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CHAPTER EIGHT

Departures from the General Rules

322. The discussion in the previous three Chapters attempted to articulate a balanced regime of warranted search and seizure powers, both in terms of justifications for intrusion and procedural mechanisms. In the interests of simplification and coherence, this task was undertaken with a view to creating one generally applicable body of rules. Yet as much as the development of general rules has drawn upon the range of different laws and practices, there are still some cases in which the general rules cannot be applied effectively. Some situations involving searches and seizures admit peculiar factors and particularly acute interests which can only be taken into account in exceptional rules.

323. In this Chapter, the need for certain exceptional provisions is approached in two distinct stages. First, we address problems that have emerged from the preceding discussions as deserving of special attention. These problems include searches of unsuspected parties, the freezing of financial accounts, and seizures of items from solicitors and the press. The issue addressed in each case will be the appropriate adjustment that ought to be made to take account of the exceptional factor introduced into the situation. The second section in the Chapter deals with the critical issue of surreptitious intrusions.

I. Special Problems Related to the Individual Searched or Object of Seizure

A. The Unsuspected Party

RECOMMENDATION

38. Where a party in possession of “objects of seizure” is not suspected of being implicated in the offence to which the search relates, an officer executing the search should be required generally to request the party to produce the specified objects. The officer should be empowered to conduct the search himself if:

- (a) the party refuses to comply with the request within a reasonable time; or**
- (b) there is reasonable ground to believe that a request will result in the destruction or loss of the specified objects.**

324. Once search and seizure powers are recognized as distinct from arrest and charging functions, the possibility arises of the police exercising these powers against an individual in possession of seizable objects, yet not suspected of being implicated in the offence to which these objects relate. This possibility is not simply an academic one. Searches of unsuspected third parties are a frequent, if not predominant, occurrence in cases of search with warrant. In the judicial panel sample from the Commission’s survey, 20% of the warrants were issued for such searches. In 63% of the cases, on the other hand, the face of the application (information or report in writing) indicated that the owner-occupant was implicated. In the remaining 17%, the implication of the occupant could not be ascertained from the available documents.³⁷¹

325. The unsuspected parties subjected to such searches include banks, telephone companies, institutions of the press, courier services, solicitors, and simply acquaintances of suspected individuals. In a number of these cases, special considerations are present, which bear upon the necessity of special procedures tailored to the circumstances of the type of party affected. As a general matter, however, two questions arise. First, ought unsuspected parties to be subjected to exercises of search and seizure powers at all? Second, short of complete immunity, are there any special

protections that ought to be accorded to such parties by virtue of their lack of suspected involvement in the alleged criminal enterprise?

326. No Canadian authority has gone so far as to assert that unsuspected parties might be totally immune to the exercise of search powers. The most extreme position taken has been that other less coercive techniques of acquiring things or information should be preferred. Such techniques might include a request or subpoena *duces tecum*. In the *Pacific Press Ltd.* case, Nemetz C.J.B.C. held that before the justice issued a valid warrant to search the premises of the newspaper involved, material should have been required to show: whether a reasonable alternative source of obtaining the information was or was not available, and if available, that reasonable steps had been taken to obtain it from that alternative source.³⁷² We question the value of this approach for two reasons.

327. First, it gives scant recognition to what has come to be recognized as the function of search and seizure to provide not merely evidence for trial, but also information to the police. Since the warrant is often used before the perpetrators of an offence have been identified sufficiently to lay charges, it is difficult to ascertain exactly who should be offered the alternative of a subpoena or voluntary compliance. The decision to give an individual the benefit of the doubt and to refrain from exercising a search power involves a possible risk of losing the items sought.

328. Second, this restrictive approach seems to assume that search and seizure powers must embody particularly coercive features. The very assertion of state control over the objects sought under search and seizure powers may be considered coercive in itself. If so, however, the alternative of a subpoena *duces tecum* is also coercive, since it requires the thing to be produced as ordered. Unlike the subpoena, of course, the notion of search contemplates the active participation of the police in finding the object, and their entry into the private zones of the individual. It is possible, however, to exaggerate this apparent distinction. Indeed, since a subpoena is required to be served personally by a peace officer,³⁷³ the visibility of the police is not peculiar to search and seizure. Nor need a distinction lie in what the officer may do once he reaches the door and confronts the individual in possession of the object. In fact, the exercise of the search power may not lead the officer past the front door at all. In the vast majority of non-residential searches captured by the Commission survey (comprising for the most part, telephone companies, financial institutions and other business premises), the object sought was reported as having been “turned over on request”.³⁷⁴ That the

physical presence of the officer encouraged compliance with this request is obvious. What is significant, though, is that in these cases, the intrusive features of execution were minimal.

329. We believe that the better course lies in according the unsuspected individual the added protections truly appropriate to his “unsuspected” status. One approach evident in Canadian authority has been to require definite indicators on the face of the information, before permitting issuance of a warrant, thus elevating the relevant standards above those applicable to regular warrant procedures.³⁷⁵ We believe, however, that what truly differentiates the unsuspected from the suspected party is the likelihood that in the absence of forceful action by the police, the things or information in the hands of the suspected parties sought may be lost. Thus the logical place to give additional protection to the unsuspected party is at the point of execution, where the question of methods of searching is primarily relevant. And since it is at this stage that the police really confront the individual, protection here is more immediate than at the issuance stage.

330. Special respect for the privacy of an unsuspected third party has been recognized in recent American legislation.³⁷⁶ The legislation calls upon the Attorney General of the United States to issue guidelines incorporating a requirement that the police use the least intrusive method of obtaining materials in the possession of such parties which does not jeopardize the availability or usefulness of the materials. While similar guidelines should be included in Canadian police materials, the basic rules deserve to be codified in legislation.

B. Financial Accounts

RECOMMENDATION

39. Where “objects of seizure” are reasonably believed to be in a financial account, the police should be empowered to obtain a warrant to transfer the amount of the seizable funds to an official police account under judicial control. A temporary freezing order on a financial account should be made available where police officers seize financial records that are reasonably believed to contain information that will enable them to apply for a warrant to seize funds in the account. The freezing order should be of fixed duration and limited by the amount of the seizable funds. It should be obtainable from a superior court judge

or a judge designated under section 482 of the *Criminal Code*, and subject to an immediate right on the part of the individual concerned to apply for its revocation.

331. We recognized earlier that in principle “objects of seizure” ought to be covered by search and seizure procedure even though they have been converted into a loan or debt and offer no evidentiary potential.³⁷⁷ There remain a number of practical difficulties, however, in applying this principle. In particular, how exactly should a “seizure” of the funds be effected? And how is the law to deal with the peculiar accounting problems of identifying the seizable funds from a potential maze of financial transactions that might have been carried out by the individual concerned?

332. “Seizure” in this context was earlier defined as the acquisition of control over the funds sought. One way to exert control in this regard is by means of a freezing or restraining order, such as that set out in section 12 of the *Business Practices Act* in force in Ontario.³⁷⁸ This provides that in conjunction with certain investigations, a designated official may, if advisable for the protection of an investigated party’s consumers,

direct any person having on deposit or under control or for safekeeping any assets or trust funds of the [investigated] person ... to hold such assets or trust funds or direct the [investigated] person ... to refrain from withdrawing any such assets or trust funds from any person having any of them on deposit or under control or for safekeeping or to hold such assets or any trust funds of clients, customers or others in his possession or control in trust for any interim receiver, custodian, trustee, receiver or liquidator ... or until the Director revokes or the Tribunal cancels such direction or consents to the release of any particular assets or trust funds from the direction

Adaptation of this provision to cover criminally acquired funds held in bank accounts was recommended by the Uniform Law Conference in 1979, with the proviso that the order be made by a superior court judge.³⁷⁹

333. Alternatively, the amount of the proceeds could be taken out of the individual’s account and transferred to another account registered in the name of the police. The latter method has indeed been used on occasion by some Canadian forces, although the basis for doing so under present legislation has never been clear. According to Recommendations 2 and 11, however, once funds were determined to be “takings of an offence” or “funds possessed in circumstances constituting an offence”, their seizure clearly could be authorized by

a warrant. This alternative possesses the advantages of respecting conventional protections associated with search and seizure with warrant, perhaps most significantly the “particularity” requirements governing the descriptions of the offence alleged and objects of seizure. These protections may be contrasted with the more general and tentative links between an offence and funds, which are characteristic of freezing order legislation. This is true not only of the Ontario model but of statutory regimes designed with specific reference to commercial crime. The Henderson Report in British Columbia, for example, proposed a statutory regime including interim freezing orders against property which “may be subject to forfeiture” as part of a criminal enterprise or profits of a criminal enterprise.³⁸⁰

334. The absence of such protections from a freezing order scheme may be balanced somewhat by the circumstance that such orders typically leave possession of the property covered by the order with the private individual affected by it. For example, a section in the American Racketeer Influenced and Corrupt Organizations legislation permits courts

to enter such restraining orders or prohibitions, or to take such other actions, including ... the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture ... as they shall deem proper.³⁸¹

What this suggests, however, is that such provisions may be less in the nature of search and seizure powers than court orders such as injunctions. This impression is enhanced by the legislation’s reference to such alternatives as acceptance of performance bonds and the coverage of species of property such as land which have remained outside the traditional ambit of search and seizure powers. It is also enhanced by recent English case-law, which has recognized injunctions rather than search and seizure powers as the appropriate procedures for controlling criminally obtained funds in bank accounts.³⁸²

335. Accordingly, we restrict our consideration of freezing orders to those that might be required as ancillary to search warrants in this regard. Is there any aspect of the problems entailed in seizure of financial accounts that might require such a special feature? One such aspect is the complexity of the transactions the police may be investigating. This complexity often makes it difficult to isolate the funds representing the proceeds until financial records of the individual have been seized as well. Since the seizure of these records, if communicated to the individual, might result in the

transfer of funds out of his account, police attempting to identify the relevant money are liable to find themselves in a dilemma. In this sense, a freezing order procedure, fixing as it does upon the account and not upon any identified money inside it, is advantageous to the police.

