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POLICE POWERS — SEARCH AND SEIZURE IN CRIMINAL LAW ENFORCEMENT

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Working Paper 30

CRIMINAL LAW

POLICE POWERS — SEARCH AND SEIZURE IN CRIMINAL LAW ENFORCEMENT

1983

Notice

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

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

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The Commission is also grateful to the Canadian Association of Chiefs of Police and its Law Amendments Committee, and to the many federal, provincial and municipal police officers who, with patience and candour, submitted their search and seizure practices to outside scrutiny.

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

Preface

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

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

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

For our part, we were inclined to suspect that the problems of search and seizure went beyond occasional non-compliance with an otherwise satisfactory legal regime. Our preliminary research had disclosed a confusing array of criminal search and seizure powers. When one added to that array the various search and seizure powers available for the investigation of other federal offences,[1] to say nothing of the powers authorized by provincial legislation, the cumulative effect was truly bewildering. Surely, it seemed, there must be substantial uncertainty in the sheer force of numbers alone. Although the rule of law's imperative of certainty might be respected in each particular instance, an indiscriminate proliferation of search

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

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

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

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

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

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

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

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

Table of Contents

PART ONE

The Present Situation
and the Need for Reform 1

PART TWO

Developing a New Regime 111

PART THREE

Summary of Recommendations 343

PART ONE:

THE PRESENT SITUATION

AND THE NEED FOR REFORM

Table of Contents

Part One: The Present Situation and the Need for Reform

CHAPTER ONE: Introduction 7

I. Searches and Seizures 9

A. Searches and Seizures as Intrusions 10
B. Search, Seizure and Arrest 12
C. Search, Seizure and Surveillance 15

II. Individual Interests Affected by Intrusion 18

A. The Person 19
B. Property and Related Rights 22
(1) Possessions 22
(2) Private Domains 23
C. Expressions and Communications 26
D. Information 27

III. Modes of Authorizing Searches and Seizures 29

A. Warrants 29
(1) The Warrant as Authority 29
(2) Judiciality 31
(3) Particularity 33
B. Warrantless Powers 34
C. Writs of Assistance 35

IV. The Constitutional Framework 39

A. Federal Jurisdiction 39
B. The *Canadian Charter of Rights and Freedoms* 41

(1) Application of the "Reasonableness" Standard..... 41
(2) Warranted and Warrantless Searches and Seizures 44
(3) Conclusion 45

CHAPTER TWO: The Present Situation 47

I. Common Law 48

A. Arrest 48
(1) History 48
(2) Arrest and Custody 50
(3) Scope of Search and Seizure 51
B. Consent 52
C. Entry to Prevent Danger to Life or Safety 53

II. Statutory Powers 54

A. Section 443 and Other General Provisions 56
B. Gaming- and Bawdy-House Provisions 58
(1) Subsection 181(1) 58
(2) Subsection 181(2) 61
(3) Women in Bawdy-Houses 61
C. Narcotics and Drugs 62
D. Obscene Publications, Crime Comics and Hate Propaganda 65
E. Weapons 68
(1) Subsection 99(1) 68
(2) Subsection 100(1) 69
(3) Section 101 70
F. Precious Metals 72
G. Timber 73
H. Cocks in the Cockpit 73
I. Items Related to Counterfeiting 74

CHAPTER THREE: The Need for Reform 75

I. Existing Problems 75

A. Incoherence 76
B. Anachronisms 77
C. Expanded Powers to Intrude 79
D. The Abandonment of the Warrant 81
E. The Gulf between Law and Practice 83

F. Accountability Problems 89
G. Constitutional Problems 91

II. Conclusion 92

ENDNOTES 93

CHAPTER ONE

Introduction

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

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

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

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

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

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

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

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

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

I. Searches and Seizures

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

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

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

A. Searches and Seizures as Intrusions

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

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

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

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

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

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

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

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

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

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

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

B. Search, Seizure and Arrest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Search, Seizure and Surveillance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Individual Interests Affected by Intrusion

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

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

A. The Person

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Property and Related Rights

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

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

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

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

(1) *Possessions*

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

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

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

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

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

(2) *Private Domains*

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

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

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

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

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

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

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

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

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

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

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

C. Expressions and Communications

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

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

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

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

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

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

D. Information

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

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

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

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

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

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

III. Modes of Authorizing Searches and Seizures

A. Warrants

(1) *The Warrant as Authority*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) *Judiciality*

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

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

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

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

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

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

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

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

(3) *Particularity*

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

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

B. Warrantless Powers

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

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

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

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

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

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

C. Writs of Assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. The Constitutional Framework

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

A. Federal Jurisdiction

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

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

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

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

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

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

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

B. The *Canadian Charter of Rights and Freedoms*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) *Warranted and Warrantless Searches and Seizures*

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

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

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

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

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

(3) *Conclusion*

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

CHAPTER TWO

The Present Situation

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

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

I. Common Law

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

A. Arrest

(1) *History*

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

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

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

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

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

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

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

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

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

(2) *Arrest and Custody*

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

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

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

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

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

(3) *Scope of Search and Seizure*

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

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

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

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

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

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

B. Consent

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

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

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

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

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

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

C. Entry to Prevent Danger to Life or Safety

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

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

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

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

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

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

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

II. Statutory Powers

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

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

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

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

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

A. Section 443 and Other General Provisions

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

> A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

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

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

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

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

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

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

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

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

B. Gaming- and Bawdy-House Provisions

(1) *Subsection 181(1)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) *Subsection 181(2)*

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

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

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

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

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

(3) *Women in Bawdy-Houses*

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

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

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

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

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

C. Narcotics and Drugs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Obscene Publications, Crime Comics and Hate Propaganda

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Weapons

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

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

(1) *Subsection 99(1)*

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

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

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

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

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

(2) *Subsection 100(1)*

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

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

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

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

(3) *Section 101*

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

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

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

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

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

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

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

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

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

F. Precious Metals

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

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

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

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

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

G. Timber

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

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

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

H. Cocks in the Cockpit

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

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

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

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

I. Items Related to Counterfeiting

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

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

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

CHAPTER THREE

The Need for Reform

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

I. Existing Problems

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

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

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

A. Incoherence

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

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

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

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

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

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

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

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

B. Anachronisms

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

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

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

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

C. Expanded Powers to Intrude

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

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

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

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

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

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

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

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

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

D. The Abandonment of the Warrant

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

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

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

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

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

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

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

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

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

E. The Gulf between Law and Practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Accountability Problems

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

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

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

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

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

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

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

G. Constitutional Problems

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

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

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

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

II. Conclusion

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

Endnotes

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

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

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

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

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

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

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

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

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

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

10. See note 3, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

115. See note 111, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

212. *Ibid.*, p. 768.

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

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

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

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

217. *Ibid.*

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

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

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

221. *Ibid.*, p. 71.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

244. See note 262, *infra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

260. See note 257, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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