commission and has extended the previous law to allow for the taking, retention and admissibility of photographs of "any property . . . that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceeding in respect of [certain offences] . . ." and that "is returned or ordered to be returned, forfeited or otherwise dealt with under section 489.1 or 490 . . . ." Our formulation retains the basic purpose of the recent amendment, with important refinements.

As drafted, subsection 491.2(2) directs that the photograph is, for all purposes, to be accorded "the same probative force as the property would have had if it had been proved in the ordinary way." This broad provision is capable of meaningful application in the case of photographs of information contained in documents, where the photograph of the document clearly reproduces the information, or in cases where, for identification purposes, a photograph captures the visual characteristics of a thing in sufficient detail to enable it to be properly identified from the photograph. However, the provision defies meaningful application in cases where the probative value of a thing can only derive from physically examining or handling the thing itself. For example, the weight of an alleged burglar tool may have significant probative value if the accused denies having had the strength to carry or wield it. A photograph would have no probative value on the issue of whether the tool was too heavy for the accused to carry.

We have stated the admissibility and probative effect of a certified photograph more narrowly and precisely than the present law. Under our rule, it may only be admitted in evidence for the purpose of identifying the seized thing, and may only have probative value for this purpose. The actual probative force that is to be given to the photograph may be undermined under this rule where other evidence is adduced to the contrary.

Copying information

267. (1) A peace officer may have a copy made of any information that is contained in a seized thing.

Admissibility of copy

(2) The copy of the information, when accompanied by a certificate described in subsection 268(1), is admissible in

271. Previously noted in the comment to s. 260.

evidence and has, in the absence of evidence to the contrary, the same probative force as the information.

Report 27, rec. 11
Criminal Code, ss. 490(13), 14; 491.2(1), (2)

COMMENT

This section complements section 266. While section 266 allows a peace officer to have a photograph made of a seized thing (for example, of a stolen television set), this section allows a peace officer to have a copy made of information contained in a seized thing (for example, by copying information contained in a computer onto a diskette).

Certificate

268. (1) A certificate of a person stating that

(*a*) the person made a copy or took a photograph under the authority of this Division,

(*b*) the person is a peace officer or made the copy or took the photograph under the direction of a peace officer, and

(*c*) the copy or photograph is a true copy or photograph

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature of the person appearing to have signed the certificate.

Affidavit of peace officer

(2) An affidavit of a peace officer stating that

(*a*) the peace officer has seized a thing and has had custody of it from the time of seizure until a copy was made of the information contained in it or a photograph was taken of it, and

(*b*) the thing or the information was not altered in any way before the copy was made or the photograph was taken

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the affidavit without proof of the signature or official character of the person appearing to have signed it.

Power to require person to appear

(3) The court may require the person appearing to have signed a certificate or an affidavit to attend before it for examination or cross-examination about the statements contained in the certificate or the affidavit.

Report 27, rec. 11
Criminal Code, s. 491.2(3), (4), (6)

COMMENT

This provision, with minor wording and structural changes, retains the basic features of present *Code* subsections 491.2(3) to (6).

Notice of intention to produce photograph or copy

269. Unless the court orders otherwise, no copy, photograph, certificate or affidavit shall be received in evidence unless the prosecutor has, before the proceeding, given a copy of it, and reasonable notice of intention to produce it, to the accused.

Criminal Code, s. 491.2(5)

DIVISION X
TERMINATION OF CUSTODY AND DISPOSITION

1. Period of Authorized Custody

Period of custody

270. A seized thing or the proceeds of its sale may be held in custody for ninety days after seizure.

COMMENT

Subsection 490(2) of the *Criminal Code*, dealing with things detained under paragraph 490(1)(*b*), now provides for a maximum initial detention period of three months from the date of the seizure. A justice may order a further period of detention if proceedings in which the thing is needed are instituted before the initial period ends, or if the justice, on application made before the period expires, is satisfied that a further period of detention is justified, "having regard to the nature of the investigation . . . ."