336. However, this argument does not go so far as to prove the need for the kind of freezing order scheme outlined in the *Business Practices Act*. It does show the usefulness of a temporary freezing order pending identification of the funds. Upon obtaining a warrant to seize the financial records of an individual, peace officers could also obtain a temporary freezing order, directed to the financial account into which the relevant funds are reasonably believed to be traceable. Rather than lasting until a subsequent hearing, an order would expire after a specified and reasonable period of time. If the police were not prepared to obtain a regular warrant for the funds being sought by the time of expiry, the account would cease to be frozen.

337. It is recognized that the imposition of any such temporary order represents a departure from the standards inherent in conventional rules of warrant procedure. As such, it needs adequate safeguards. Primarily, the duration of such an order should be as short as the demands of investigation permit. Setting a statutory time limit, as in the case of deadlines for execution, is inevitably somewhat arbitrary. Discussions with police, however, indicated that a thirty-day period, with opportunity for renewal if necessary, could prove workable. Second, the amount of funds frozen should in no case exceed the funds identified with the offence. Third, given the degree of conjecture and complexity that could be expected to characterize police identification of the funds at this preliminary stage, and the correspondingly greater judicial scrutiny and discretion required, we recognize that resort to a superior court judge or judge as designated under section 482 of the *Criminal Code* is appropriate for the freezing order itself. And finally, as in the model Ontario legislation, the person affected by the order should have a right to apply immediately to the court to cancel it.

338. Our recommendation is a limited one in that it is specifically directed to funds in financial accounts. This limitation reflects our perception that, although temporary restraining orders could be instituted with respect to assets such as securities or negotiable instruments, they would be unlikely to be effective as an aid to a search and seizure power. Ultimate "seizure" of such property by the police, in the sense of acquiring control or possession, would be complicated by questions of administration and

disposition not evident in the case of funds. We view the critical issue with respect to these species of property, as indeed with realty, as being the need for long-term restraining orders such as those contemplated by the Henderson Report. This complex and significant issue is beyond the scope of the present Working Paper.

C. Solicitor-Client Privilege

RECOMMENDATION

40. The sealing and application procedures set out in Bill C-21, proposed in 1978, should be instituted with two new provisions — the protection should extend to materials in possession of the client as well as the solicitor, and counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application.

339. Under amendments introduced in the *Criminal Law Amendment Act, 1978*, a new section 444.1 would have been introduced into the *Criminal Code*.³⁸³ It would have provided for a special procedure to deal with documents seized while in the possession of a lawyer, by requiring that, upon a lawyer's claim that documents to be seized were privileged, the officer making the seizure place the documents in a sealed package without examining or copying them. The package having been placed in the hands of a suitable custodian, the lawyer or his client would have fourteen days to make an application to a judge. At the hearing of the application, the judge would be required to inspect the sealed documents and then decide summarily the claim of privilege. In cases in which privilege was found to exist, the custodian would be ordered to return the document to the applicant and the document would be inadmissible as evidence unless privilege were subsequently waived. If no privilege was recognized, the document would be delivered to either the police or the Crown.

340. The implementation of this set of provisions would resolve a dispute that has plagued recent case-law as to when solicitor-client privilege may be asserted. As this Working Paper is being completed, the matter is before the Supreme Court of Canada in *Descoteaux v. Mierzewski*.³⁸⁴ In the meantime, the restrictive position, represented in decisions such as *R. v. Colvin*; *Ex parte Merrick*,³⁸⁵ has been that

the privilege is simply evidentiary and accordingly can only be raised at trial. The expansive position, on the other hand, would allow the privilege to be raised at the investigative stage. In *Re Director of Investigation and Research and Shell Canada Ltd.*, Jaccett C.J., dealing with seizure powers under the *Combines Investigation Act*,³⁸⁶ stated:

It is sufficient to say, in so far as this matter is concerned, that it has been recognized from very early times that the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.³⁸⁷

We accept the policy articulated by Jaccett C.J. and accordingly view the proposed section 444.1 as a progressive and sound step. However, we note two distinct weaknesses in the 1978 legislation.

341. First, it restricts the documents covered by the privilege to those in the possession of the solicitor. This was recognized by the Manitoba Law Reform Commission in its criticism of similar provisions already in effect under the *Income Tax Act*.³⁸⁸

As is often the case, however, documents in the possession of the client, his accountant, or some other party may also be subject to solicitor-client privilege Presumably, then, while privileged documents in a lawyer's possession could be removed from his control, the same documents in the hands of the client could be withheld from department officials by virtue of the common-law doctrine of privilege. This interpretation of the law clearly points out that if a statutory mechanism for the invocation of solicitor-client privilege is to be employed, it must be comprehensive and apply to all documents, regardless of their location.³⁸⁹

We concur with this position.

342. Second, the procedure does not recognize the legitimate interest counsel have in examining the documents before presenting their cases before the judge. While the judge has the explicit duty to inspect the relevant documents, there is no statutory power given under the 1978 amendments to either counsel to do so. Although counsel for the solicitor might be presumed to know the nature of these documents, it would be expected that the Crown would be ignorant of them unless given a right of access. Indeed, counsel for the solicitor might well wish to examine the sealed package himself for the purpose of preparation. It would appear useful, therefore, to give counsel for both parties statutory rights of access to the

documents, with certain stipulations to ensure that Crown counsel would not benefit from this access were the judge to find the documents protected. Two stipulations seem appropriate. First, Crown counsel on the application should be precluded from further participation in the investigation or prosecution of the matter to which the application relates. Second, he should be under a duty not to disclose the contents of the sealed package.

D. Searches of the Press and Other Media

RECOMMENDATION

41. The press should have no special protections against unreasonable search and seizure, other than those conferred by the *Charter* and by these recommendations.

343. The *Canadian Charter of Rights and Freedoms* recognizes “freedom of the press and other media of communication” as a fundamental freedom existing in Canada.³⁹⁰ Does this give the press any special protection against the exercise of search and seizure powers by the police? This question has been addressed in recent case-law both in Canada and in the United States. The case-law has been specifically focused. It does not suggest that an institution of the press deserves any measure of added protection when it is itself a suspected party in an offence. Rather, the debate has been concerned with the vulnerability of the institution when it is not a suspected party, but merely a holder of relevant things or information. For example, a reporter or photographer may have recorded events of an allegedly criminal nature. Should the police be entitled to obtain a warrant to search for and seize such a record in the normal way?

344. An exhaustive consideration of the question appears in the various judgments in *Zurcher v. Stanford Daily*, in which the United States Supreme Court held that a warrant issued to search the premises of a campus newspaper was constitutionally valid.³⁹¹ The dangers the minority identified with the use of search powers included the unconfined examination of files unrelated to the specific investigation and unnecessary disclosure of confidential sources. This prospect of random search was rejected by the majority, which relied instead on case-law which insisted “that the courts apply the warrant requirements with particular exactitude” when freedom of

the press was threatened. Since the warrant in the *Zurcher* case itself complied with these requirements, it was found to be valid. However, following the Supreme Court decision, legislation was enacted restricting powers to search and seize materials in the possession of journalists.³⁹²

345. A similar policy of imposing the general safeguards with greater strictness underlies the decision of the British Columbia Supreme Court in the *Pacific Press Ltd.* case. The result, however, was the opposite: the warrant to search newspaper offices was invalidated on the basis that sufficient grounds had not been presented to the issuing justice. Nemetz C.J.B.C., after canvassing British and American authorities, stated:

Where, then, does the matter stand in Canada? Counsel for the petitioner submits that Parliament has accorded the free press a special place under the *Canadian Bill of Rights*. Accordingly, he argues, ss. 1(f) and 2, must be taken into consideration and weighed by the Justice of the Peace before he exercises his judicial discretion to grant the issuance of a search warrant against an organ of the free press of this country. *A fortiori*, he says, this fact is to be weighed in cases where the premises of the newspaper are not the premises of those persons accused of the crime. I agree with this submission.³⁹³

346. The situation, as indicated in the passage above, is really a sub-category of the general dilemma regarding searches of unsuspected third parties. It was argued earlier that protection of these parties is appropriate upon execution of a warrant rather than its issuance.³⁹⁴ However, some jurisprudence has recognized that the journalist plays a role in society that differentiates him from other unsuspected parties.³⁹⁵ For example, the British test for compelling the use of a journalist's film as evidence in court is higher than a simple "relevance" test. Rather, the film has to "have a direct and important place" in the determination of the issues before the court.³⁹⁶

347. Canadian law has been equivocal in its protection of journalists. The most relevant decisions on press privilege have concerned the power of a court to compel a reporter to disclose his sources while testifying in a civil discovery. In *Reid v. Telegram Publishing Co. Ltd. and Area*, the Ontario High Court held that the reporter could not be so compelled.³⁹⁷ In *McConachy v. Times Publishers Ltd.*, the British Columbia Court of Appeal held that he could.³⁹⁸ These cases are only tangentially relevant to the problem involving search and seizure, but it is significant that in *Pacific Press Ltd.*, the British Columbia Supreme Court did not cite the

McConachy case, preferring protective British and American authority on point.

348. It is fair to say that each time a court is presented with an attempt by the State to acquire information from an unco-operative institution of the press, it must balance competing interests of considerable importance. For our part, we would strike that balance by according the press the same protections we have accorded other unsuspected parties. Our Recommendation 38 would oblige the police, at the outset of their search, to request that the specified objects of seizure be produced; only if this request were met with a refusal, or if there were reasonable grounds to believe that the delay entailed in a request would result in the loss or destruction of the objects of seizure, would the police be authorized to execute their warrant in the usual manner. That protection, coupled with the “particular exactitude” which the issuing justices and reviewing courts can be expected to exercise, should provide adequate protection against unreasonable search and seizure for the press and other media of communication.

II. Surreptitious Intrusions

RECOMMENDATION

42. Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Absent compelling evidence of the need for such sacrifices, the modifications should not be made in the context of criminal or crime-related investigations.

349. The issue of police powers to perform intrusions surreptitiously has been brought into public attention in recent years by a number of disclosures concerning police activities in Canada. These activities have been scrutinized in both the Keable Report, which examined certain incidents involving federal, provincial and municipal police in Québec,³⁹⁹ and the McDonald Report, which looked into matters concerning the R.C.M.P.⁴⁰⁰ Both reports recommended that the Law Reform Commission of Canada address certain key issues respecting police powers.⁴⁰¹ We agree that the

issue of surreptitious searches and seizures in crime-related investigations is a critical one and have approached it in two stages. First, looking at statutory and common law, we perceive that, with one doubtful exception, these activities are not legally authorized at present. Second, after weighing the benefits and dangers of powers to conduct such activities, we conclude that the interests of criminal law enforcement do not justify enacting these powers.

A. The Present Law

350. By surreptitious intrusions we are referring mainly to what police officials frequently call “intelligence probes”. The objective of such exercises is to recover information from the place entered without alerting the individual concerned to the investigation. Achieving this objective, as in the case of interception of communications under section 178.1 of the *Criminal Code*, depends in large part on the intrusion itself remaining invisible. However, we also must take into account activities in which the intrusion itself is visible but the police role in it is not. An example of a search and seizure activity of this kind was “Operation Bricole”, which was discussed in the Keable Report. An expressed objective of this clandestine police operation was to be “disruptive”, by planting suspicion in the organization searched that another organization was responsible for the evident intrusion upon its premises.⁴⁰²

351. Police views as to the lawfulness of these activities have themselves varied. The illegality of “Operation Bricole” was conceded in internal police documents.⁴⁰³ Information presented to the McDonald Commission by the R.C.M.P., on the other hand, indicated that “intelligence probes” have been carried out by a number of divisions on the assumption that they were legally acceptable.⁴⁰⁴ At the Commission’s hearings, however, the force conceded that at present the law is less than clear.⁴⁰⁵ The McDonald Commission’s own view was that surreptitious entries were unlawful with the possible exception of searches conducted under narcotics and drugs legislation. Although this view has been challenged in a memorandum issued to the public by the Department of Justice,⁴⁰⁶ we generally concur with the McDonald Commission in this regard.

352. The McDonald Commission’s reasoning was that, given the trespasses entailed in such entries, the police require a specific

common law or statutory power to perform them lawfully. Our own research indicates that no common law power to enter and make surreptitious observations has been recognized in reported Canadian case-law. In fact, certain remarks of McRuer J. in the *Bell Telephone* case, in which a search warrant to enter premises and observe telephonic communications was invalidated, stand against the existence of such a power:

As there is no common law authority for what is sought to be done in this case, the authority must be found in the relevant statute.⁴⁰⁷

Proponents of common law powers to perform intelligence probes essentially base their arguments on the possibility that the common law *could* develop in such a way as to accommodate such a power. But this position, while founded on references to expanded police powers in some landmark Canadian and English cases,⁴⁰⁸ becomes tenuous in the face of recent Canadian judgments more relevant to the power at issue.

353. Perhaps the most relevant case on point is *Colet*,⁴⁰⁹ in which the Supreme Court of Canada ruled that a statutory power to seize firearms did not carry with it a right of entry upon, or search of, private premises. The case does not afford an exact parallel; in *Colet*, the police activity occurring after entry (seizure of firearms) was authorized in the *Criminal Code*, whereas surreptitious observation is not recognized in any federal statute. However, the argument may be put on an *a fortiori* basis: if no implied entry power exists for an activity sanctioned in legislation, how can it exist for an activity *not* sanctioned in legislation?

354. Another analogous problem is that of making surreptitious entries in order to conduct electronic surveillance as permitted under section 178.1 of the *Code*. The absence of any power of entry for such objectives was noted in *Dass*:

Crown counsel argues that the authority to install carries with it, by implication, the authority to enter premises by force or by stealth in order to implant the device....

... I see nothing in the *Criminal Code* which gives a Judge the power to authorize or condone illegal entry. Crown counsel points to s. 178.13(2)(d), which appears to enable the Judge to impose terms and conditions which he considers advisable in the public interest. In my view, that provision was not intended as a mechanism to have the Courts authorize illegal acts.⁴¹⁰

A contrary view was expressed by the United States Supreme Court in the *Dalia* case, in which it was held that it was lawful to perform a

surreptitious entry to install a listening device. The majority of the Court reasoned that such a power of entry was necessary to carry out the purpose of the electronic surveillance legislation at issue.⁴¹¹

355. We conclude that no strong basis exists for a common law authority in Canada to make surreptitious entries in order to acquire information. This leaves open the possibility that such authority could be conferred by statute. The only possible sources of statutory authority relevant to the area of crime-related searches and seizures are paragraph 10(1)(c) of the *Narcotic Control Act* and paragraph 37(1)(c) of the *Food and Drugs Act*, which provide that a peace officer “may ... seize and take away” narcotics or drugs and other relevant objects found in places searched under the relevant regimes.

356. These powers of search (whether with writs, or warrants, or, in the case of non-residential premises, without documentary authority) are worded so as to give the officer apparent discretion to seize certain objects. They may not *require* him to seize them if he finds them. In this respect, these powers serve as an obvious contrast with warrants in Form 5 of the *Criminal Code*, under which an officer is “required” to enter specified premises, search for specified objects and bring them to a justice. The argument that these powers permit surreptitious intrusions essentially boils down to the contention that an officer can enter the place under investigation, attempt to locate evidence of illegal activity, record it or obtain samples and leave without disturbing the status quo. On the other hand, the statutory provisions for both writs of assistance and warrants provide that such instruments are to be issued to “search for narcotics”. Accordingly, where the efforts of the peace officer are directed to searching for information about narcotics rather than the narcotics themselves, it could be argued that the practice falls outside the intent of the present provisions. Moreover, the exact relationship between secret searches and existing requirements for announcement prior to entry remains problematical.⁴¹²

357. At any rate, it is apparent that if any power exists to perform a surreptitious entry in narcotics and drugs investigations, it is a relatively limited one. The power requested by the R.C.M.P. is much wider: rather than a search power triggered by “reasonable grounds to believe”, discussion has focused on a power to intrude so as to know with certainty whether evidence or contraband is present in a particular premise.⁴¹³ Given the expansive nature of this demand and the dispute concerning the scope of activity permissible under existing law, it is important that the matter be clarified. If no power to make surreptitious intelligence probes is justifiable, the

practice should be precluded by legal rules. If it is decided to institute such a power, then it should be carefully and precisely set out in legislation.

B. Should Surreptitious Intrusions Be Authorized?

358. There are actually two questions at issue in the discussion of possible laws to deal with surreptitious intrusions. First, *how could* such intrusions be authorized for criminal investigations? Secondly, *should* such intrusions be authorized for these purposes? We believe that it is important to address the questions in this order, for knowing the nature of the potential authorization procedure helps to put the second question in context.

(1) *Alternative Modes of Authorization*

359. The McDonald Commission did not answer either of these questions directly. However, it did recommend a regime for authorizing surreptitious entries, along with other intrusive operations, in connection with security intelligence. This regime follows a mode of authorization quite similar to that set out in section 178.1 of the *Criminal Code*.⁴¹⁴ Certain remarks in the Report seem to imply that this mode is more suitable for surreptitious entries in criminal investigations than traditional search warrant provisions. Specifically, the Report found that justices of the peace, even those unconnected with the R.C.M.P., would not be qualified to issue the “warrants” that would authorize such entries for security purposes. Accordingly, it was proposed that security intelligence “warrants” be issued by Federal Court judges.⁴¹⁵ Although it is not entirely clear from the proposed regime whether a judge could authorize more than one entry per application, the existence of certain features, such as a 180-day maximum period during which the authorization would remain in force, suggests that the “warrant” could be used for more than one entry.⁴¹⁶ We find this an alarming prospect.

360. Each surreptitious entry entails a distinct intrusion. This differentiates the matter from, say, electronic surveillance, in which the intrusion — access to conversations — is by its nature continuous. Once this distinction is accepted, it becomes difficult to conceive of the need for a power to make a sequence of entries under one authorization document. Such discretion utterly contradicts the

“particularity” features of the conventional search warrant procedure.⁴¹⁷ Indeed, given the manifest character of the “intelligence probe” as a search, the threshold question is why proposals for its authorization must fix on special modes of authorization at all, be they given the “warrant” label or not. We suggest, rather, that the starting point for discussion must be the conventional search warrant procedure.

361. The McDonald Report’s preference for a Federal Court judge really begs the question. There is no reason in principle why high-level judges could not be assigned responsibilities in certain cases if departures from conventional warrant procedures were determined to be necessary. But what departures *are* necessary? The McDonald Report includes a number of comments regarding the inappropriateness of search warrants for surreptitious intelligence probes. These comments focus on three limitations perceived to be characteristic of traditional warrant provisions: (1) no offence may be identifiable at the point in time at which the police wish to conduct the entry, (2) search warrants are not obtainable on mere “suspicion”, and (3) the procedures are not secret enough.⁴¹⁸ These reasons demand analysis.