Subsection 490(3) of the *Code* provides that there may be successive extension orders under paragraph 490(2)(*a*). However, the cumulative detention period of such orders may not exceed one year from the date of seizure unless, within that year, "a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 . . ." orders additional detention, having, on application, been "satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period" (s. 490(3)(*a*)); or "proceedings are instituted in which the thing detained may be required" (s. 490(3)(*b*)).

If, before a detention period expires, the prosecutor decides that further detention is not necessary, subsection 490(5) now requires the initiation of restoration proceedings.

Sections 270 and 271 do not change the basic grounds justifying detention or extension orders but state the law more simply. In our view, after a seizure has been made, three months (with the possibility of extension in appropriate circumstances) is, in most cases, an adequate and reasonable period within which a decision to initiate criminal proceedings can be made. Three months (specified more precisely here as

ninety days) is not an unreasonable burden for a citizen to bear in order to assist in the administration of justice.

Extension of period of custody

271. The seized thing or the proceeds may be held for a longer period if

(*a*) within ninety days after seizure

(i) proceedings have begun in which the seized thing may be required as evidence or in which the thing or the proceeds are subject by statute to forfeiture, or

(ii) an application for extension of the period of custody has been made; or

(*b*) before an extended period of custody ends, proceedings have begun or another application for extension has been made.

COMMENT

Accountability and control are enhanced when the authorities are regularly required to justify extensions. If an extension is truly necessary, it should be granted. However, the *Code*'s provision for a present one-year maximum cumulative period of detention which may nevertheless be extended (see subsection 490(3)) is a curious formulation and has been deleted. Paragraph 271(*b*) otherwise continues the present law, stating explicitly that any extension must be granted *before* the authorized detention period expires.

Custody after end of proceedings

272. The seized thing or the proceeds may be held in custody for a period no longer than thirty days after the end of all proceedings in respect of which the thing or the proceeds were detained.

Report 27, rec. 5(1), (2), (3)
Criminal Code, s. 490(2), (3), (12)

COMMENT

To allow for meaningful appeals, section 272 states that the seized thing or the proceeds of its sale may be detained for a period of thirty days after the end of all criminal proceedings in which it is needed for evidence or investigation.

2. Application for Extension of Custody

Application by prosecutor

273. (1) A justice who, on application by the prosecutor, is satisfied that a seized thing or the proceeds of its sale are required to be kept in custody because of the complex nature of the investigation may order that the period of custody be extended for further periods not exceeding ninety days each.

Application by other person

(2) A justice who, on application by a person with an interest in a seized thing, is satisfied that the seized thing is required to be kept in custody to preserve it as evidence may order that the period of custody be extended for further periods not exceeding ninety days each.

Report 27, rec. 5(2)
Criminal Code, s. 490 (2)(*a*), (3)(*a*)

COMMENT

This section specifies who may apply to extend a custody period and sets out the grounds for an extension. (These grounds vary, depending on who the applicant is.) While the applicant will ordinarily be a prosecutor seeking an extension because the investigation is complex and thus time-consuming (see subsection 273(1)), subsection 273(2) contemplates the possibility of an application by other persons interested in the evidentiary value of the thing seized. An applicant under subsection 273(2) could, for example, include an accused or co-accused who seeks an extension to ensure that evidence is retained for use in the same or separate proceedings.

Notice

274. The applicant shall give three clear days' notice to any person who, to the applicant's knowledge, may have an ownership or a possessory interest in the seized thing or the proceeds of its sale, to the prosecutor and to any other person named by the justice.

Report 27, rec. 5(2)
Criminal Code, s. 490(2), (3)

COMMENT

This section continues the present general requirement that extension applications be brought on notice to affected parties. Paragraphs 490(2)(*a*) and (3)(*a*) of the present *Code* require notice only to "the person from whom the thing detained was seized . . . ," who may have no real or continuing interest in the thing after its seizure. The persons specified in section 274 as requiring notice have been selected in an endeavour to restrain unnecessary extensions. These are the persons most likely to have an interest in the speedy disposition of the seized thing and it is assumed that they will vigorously defend their position in applications seeking to prolong the period during which the seized thing may be detained.