362. That no offence may be identifiable at the relevant point in time is a problem cited in the context of security operations and may be confined to that context. The cases cited in the Report in which surreptitious entry might be used in criminal investigation appear to focus on specific offences: drug or narcotics manufacturing and “white collar crimes”. We attach considerable importance to the requirement that intrusive criminal investigations be directed to specific offences; this rule flows directly from the principle that makes criminal law enforcement “responsive”.⁴¹⁹ No other criminal law power allows intrusion without identification of an offence. In fact, no recommendation in the McDonald Report itself would remove this requirement from any exceptional power granted for purposes of criminal investigation. We cannot accept a departure from search warrant requirements in this respect.

363. With respect to the grounds for authorization, it is indeed a fundamental rule that search warrants cannot be granted on the basis of mere “suspicion”. Indeed, it was the fear that warrants would be issued on such a tenuous basis that prompted early common law advocates such as Coke to maintain their opposition to the recognition of warrants. When this opposition was overcome, it was with the assurance that warrants would issue only on “probable cause”.⁴²⁰ This standard has evolved over time into the “reasonable

grounds” test recognized in all Canadian crime-related warrant provisions. It seems fair to say that insofar as crime-related procedures would permit the authorization of searches on the basis of applications that fall below this standard, they would derogate from one of the essential elements in warrant procedure.

364. What is there about intelligence probes, though, that makes compliance with a “reasonable grounds to believe” test impossible? The McDonald Report contains the following observation:

Surreptitious entry was considered to be justified when the purpose of the entry was to secure information or to confirm that an offence was in the planning stage, or was being or about to be committed, even though a search warrant could not be obtained because there were not reasonable and probable grounds of belief, as required by section 443 of the *Criminal Code*. In addition, on some occasions where a search warrant might well have been obtained, surreptitious entry without warrant was used because the police needed to ensure, before formal entry and seizure under a search warrant, that the activity under surveillance had reached a stage that the evidence found upon the search would be in such a form as to support a successful prosecution.⁴²¹

Of the two types of situations contemplated here, it would seem that the second, in which a warrant “might well” be obtained, presents the distinct possibility of compliance with a “reasonable grounds” test. It is the first, in which confirmation of the occurrence of an offence is required, that represents the more serious departure from the traditional warrant protections.

365. It is to be noted, however, that the warrant envisaged here is that created by section 443 of the *Criminal Code*, which is restricted to the seizure of “things”. If, as recommended earlier in this paper, search powers applied with respect to “information”, then a warrant might be obtained in this first type of situation.⁴²² This would depend on whether or not there were indeed “reasonable grounds to believe” that a particular offence had been initiated and that particular information, which would provide evidence with respect to that offence, was present on the premises. Absent such grounds, we again hesitate to authorize any intrusive activity. To permit exploratory entries to ascertain whether such grounds exist is to render protection against unjustified intrusion extremely tenuous.

366. Assuming requirements for a valid search warrant to be met, however, the question arises as to the practicability of using a warrant, given the visibility features associated with it. For one thing,

the availability of application documents is a substantial issue, particularly in the light of the Supreme Court of Canada decision in *MacIntyre*.⁴²³ Secrecy problems also extend to the execution of searches. In this Working Paper, we have made recommendations covering announcement of entry, provision of certain documents to the individual concerned, and allowing the occupant to witness a search of his premises.⁴²⁴ It is obvious that these rules would have to be modified if surreptitious intrusions were to be effective under a search warrant regime. Although such modifications would severely compromise the degree of protection associated with warrant procedure, they would still leave this mode of procedure a preferable safeguard against undue intrusion to that represented by the surveillance model, if only because the scope of authorized intrusion would remain more limited. The question thus becomes whether such modifications should be introduced into crime-related legislation.

(2) *Conclusion*

367. The claim for exceptional provisions to facilitate surreptitious entries rests largely on police representations that such entries are necessary. The McDonald Report, while refraining from making a recommendation in this respect, observed:

In a brief to us concerning surreptitious entries the R.C.M.P. has made a strong case that this is a desirable, and often an essential, investigative technique when the manufacture of illicit drugs and alcohol comes under the scrutiny of resourceful investigators. Eventually a time comes when members employed on lengthy, difficult investigations, many involving great personal danger, are faced with the problem of having to know with certainty whether an illicit drug laboratory or still is secreted in a place, if the laboratory or still is producing or is in the development stage, if a cache of drugs or alcohol is in a place, or if quantities of illicit drugs or spirits are being removed from a cache bit by bit for trafficking purposes. The Force considers that it is extremely difficult, without the power to search in circumstances when a search warrant cannot now be obtained, to detect the existence of clandestine drug laboratories. The R.C.M.P. also asserts that surreptitious entry is a valuable tool generally in the fight against "white collar" crime. This latter assertion, however, has not been substantiated before us.⁴²⁵

368. It is difficult to evaluate claims about the utility of "intelligence probes", given the present state of empirical data. For understandable reasons, the R.C.M.P. have been reluctant to release information that might endanger the success of some of their investigations. On the other hand, even from publicly presented

submissions, it is apparent that the use of the practice has varied widely from division to division. Indeed, in conjunction with the inquiry of the McDonald Commission, the Force itself had difficulty ascertaining and depicting the extent to which intelligence probes were used in practice.⁴²⁶ The specific examples cited in the Report often give little indication of the seriousness of the offences involved or the availability of alternative techniques of investigation. In "K" Division in Alberta the technique was reported to have been used predominantly with respect to stolen property offences,⁴²⁷ which fall outside the drug, alcohol and white collar crime investigations cited by the Force in its arguments for the necessity of the practice.

369. These observations call attention to a serious danger entailed in surreptitious entries: the problems of accountability that develop as the exercise of power loses its visibility. Such a problem has arisen in connection with electronic surveillance under section 178.1 of the *Criminal Code*, which includes reporting provisions expressly enacted to enable Parliamentary review of the interception of communications.⁴²⁸ Particularly in terms of the figures for convictions obtained, an important set of facts for determining the success or usefulness of the interceptions, Commission research has indicated that the datum produced is essentially meaningless. This condition has been attributed in large part to the time required to process cases, and to ambiguities resulting from matching complex investigative facts to the reporting requirements.⁴²⁹

370. Beyond the problems with accountability in this general sense, surreptitious powers thwart accountability for particular actions. Once again, the confidentiality features of electronic surveillance legislation are illustrative. Notification to an individual affected that he has been subjected to electronic surveillance may be delayed for anywhere from ninety days to three years.⁴³⁰ Even if evidence obtained from the interception is brought to trial, the materials used to obtain authorization are inaccessible except in manifest circumstances of fraud or wilful non-disclosure.⁴³¹ The effect of such restrictions is to restrict accountability almost exclusively to the judge authorizing the intrusion and the Crown and police officials supervising it. To permit a trend towards such a condition in search and seizure law would severely compromise a basic characteristic associated with these powers since their introduction three centuries ago: their visibility to the individuals affected.

371. Some of our recommendations in this paper account for modern technological developments such as the use of photographs

and computers that allow the acquisition and storage of information about individuals to become less visible.⁴³² These developments do not diminish the justifiability of visibility features in search and seizure law. On the contrary, they make it even more critical that the law itself ensure that police powers are exercised in a visible manner. Aside from the possibility of intrusions being undertaken on insufficient grounds, authorization to conduct intelligence probes in criminal investigations heightens the risk of particular intrusions being conducted for purposes outside those ostensibly covered by the enabling legislation. Of particular concern are instances such as Operations "Bricole" and "Ham", two projects carried out by the R.C.M.P. in Québec to obtain information about political activities.⁴³³

372. The policy considerations outlined above may be augmented by the constitutional issue raised by section 8 of the *Canadian Charter of Rights and Freedoms*, which affords security against "unreasonable search and seizure". Remarks in American case-law indicate surreptitiously conducted searches violate the similarly worded standard contained in the Fourth Amendment. In *Gouled v. United States*, a case involving a warrantless entry, the United States Supreme Court observed:

Whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment....⁴³⁴

The apparent generality of these remarks, however, must now be considered to be confined by the *Dalia* case. Upholding the power to make covert entries to install an electronic bug, the Court held that such entries "are constitutional in some circumstances, at least if they are made pursuant to a warrant".⁴³⁵

373. Whether or not surreptitious searches with warrant might be found to be constitutional by a Canadian court, we conclude that no power to conduct surreptitious entries should be provided in our proposed regime. Recent years have seen the introduction of electronic surveillance legislation in Canada and proposals for mail-opening powers in the conduct of certain crime-related investigations.⁴³⁶ Like these powers, powers to perform intelligence probes encroach on privacy interests in new ways that make it critical that they be introduced only when convincing proof of their necessity has been made. Absent such proof, we do not recommend the institution of powers to make surreptitious intrusions.

CHAPTER NINE

Special Provisions under Present Law

374. The discussion in Chapter Two outlined the historical background and distinguishing features of crime-related search and seizure provisions under present law. We have incorporated many of these provisions in whole or in part within our previous recommendations. Indeed, our proposed regime completely subsumes present powers of search and seizure following arrest, in cases of consent and under section 443 warrants. There remain, however, many of the special powers directed towards particular problems. In discussing the continuing viability of each special provision, both the individual hallmarks and historical origins become relevant. As far as the former are concerned, it is useful to consider whether the justifications or procedures peculiar to the special provision under present law have been accommodated by the scheme of general rules developed in the previous Chapters. To the extent that accommodation has been made, the special provision is simply redundant. Insofar as the provision would represent a departure from the proposed rules, however, the more substantial question of the justifiability for the departure must be addressed.

I. Writs of Assistance

RECOMMENDATION

43. The writs of assistance under the *Narcotic Control Act*, *Food and Drugs Act*, *Customs Act* and *Excise Act* should be abolished.

375. Our recommendation to abolish the writ of assistance is based on an examination of its history, its present use and its juridical character. Because contemporary discussions about retention of the writ often are based on misconceptions about these topics, we put them in their proper perspective in Part One of this paper.⁴³⁷ We believe that when the issues are examined in the light of our other recommendations, abolition of the writ would reflect both sound analysis and balanced policy.

376. Throughout Part Two of this Working Paper, we have taken the position that non-consensual warrantless entry into privately occupied places to perform searches and seizures should only be authorized when human life or safety is in jeopardy. This position is based on both principled and pragmatic considerations — the individual's strong interest in maintaining the inviolability of his private domain against unjustified intrusions, and the danger that broader exceptions to the warrant requirement in this regard make the requirement itself meaningless. The writ of assistance represents a serious derogation from the procedural norms that characterize the warrant — it is neither granted “judicially” nor with respect to any “particular” intrusion. We believe that these departures cannot be justified by the claims made by defenders of the writ in support of its retention.

377. Our concern is enhanced by the security against unreasonable search and seizure effected by section 8 of the *Canadian Charter of Rights and Freedoms*. It is not irrelevant that the immediate concern prompting the American Fourth Amendment was precisely prohibition of discretionary writ searches to which Americans had been subject as British colonials.⁴³⁸ Although the “warrant clause” of the Fourth Amendment is not reproduced in section 8 of the *Charter*, it is arguable that the writ may be impugned by the basic standard of “reasonableness” which the Canadian section has incorporated. Due to the impossibility of exercising judicial discretion in granting writs under existing legislation, it could be found that the provisions for their issuance violate the standard of “reasonableness” recognized in the *Charter*. While the power to perform an entry under authority of a writ is circumscribed by a “reasonable grounds” test under the *Narcotic Control Act* and *Food and Drugs Act*, we believe that meaningful compliance with this standard can best be ensured by a judicial officer, adjudicating before the event upon a sworn information. While this position, which

conforms to the American approach, may not be found by Canadian courts to be absolutely required by section 8, we believe that it would give valuable force to the constitutional rule. Moreover, we note that under section 139 of the *Customs Act*⁴³⁹ and section 72 of the *Excise Act*,⁴⁴⁰ reasonable grounds are not a prerequisite to entry.

378. Defenders of the writ of assistance point to the administrative safeguards the R.C.M.P. have built into their operational guidelines regarding use of the writ. In instances of narcotics and drugs these guidelines have required officers to use a writ only in important investigations in which a search warrant could be obtained, but where the immediate search of a dwelling-house was required for the successful conclusion of the case.⁴⁴¹ The *ex post facto* reporting requirements set out in the guidelines are thorough. Indeed we used them as a model for the reports proposed by Recommendation 37 for warrantless seizures.⁴⁴² The examples of these reports shown to our researchers in the course of our writ survey portrayed accounts of searches undertaken on grounds of belief that, if sworn before a justice before the intrusion were commenced, would generally have been sufficient to justify issuance of a search warrant.

379. These circumstances still leave a major gap, however, between the administrative guidelines informing writ use and the protections associated with the warrant. For one thing, since the reasons for the search with writ are recounted after the fact, they may be enhanced by information acquired during the search. This possibility derogates from the requirement of "proofs beforehand", which Hale built into the archetypal warrant for stolen goods and which have remained characteristic of warrant procedure ever since.⁴⁴³ Perhaps more importantly, the guidelines currently used by the R.C.M.P. are merely internal procedures and hence have no legal force. While we do not discount the regulatory value of administrative controls, we believe that the individual is entitled to safeguards with legal status when significant intrusions such as entry upon privately occupied places are at stake. In this regard, it is relevant to note that the internal R.C.M.P. safeguards are at least in part a response to the controversy regarding retention of the writs. This response is a sensitive and commendable one, but it does not offer the fixed protection of the law.

380. In arguing for retention of the writ, officials have indicated a willingness to impose new safeguards on the writ,⁴⁴⁴ including investing the issuance procedure with "judicial discretion". This concession may have been offered with the intention of meeting the

objections articulated by Federal Court judges required to issue the writ under existing law. The new features of “judicial discretion” that have been offered, however, have been limited. For example, a set of proposals advanced by the federal Minister of Justice in 1978 would have provided that a judge determine whether issuance of the writ would be “in the best interests of justice” in the area served by the R.C.M.P. officer named in the application, and whether the member had a statutorily prescribed amount of law enforcement experience.⁴⁴⁵ Rather than giving a judge the task of case-by-case adjudication characteristic of judicial discretion, these proposals present him with a mandate only to tabulate the officer’s years of service and assess local law enforcement needs. While limitations on the duration and area of operation of the writ would differentiate the consequences of issuance from the broader powers lamented in Jaccett P.’s judgment in *Re Writs of Assistance*, we wonder whether judges would be persuaded that they had much more discretion to refuse an application under such proposed schemes than under the existing ones.⁴⁴⁶

381. In some part, the arguments in favour of retention fix on assertions as to the effectiveness and careful use of the writ as an enforcement tool. High “hit” ratios have been cited as proof that the writ is not used for “fishing expeditions”.⁴⁴⁷ Empirical evidence from our writ survey gives qualified support to these contentions.⁴⁴⁸ The use of the writ was usually reported to result in seizures, frequently of the specified contraband identified as the original object of search. Such figures, however, tell only a partial story. They do not prove that searches performed with writs would not have been equally effective if another form of authority, such as a warrant or power incidental to arrest, had been used instead.

382. Defenders of the writ point to the peculiar difficulties experienced by narcotic and drug investigators, in particular the frequent need for speedy authorization.⁴⁴⁹ Our empirical survey of writ use did reveal that “urgency” factors were the primary reason cited by officers for choosing a writ as the mode of authorization in narcotic and drug searches as opposed to a warrant. However, the patterns of writ use show us that other options such as the use of the power of search incidental to arrest would frequently have sufficed to authorize the intrusions at issue.⁴⁵⁰ We perceive that this power, along with those flowing from our search warrant recommendations, afford wide latitude to narcotic and drug investigators.⁴⁵¹ Insofar as the perceived impracticability of warrants may be attributable to the delay inherent in documentary procedures, we believe that the

telephonic warrant procedure proposed in Recommendation 19 offers a sound and practicable alternative.⁴⁵²

383. Defenders of the writ also argue that the instrument is necessary to police serious drug offences. Particular reference is made to those involving “trafficking”.⁴⁵³ However, the narcotic and drug searches with writs reported in our survey do not entirely support this argument. In fact, searches appeared slightly more likely to be carried out with respect to simple possession than trafficking offences. While some of the drugs targeted in the possession cases may be viewed as “hard” (e.g., heroin), these figures suggest that the writ is more frequently used to capture the user than the trafficker.⁴⁵⁴

384. Even if powers of search under writs of assistance should ultimately be determined to be constitutionally valid in Canada, we believe that the retention of these instruments cannot be justified. We agree in this respect with the Australian Law Reform Commission, which, referring to writs as “general search warrants”, concluded:

The power to search and seize is undoubtedly a very necessary one for police to have. It has great destructive potential so far as the right to privacy and civil liberties generally are concerned. The power must therefore be capable of justification on every single occasion on which it is used. On this view, the continued existence of general search warrants cannot be countenanced. In the Commission’s view such provisions should long ago have disappeared from the Commonwealth and Territorial statute books. We recommend that their demise be delayed no longer.⁴⁵⁵

Similarly, we would urge that the demise of Canadian writs of assistance be delayed no longer.

II. Other Special Powers

RECOMMENDATION

44. The following special provisions should be abolished:

- (a) bawdy- and gaming-house powers — section 181 of the *Criminal Code*;
- (b) warrants for women in bawdy-houses — section 182 of the *Criminal Code*;

- (c) special interrogation procedures for persons found in disorderly houses — section 183 of the *Criminal Code*;
- (d) precious metals warrants — section 353 of the *Criminal Code*;
- (e) powers to search for stolen timber — subsection 299(3) of the *Criminal Code*;
- (f) powers to seize cocks in a cockpit — section 403 of the *Criminal Code*;
- (g) powers to seize counterfeit money — section 420 of the *Criminal Code*;
- (h) powers relating to narcotics and drugs — section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*.

A. Gaming- and Bawdy-House Provisions

385. We offer our recommendations to abolish the powers conferred by sections 181, 182 and 183 of the *Criminal Code* at a time when Parliament is considering proposals to repeal the latter two sections.⁴⁵⁶ While concurring with the Minister of Justice's proposals in this respect, we cannot anticipate the fate of the present legislation. Accordingly, our discussion addresses all aspects of the special search and seizure powers relating to gaming- and bawdy-houses.

(1) *Sections 181 and 183*

386. There are two essential features that have historically distinguished the search warrant under subsection 181(1) of the *Criminal Code*: the "report in writing" procedure, and the authority to seize and question persons found in the premises searched, pursuant to section 183. Both of these idiosyncrasies represent departures from our proposed recommendations. Together with these special features of the warrant, we examine the special power of warrantless seizure afforded by the present subsection 181(2).

387. The "report in writing" is unique in two respects. First, it is the one warrant procedure that does not require the applicant to present reasonable grounds in his application for the warrant.⁴⁵⁷ Second, it is not concluded by swearing an oath. These features, as was outlined earlier, are traceable to the peculiar origins of section 181 as an essentially internal police order procedure.⁴⁵⁸ The

identifiably “judicial” safeguard that the applicant satisfy a probative test by sworn evidence was simply not appropriate to the original administrative context of the provision. As has been noted, though, a measure of protection was originally offered in the ancillary requirement that a citizen’s complaints under oath be appended to the report. Consequently, it is possible to see that the safeguards on the procedure have indeed been decreased since its origins, despite the recent inclusion of section 181 within the category of expressly labelled “warrant” provisions.