3. Return of Seized Things

Power of prosecutor to return seized things

275. The prosecutor may have a seized thing or the proceeds of its sale returned to the person who is believed to be lawfully entitled to possession if

(*a*) the period of authorized custody has expired or the seized thing or the proceeds are no longer needed;

(*b*) to the knowledge of the prosecutor, there is no dispute as to the right to possession; and

(*c*) the seized thing or the proceeds are not subject by statute to forfeiture.

COMMENT

If a detention period expires, or if the prosecutor determines before the period expires that the continued detention of something seized is no longer required, the present law requires the prosecutor to initiate what is, in effect, a restoration application.[272] Sections 275 to 277 establish a simple and efficient procedure, allowing the prosecutor, without the need for a hearing, to have the thing or its proceeds returned to the person believed to be lawfully entitled to possession, provided there is no dispute as to the right to possession known to the prosecutor and the seized thing or the proceeds of its sale are not by statute subject to forfeiture.

Notice

276. A prosecutor who intends to have a seized thing or the proceeds of its sale returned shall notify the custodian in writing and shall file a copy of the notice with the clerk of the court for the judicial district in which the post-seizure report is filed.

Returning seized thing

277. The custodian shall return the seized thing or the proceeds of its sale as soon as practicable after receiving the notice.

Report 27, recs. 5(1), (3); 6(2)
Criminal Code, s. 490(5), (6)

4. Disposition Order

Duty of prosecutor

278. If the prosecutor does not have a seized thing or the proceeds of its sale returned when the period of authorized custody has expired or the seized thing or the proceeds are no longer needed, the prosecutor shall apply as soon as practicable for an order to dispose of the seized thing or the proceeds.

COMMENT

Sections 278 to 282 set out the procedure to be followed when the prosecutor does not act under section 275. In this case, the prosecutor must initiate an application to a justice for an order to dispose of the seized thing or the proceeds of its sale, on notice to all interested parties as specified in section 279.

272. See *Criminal Code*, s. 490(5), (6).

Notice

279. The prosecutor shall give eight clear days' notice to the custodian, the accused, any person who, to the prosecutor's knowledge, may have an ownership or a possessory interest in the seized thing or the proceeds and to any other person named by the justice.

Additional contents of application

280. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the period of authorized custody has expired or the seized thing or the proceeds are no longer needed;

(*b*) if the period of authorized custody has expired, the date on which it expired; and

(*c*) whether the thing or the proceeds are subject by statute to forfeiture.

Power of justice

281. The justice shall order that the thing or the proceeds be

(*a*) returned to the lawful possessor if there is no dispute as to the right to possession;

(*b*) returned to the person from whom it was seized if possession by that person is lawful and if there is a dispute as to the right to possession but no civil proceedings in respect of any possessory interest in the thing or the proceeds have been commenced;

(*c*) transferred to the custody of any court in which there are pending civil proceedings in respect of any possessory interest in the thing or the proceeds; or

(*d*) forfeited to Her Majesty, to be disposed of as the Attorney General directs, if

(i) there is no person known or claiming to be the lawful owner or possessor,

(ii) possession by the person from whom it was seized is unlawful and if there is a dispute as to the right to possession but no civil proceedings in respect of any possessory interest in the thing or the proceeds have been commenced,

(iii) the thing or the proceeds are subject by statute to forfeiture, or

(iv) the lawful owner or possessor cannot be found.

Report 27, recs. 5(1), (3); 6(2)
Criminal Code, ss. 490(5), (6), (9); 491.1

COMMENT

Section 281 sets out the various disposition options available to the justice. Paragraph (*a*) provides the option of restoring the state of affairs existing before the seizure. It allows the return of the thing to the lawful possessor if there is no dispute as to the right to possession. For example, a television set marked with the owner's name may be expeditiously returned to the owner under this provision.