388. What justifies the retention of these exceptional features today? In the course of interviews with police officers from some Canadian forces, Commission researchers were told that speed was essential in obtaining a warrant to search gaming- and bawdy-houses and that reversion to an ordinary procedure of “information upon oath” would unduly impair police efficiency. On the other hand, representatives of other forces perceived that there was little practical difference in the preparation of applications for section 443 and section 181 warrants. In regard to the presentation of reasonable grounds, this latter view appears to respect the ruling in the *Foster* case,⁴⁵⁹ which held that if reasonable grounds are not presented on the face of the report, the justice must inquire into them. Indeed, police in Saint John and Edmonton appear, from the samples of the warrants collected during the Commission’s survey, to follow a practice of including reasonable grounds on the report form despite the absence of a statutory requirement to do so. The claim that section 443 procedures are too cumbersome for the gaming- and bawdy-house offences listed in section 181 was also contradicted by evidence in the warrant survey that officers in some cities surveyed were more likely to respond to the commission of a gaming- or bawdy-house offence by resorting to section 443 than to the special provision of section 181.⁴⁶⁰

389. Nor does any legitimate justification exist for the retention of the power to seize and question persons found on the premises searched. This power is not really a search or seizure power as such. Rather, it is basically a provision for detention outside arrest and for compulsory submission to interrogation outside traditional restraints upon police powers to enforce private co-operation. The implications of section 183 are obviously quite severe, a fact noted with concern by the Saskatchewan Court of Queen’s Bench in *Re Sommerville*. According to this decision, section 183 can only be employed to gain information about two matters — the use of the relevant premises and the execution of the search.⁴⁶¹ Even staying within the bounds of

permissible questions, however, the interrogation gives the police an anomalous power to compel private co-operation. While insisting that resort to this power was rare, police representatives did allude to instances in which it had been used to compel disclosure of the identity of the “keeper” of suspected premises.

390. Nor can we find a persuasive reason to retain the warrantless power of seizure found in subsection 181(2). In fact, representatives from a number of forces interviewed by Commission researchers asserted that the provision is never used; in these forces, administrative policies dictate that a warrant always be obtained. Representatives from other forces, however, maintained that the warrantless power was occasionally useful. Examples of suggested use included instances of stumbling upon an illegal game in progress, finding a game being held in a public place, and situations of urgency. However, the decision of the Supreme Court of Canada in *Rockert v. The Queen*⁴⁶² seems to have diminished the provision’s utility even to those forces which have resorted to it. It was decided in that case that a practice of employing premises is necessary for the place to constitute a “common gaming house” as defined in the *Criminal Code*. Accordingly, the use of subsection 181(2) to respond to initial or transient uses of premises for gaming might well be improper.

391. It might be possible to defend these departures, were the interests at stake in enforcing prohibitions against gaming- and bawdy-houses more critical. On the contrary, however, the validity of the underlying rationales are open to question. The nineteenth-century view of controlling the targeted activities in order to prevent more serious crime is open to question. This Commission has cited laws against unlawful gaming as examples of offences that should be reconsidered in the light of present social attitudes.⁴⁶³ Even though such activities remain prohibited, it is difficult to maintain that a special search and seizure power should be accorded to enforce them.

392. One concern expressed by representatives of some Canadian police forces was that in the absence of a special warrant provision, the presumption stated in paragraph 180(1)(a) might become inoperative. This paragraph reads:

(a) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is, in the absence of any evidence to the contrary, proof that the place is a disorderly house; ...

Without discussing the merits of this provision, a topic outside the scope of this paper, it might be commented that the presumption is

not triggered by the existence of a section 181 warrant; rather, it depends solely on the authority of the peace officer to enter the relevant premises. This authority could validly come from any warrant, be it one we have proposed in our recommendations or the present section 443 of the *Criminal Code*.

(2) *Women in Bawdy-Houses*

393. The warrant provision currently defined by section 182 appears to be rarely used. The Commission's survey did not disclose any examples of its issuance. Police officers interviewed in Winnipeg, Toronto, Ottawa, Calgary and Montréal regarded the provision as useless and could not recall an instance in which it had been employed.

394. Any lingering validity this warrant might possess would vanish under the scheme of general rules advanced in this paper. We have recommended that powers of search and rescue be provided for persons unlawfully obtained.⁴⁶⁴ To the extent that the presence of an "enticed" or "concealed" woman in a bawdy-house may not be a product of illegal detention, there is simply no valid justification for intrusion under a search and rescue power, much less a search and seizure power. If the police wish to assert control over a woman in circumstances that are not legitimately those of rescue, their power to do so should be viewed in the normal context of such intrusions — that of an arrest. While the original enactment of the warrant for women in bawdy-houses may have been occasioned by a genuine concern for their exploitation, its retention in the present *Criminal Code* cannot be justified.

B. Precious Metals

395. As quaint as the section 353 warrant might appear to be, the basic fact remains that it does nothing more than clutter up the *Criminal Code*.⁴⁶⁵ Not surprisingly, no evidence of its use showed up in our survey of warranted searches in cities. If anyone is using this warrant in rural areas, it is a fairly well kept secret. In an attempt to uncover some evidence of its use, our researchers contacted provincial court offices in the Yukon and Northwest Territories. Surveys conducted by these offices failed to turn up a single judge

who could recall issuing such a warrant. The provision was created to deal with frontier mining in the mid-nineteenth century, but both the epoch and the administrative scheme the original warrant enforced have faded away.

396. The provision still applies to the offence of fraud in relation to minerals, as set out in section 352. However, the remaining days of this offence may themselves be numbered. The Law Reform Commission of Canada has proposed a regime of theft and fraud offences that would remove particularized provisions such as the present section 352 from the *Criminal Code*.⁴⁶⁶ Even if the substantive offence is retained, the warrant provision serves no useful purpose, even in theory; its subject-matter would be comprehended by our general recommendations as well as existing powers incidental to arrest, and under section 443.

C. Timber

397. Section 299 of the *Criminal Code* appears to be used infrequently at the present time. It is true that training materials for a number of police forces still contain references to this offence.⁴⁶⁷ However, the virtually negligible rate of prosecutions under section 299 in recent years strongly suggests that very little resort is made to the search power under that section. Between British Columbia and Québec (two of the major timber producing provinces in Canada), only three charges were recorded in 1978.⁴⁶⁸ Moreover, the registration of timber marks — the subject of the special search power — appears itself to be declining. We therefore recommend that this special provision be abolished.

D. Cocks in the Cockpit

398. It similarly appears that the cock-fighting sections of the *Criminal Code* are used very infrequently at the present time. In 1978, the most recent year for which even partial criminal statistics are available, only one prosecution was launched in the reporting provinces of British Columbia and Québec.⁴⁶⁹ Whatever utility the provision ever had has probably been superseded by provincial

cruelty to animals legislation.⁴⁷⁰ Although some peace officers recounted some interesting anecdotes to Commission researchers about cock-fighting prosecutions, none could recall using the power of seizure. We recommend that the provision found in subsection 403(2) of the *Criminal Code* be abolished.

E. Counterfeit Money

399. Unlike the statutory provisions related to timber and cocks in a cockpit, this power of seizure may be useful to peace officers under present law. There were 226 charges of counterfeiting and currency offences in 1978, a fraction of the percentage of criminal charges laid in Canada in that year, but nonetheless a significant number compared with the even more marginal figures pertaining to cock-fighting and timber offences.⁴⁷¹ We must ask, then, what the special seizure provision in section 420 adds to the proposed powers to seize items possessed in circumstances constituting an offence or comprising evidence of crime.

400. Peace officers have pointed to two situations in which the provision may be useful. First, it permits seizure of tainted money from individuals without a warrant in circumstances in which the individuals themselves are not suspected of involvement in an offence. Without section 420, peace officers could not make a warrantless seizure from a person without either arresting him or obtaining his consent. Second, it permits peace officers lawfully present on suspected business premises to make a quick seizure of counterfeit money found therein even where the money is beyond the control of a suspect and hence not seizable as an incident of arrest. Since the second situation is manifestly covered by the "plain view" rule in Recommendation 30, we turn our attention to the first.

401. It should be noted that in the case of possession of other classifications of contraband, such as house breaking instruments, no warrantless power of seizure is provided by the *Criminal Code*, notwithstanding the fact that existing indicators of the gravity of the offence, such as penalty maxima, are identical to those attending counterfeiting offences. It is possible that even innocent persons, reluctant to part with counterfeit money in their possession without compensation, might thwart efforts to seize it in the delay necessary to obtain a warrant after being confronted with police investigators. In such cases, a peace officer would have to determine whether

warrantless seizure could be justified as an incident of arrest or as within the scope of the “plain view” doctrine.

402. There is a manifestly regulatory aspect to section 420, an apparent tolerance of the special discretion it confers on peace officers in order to protect the integrity of Her Majesty’s currency. We recommend that, at least insofar as crime-related legislation is concerned, the seizure of counterfeit money and counterfeiting instruments should be governed by the same principles that govern other items illegally possessed.

F. Narcotics and Drugs

403. Having discussed writs of assistance in conjunction with Recommendation 43, we turn to the other search and seizure powers under the *Narcotic Control Act* and the *Food and Drugs Act*. Although, in terms of the procedural norms we have outlined, these represent exceptional provisions, it is important to realize that they are actually exercised quite frequently. Narcotics and drugs were identified as the object of search in 488 of the 1,825 warrants reported as having been executed in our warrant survey.⁴⁷² In the case of personal searches without warrant, they also appear to be frequently sought.⁴⁷³

404. The major effect of our recommendation to abolish special search powers for narcotics and drugs would be to require a warrant for all non-consensual entries into privately occupied places, whether residential or not, unless human life or safety was at risk. Although the effect of such a modification in Canadian law may seem drastic, it is important to realize that the warrantless powers currently given to peace officers in this country with respect to narcotics and drugs exceed those available in most of the other countries with a common law tradition.

405. In England, for example, a warrant is required to enter premises to search for unlawfully possessed drugs,⁴⁷⁴ a requirement endorsed by the Royal Commission on Criminal Procedure:

3.39. We have received little evidence arguing for coercive powers of entry and search before arrest to be available without warrant or other written authorisation. In our view such an intrusion upon the citizen’s privacy should always require some form of prior and formal authorisation, whatever the purpose of the search. The existing powers

are mainly confined to entry and search for items which it is an offence knowingly to possess (we refer to these as prohibited goods) for example stolen goods, drugs, firearms, and explosives.... Warrants for these items should be issued only if it is shown to the issuing authority that there is suspicion based on reasonable grounds that the object of the proposed search is on the premises specified.⁴⁷⁵

An even stronger position obtains in the United States, in which it has been held that, absent narrowly defined exigent circumstances, a warrantless entry into premises to search for contraband is presumptively “unreasonable” and unconstitutional.⁴⁷⁶ While the *Criminal Investigation Bill, 1981* currently under consideration in Australia would permit warrantless searches of private premises for objects such as narcotics to prevent their loss or destruction, the Australian Law Reform Commission, in proposing this power, expressed its hope that such intrusions would be legislated judicially “very much along the lines of the American experience”.⁴⁷⁷ The country with the closest position to that of present Canadian law in this respect is New Zealand, in which police officers may search premises without a warrant for certain classifications of “controlled drugs” including cannabis, cocaine, opium and morphine.⁴⁷⁸

406. If a power to conduct warrantless searches of privately occupied places were considered to be justifiable in narcotics and drugs cases, it would have to be narrowly confined to particularly dangerous narcotics and drugs, and to particular emergencies in which loss or destruction of the objects was imminent. For reasons outlined earlier, we believe that “emergency” criteria are difficult both to define and enforce. While narcotics and drugs offences may be viewed as serious, we find it difficult to justify a departure from the policy against authorizing warrantless entries into private premises solely to avoid dangers of loss or destruction of “objects of seizure”.⁴⁷⁹ In situations in which obtaining a conventional search warrant is impracticable, our position leaves open the possibility of seizing narcotics incidental to the arrest of a person believed to be in the premises, or of obtaining a telephonic warrant.

407. Certain other provisions are affected by our recommendation. The narcotics and drugs provisions were cited earlier as examples of disharmony between grounds for entering a place and powers of execution once entry has been made.⁴⁸⁰ This disharmony undermines the control represented by the warrant, since it leaves the peace officer with wide discretion as to the ambit of intrusion: in particular, as to whom to search and what to seize. The general proposals we have developed avoid such incongruity by allowing the

warrant itself to authorize and define most of the types of intrusion the officer might be called upon to make in the legitimate pursuit of a search or seizure power. For those contingencies that cannot be addressed by the warrant, such as discovery of unanticipated objects of seizure, we attempted to develop fair and balanced approaches. The extension of our recommendations to searches related to narcotics and drugs offences would make some of the incongruous and peculiar powers under existing legislation unnecessary.

408. Consider, for example, the seizure of evidence of an offence. At present, this may not be authorized in a *Narcotic Control Act* and *Food and Drugs Act* warrant, which can only be issued to search for the contraband itself, but it may be effected by the officer in the course of executing the search. It is difficult to discern a legitimate reason for this restriction upon *Narcotic Control Act* and *Food and Drugs Act* warrants. Indeed, its continued existence has made it necessary for officers to make strained allegations of conspiracy in order to invoke *Criminal Code* powers to seize documentary materials in premises, such as telephone company offices, where no contraband is believed to exist. Making the general rules applicable would make this practice unnecessary.

409. The existing *Narcotic Control Act* and *Food and Drugs Act* provision for search of "any person" found in a place searched may be rationalized on the basis of the historical absence of any general power to make such a search in the absence of arrest. Our recommendations, however, allow for personal search only where authorized by warrant or where authorized as an incident of arrest. No convincing reason exists for exempting narcotics or drugs searches from this rule. Indeed, the arguments in favour of the rule have been advanced quite often in discussions of searches for narcotics. The *Ybarra* case, the leading American constitutional decision on point, dealt with a drug raid in a tavern.⁴⁸¹ In Canada, the Pringle Commission, having investigated a similar raid in Fort Erie, Ontario, concluded with the following recommendation:

Persons found in a place other than a dwelling-house, where there is no reasonable cause to believe that they are in possession of a narcotic or anything incidental to possession of a narcotic by themselves or others, should not be subject to search when the only basis for the search is their legitimate presence in such place.⁴⁸²

410. The existing discretion to conduct personal searches for narcotics or drugs raises an apprehension of employing the power against individuals not because of what they are believed to have done, but because of their personal characteristics, membership in

minority groups, or conformity with police profiles of drug users or couriers. These apprehensions arise in conjunction with street searches as well as searches of privately occupied places. We believe that, however important criminal law enforcement objectives may be in a particular case, intrusions should not be performed either on a wholesale basis at selected target groups or, for that matter, at random. The retention of an open power to search invites both the exercise of that power in inappropriate cases and the apprehension that such unjustified use of the power is being made.

411. The major concern on the part of police officials about losing the special power to search persons for narcotics and drugs is that they encounter many circumstances in which, through intuition, they believe a number of members of a group to be in possession of drugs, yet would be reluctant to risk incurring liability by subjecting these intuitions to a "reasonable grounds" test. An example of such circumstances cited by the police is a search of a house in the course of which a number of occupants are found. If the concern were to be persuasive, one would expect the existence of this intuition to be borne out by the fact of frequent seizures of drugs on such persons. Yet the empirical evidence from the Commission's survey indicates the contrary. For example, of 32 seizures of chemicals reported in the warrant survey, only 18.6% were made by virtue of frisks or strip searches of persons. While there were far more reported seizures of marijuana (412), a smaller proportion of these (5.8%) occurred by virtue of person searches. In most cases involving narcotics and drugs seizures, the extent of intrusion made to find them was either a sighting in "clear view" or a search of "drawers, cupboards, closets and files".⁴⁸³ These figures prompt one to concede the utility of person searches in some cases involving illegal narcotics or drugs. They also suggest, however, that these items are not so frequently found to be concealed on occupants of premises as to justify the present existence of utter discretion to perform such searches. As in the case of all items mentioned in warrants, a person should only be searched for narcotics or drugs when there are reasonable grounds to believe that he is concealing them.

412. Finally, there is the problem of the special powers to use force to break open various compartments and things. These powers, as currently set out in subsection 10(4) of the *Narcotic Control Act* and subsection 37(4) of the *Food and Drugs Act*, were not introduced into narcotic and drug legislation until the 1960-61 amendments.⁴⁸⁴ The new scheme introduced by these amendments was also significant for bringing the writ of assistance into the mainstream of search and

seizure provisions in the latter Act. Indeed, the extraordinary powers to use force may be identified quite readily with the writ and traced historically to the exercise of royal prerogative associated with early writ legislation. If this somewhat inappropriate transplant from writ of assistance provisions explains the anomalous power to use force in *Narcotic Control Act* and *Food and Drugs Act* searches, however, there is little basis for arguing for its retention. To make such an argument, in light of Recommendation 20, which incorporates existing standards of “reasonable and probable grounds” and “necessity”, is to argue for giving the police the discretion to use force either when such grounds do not exist or at least unnecessarily. Any concern for the special factors presented by *Narcotic Control Act* and *Food and Drugs Act* searches may be met by the concession that section 25 of the *Criminal Code* is flexible enough to take these factors into account.⁴⁸⁵

413. To the degree that the departures from our recommendations respecting searches of places and persons and use of force cannot be justified, we recommend the abolition of the special search and seizure provisions under section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*. If illegal use of narcotics and drugs continues to be dealt with under legislation separate from the *Criminal Code*, then the crime-related search powers outlined in this paper should be incorporated into that legislation. It may be unnecessary to do so expressly, given subsection 27(2) of the *Interpretation Act* and the cases applying this provision to search and seizure law.⁴⁸⁶

G. Obscene Publications, Crime Comics and Hate Propaganda

RECOMMENDATION

45. Special warrant provisions for obscene publications, crime comics, and hate propaganda should be regarded as regulatory provisions rather than legitimate components of criminal procedure. Accordingly, if they are to be retained, they should be incorporated into regulatory legislation and removed from the *Criminal Code*.

414. That it is legitimate to seize items to prevent the continuation of an offence was recognized earlier in this paper⁴⁸⁷ But the detention and disposition of the things seized are tied, according to the conventional model of criminal procedure, to an accusation and ad-

judication against their possessor. The *in rem* alternative offers a mechanism that allows for an initial intrusion, an adjudication, and a disposition outside the conventional route of the criminal prosecution. It is trite to say that this alternative falls outside the limitations articulated by Dicey in the first principle of the rule of law; it is obviously not a way by which "a distinct breach of the law" is "established in the ordinary legal manner".⁴⁸⁸ The question is whether the availability of this alternative may be supported by arguments strong enough to justify its retention.