The Criminal Court is not an appropriate forum for the adjudication of property disputes. Paragraphs (*b*) and (*c*) and subparagraph (*d*)(ii) establish the procedure governing the disposition of disputed goods.

If there is a dispute, but no civil proceeding is pending to resolve the dispute, paragraph (*b*) requires that the *status quo ante* be restored and that the justice order the items returned to the person from whom they have been seized provided that possession by that person appears to be lawful. (Goods seized from a person charged with possession of stolen goods could not be returned to that person.) If there is a civil proceeding pending to resolve disputed ownership or possession, paragraph (*c*) requires the justice to order that the thing be transferred to the custody of the appropriate civil court that will be called upon to determine the issue. Finally, under subparagraph (*d*)(ii) a justice may order forfeiture of the seized thing if the person from whom seizure was made has no lawful claim to it, if the right to possession is in dispute as between other parties, and if no civil proceedings have been commenced in order to resolve the dispute. This provision is designed to serve as an incentive to affected parties to assert their rights in relation to seized goods or their proceeds of sale. Naturally, it is expected that the prosecutor would move with caution and restraint when seeking to exercise the power given under this provision.

Other aspects of forfeiture are also addressed in paragraph (*d*). If no one is known to be the lawful owner or possessor, if the lawful owner or possessor cannot be found or if a statute provides for forfeiture, subparagraphs (*d*)(i), (iii) and (iv) authorize the justice to order forfeiture of the thing or its proceeds to the state.

Things of negligible value

282. If the seized thing is of negligible value, the justice may order that it be destroyed or otherwise disposed of.

COMMENT

Section 282 is a new provision designed to simplify administration. It gives a justice the discretionary power to order the destruction or other disposal of seized things of negligible value. This paragraph could apply, for example, to a broken beer bottle which may have been an important piece of evidence, but has no value for its "owner." Since restoration of such things will normally not be sought and forfeiture will technically not be available under paragraph 281(*d*), a special provision for disposal of such things has been provided.

CHAPTER IV
APPEALS

Right to appeal

283. Any person aggrieved by a decision under section 232 (preservation and safeguarding), subsection 236(1) (preservation and safeguarding), 243(1) (access, copies) or (2) (dispensing with fee), section 254 (dangerous things) or 260 (restoration) or paragraph 281(*d*) (forfeiture) respecting anything seized or the proceeds of its sale may appeal the decision to an appeal court within thirty days after the date of the decision.

Report 27, rec. 14(1)
Criminal Code, s. 490(17)

COMMENT

Present *Criminal Code* provisions are unduly restrictive of the right to appeal decisions made in relation to seized things.[223] Section 283 recognizes that many people, not just the person searched, are affected by dispossession resulting from a seizure. Accordingly, any person "aggrieved" is permitted to appeal decisions made under this Part that could defeat the ends of justice (such as a restoration order that may result in a loss of evidence) or that could irremediably compromise one's rights in the seized thing (such as an order of forfeiture that denies a right of ownership or possession.)

Custody after order or pending appeal

284. A seized thing or the proceeds of its sale shall not be disposed of until thirty days after an order is made pursuant to a provision referred to in section 283 or pending an appeal of any such order unless all aggrieved persons waive their right of appeal in writing or unless the thing seized poses an imminent and serious danger to public health or safety.

Report 27, rec. 14(2)
Criminal Code, s. 490(12)

COMMENT

Section 284 has as its goal the effective preservation of appeal rights. It is designed to ensure that seized things or the proceeds of their sale are not disposed of before decisions may be reviewed. Unlike subsection 490(12) of the present *Code*, however, this provision clearly allows for earlier disposal in the circumstances stated.

273. For example, while s. 490(15) allows for an application to be made for access to detained things for the purpose of examination, there is no provision for appeal from a denial of access. See *R. v. Stewart*, [1970] 3 C.C.C. 428 (Sask. C.A.).