415. To begin with, the point may be made that since the individual distributor is not charged with an offence, the *in rem* procedure spares him the prospect of a criminal conviction if the publication is indeed found to violate the relevant test. The benefit of this dispensation is augmented by the apparent willingness of the courts to impose traditional criminal law burdens of proof and rules of evidence upon the Crown, despite the reference in subsection 160(2) (obscene publications and crime comics) and subsection 281.3(2) (hate propaganda) of the *Criminal Code* to the individual "showing cause" why the matter seized should not be forfeited.⁴⁸⁹ In other words, goes the argument, the individual gains some of the protections of a criminal trial without suffering its major risk.

416. This argument must concede that, notwithstanding the absence of a conviction, considerable prejudice is caused to the publisher or distributor by the *in rem* procedure. In *R. v. Pipeline News*, for example, the Edmonton authorities seized and obtained a forfeiture order for 2,580 publications.⁴⁹⁰ In fact, the possible prejudice does not merely stem from the forfeiture order; rather, considerable loss may be caused by the detention of the materials pending the final disposition. Although the show-cause hearing is required to proceed within seven days, one must take into account the possibility of delay in a final adjudication. The decision of first instance in *Pipeline News*, for example, was not rendered until a year after the hearing. When the additional possibilities of appeals and applications to quash the warrant are considered, the financial consequences of an unjustified seizure, particularly to periodicals, must be recognized as significant.⁴⁹¹

417. Consequently, the defence of the *in rem* proceeding must fall back to the position that while the implications of the intrusion may be significant, they are not as potentially harmful as those attending criminal conviction. It might be commented that since the parties named in proceedings related to obscene publications and crime comics are almost invariably corporations, the critical elements of imprisonment and the stigma of a personal criminal record have rarely been a

real possibility in these cases. In any event, however, it is important to recognize that neither section 160 nor section 281.3 of the *Criminal Code* precludes the laying of a criminal charge following a forfeiture, although the former does require the Attorney General's consent to do so. The argument in favour of the *in rem* proceeding on this point is reduced to the proposition that, given a seizure and forfeiture hearing under one of the two sections, the Crown will be content with the disposition of the case and decline to prosecute.

418. Ultimately, the choice of initiating the *in rem* procedure as opposed to the conventional prosecution is a matter of Crown discretion, the difference between the two provisions being that while the launching of a section 281.3 proceeding requires the consent of the Attorney General, the section 160 warrant does not. Although these warrants were not covered by the Commission's warrant survey, some information as to their use is available from previous Commission studies⁴⁹² and interviews with police representatives. This evidence suggests that resort to a section 160 warrant is very much a matter of local preference. Most cities did not use it at all, preferring the conventional prosecution, and in those localities in which it was employed, such as Ottawa and Toronto, the authorities favoured conventional prosecutions in most cases. If the *in rem* proceeding offers the distributor or publisher any practical benefits, then, it would appear that these are granted on a discretionary and somewhat idiosyncratic basis.

419. It is difficult to discuss the issue of maintaining these *in rem* proceedings without reflecting upon the content of the two distinct prohibitions which the *in rem* provisions enforce. However, it is important to detach the provisions for the *in rem* proceeding from the subject-matter of the legislation. Indeed, the detachability of these provisions is supported by their histories: the section 160 warrant was introduced into Canadian legislation almost seventy years after the connected offences, and the Special Committee did not itself recommend a warrant for forfeiture before conviction. Whether the substantive offences dealing with the different categories of publications ought to be abolished is a question that obviously must deal with the provisions separately. The propriety of an *in rem* procedure, however, may be examined in a broad context. Assuming that it is desirable to assert control over the relevant types of material, is it legitimate to employ the *in rem* proceeding to do so? We conclude that once the sole purpose of the *in rem* proceeding is recognized as removal of the targeted publications from circulation, the provisions may clearly be identified as nothing more and nothing less than regulatory schemes for the protection of the public. And as such, they do not belong in a code of criminal procedure.

420. The distinction between the enforcement of criminal law and the regulatory control of publications through censorship and restraints upon distribution is often blurred, yet a distinction has been made for constitutional purposes. In *Nova Scotia Board of Censors v. McNeil*, the Supreme Court of Canada held that the Amusements Regulation Board established under Nova Scotia legislation could validly ban a film from public viewing. Ritchie J., writing for the majority, stated:

Under the authority assigned to it by section 91(27), the Parliament of Canada has enacted the *Criminal Code*, a penal statute the end purpose of which is the definition and punishment of crime when it has been proved to have been committed.

On the other hand, the *Theatres and Amusements Act* is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performances which do not comply with the standards of propriety established by the Board.

The areas of operation of the two statutes are therefore fundamentally different on dual grounds. In the first place, one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is penal.⁴⁹³

421. The *McNeil* case did *not* decide that the federal government could not itself enact a valid regulatory censorship scheme, nor is it intended to impugn the constitutionality of either section 160 or section 281.3 in this paper. What is significant for present purposes about Ritchie J.'s judgment is its restriction of the *Criminal Code* to a "penalizing" function rather than a broader "preventive" one, and its perception of the enforcement of criminal prohibitions against the relevant subject-matter through the prosecution alone.⁴⁹⁴ Arguably, therefore, if Parliament wishes to retain a mechanism for preventive searches and seizures of obscene materials, crime comics and hate propaganda, then it should do so in a context other than criminal law and procedure. A number of possible regulatory models from other jurisdictions are available. New Zealand's Indecent Publication Tribunal has been cited by analysts of the present Canadian legislation,⁴⁹⁵ although subjected to criticism in New Zealand itself.⁴⁹⁶ In the United States, obscene publications are covered by civil forfeiture provisions.⁴⁹⁷ It is noteworthy, though, that preventive seizures of offending materials have long been countenanced in a regulatory context here in Canada, under the *Customs Tariff Act*.⁴⁹⁸

422. Whether the intrusion upon liberties represented by seizures of materials before distribution should be authorized by contemporary law, and whether the existing provisions in the *Customs Tariff Act* satisfactorily meet the demands and interests inherent in this task, are questions beyond the scope of this paper. It is suggested, however, that the task, if undertaken, should be recognized for what it is — a preventive, regulatory programme. It should not be confused with, nor dressed up as, a search and seizure power exercised in the enforcement of the criminal law. As currently conceived, sections 160 and 281.3 of the *Criminal Code* should be repealed.

H. Weapons

RECOMMENDATION

46. Powers to seize firearms currently authorized under sections 99 and 100 of the *Criminal Code* are subsumed in the Recommendations set out above. Section 101 of the *Criminal Code* is not a valid mechanism for the enforcement of criminal law. However, it may serve legitimate objectives as a regulatory instrument of gun control. The section should be redrafted in this light so as to:

- (a) tie the search and seizure sections more firmly to *in rem* confiscation provisions; and**
- (b) permit a search to be performed only when there is a reasonable belief that the person concerned is in possession, custody or control of a weapon.**

423. In Chapter Five, it was recognized that protective search of an individual ought to be allowed as an incident of arrest, as is presently allowed by common law.⁴⁹⁹ Other justifications articulated in that Chapter would allow weapons to be seized when they are either evidence of an offence or possessed in circumstances constituting an offence. These justifications basically comprehend the particular rationales for warrantless seizure of weapons which exist under sections 99 and 100 of the present *Criminal Code*, as well as the wide-ranging section 443 warrant. While the section 443 warrant covers only searches of places, however, the proposed set of general rules, like section 99, would cover searches of persons and vehicles as well. Since we provide that such searches could be

performed without warrant whenever human life or safety was in danger, it is unlikely that any search which would be authorized at present under sections 99 or 100 would fail to be authorized under our proposed Recommendations.

424. The same cannot be said of powers under section 101. It was argued earlier that the broadly protective justification present in this section did not belong in an elaboration of general rules, and that by failing to conform to a sequence of crime and response to crime, the provision opens the door to dangers of uncertainty and arbitrariness. Can these dangers be justified where searches for weapons are concerned? In answering this question, we refer to the two concerns addressed in section 101: immediate criminal law enforcement, and long-term regulation of possession of weapons.⁵⁰⁰ We conclude that the first concern does not justify additional grounds of intrusion to those recognized in the proposed general rules, and that the second concern, while supportable on principles associated with health and safety legislation outside of criminal law, does not justify the provisions of section 101 as currently worded.

425. The first concern is basically an application of the preventive policing approach to the problem of dangerous possession of weapons. The need for preventive powers in this regard has been articulated in contexts as diverse as legal publications⁵⁰¹ and police submissions to Parliamentary Committees.⁵⁰² Quite simply, proponents of such powers argue for the legitimacy of intervention where a firearm "is about to be used illegally". What this argument passes over, however, is the fact that the prospective use of a firearm for an illegal purpose is itself covered by offence provisions. The *Criminal Code* includes prohibitions against concealment, careless use, pointing a firearm, possession at public meetings, and possession for dangerous or illegal purposes.⁵⁰³ Particularly in this last case, the law reflects a concern for the safety of members of society by curbing what is essentially inchoate criminal activity. And in addition to the restrictions on use, there are provisions against illegal possession of weapons that fall into restricted and prohibited categories.⁵⁰⁴ A reasonable belief on the part of a peace officer that an individual possessed a weapon in contravention of these laws would provide a sound basis for invoking authority to search for and seize the weapon.

426. The issue, then, is a rather precise one. What "safety" factors, outside of the illegality of a weapon possessed, its subjection to careless use or handling, the unlawful or dangerous purpose of its possession, or the fact of arrest, might present valid grounds upon

which an officer should be authorized to conduct a search for, or seizure of, a weapon? This question is probably best answered by reference to the uses to which section 101 may be put.

427. The *First Progress Report* on the evaluation of gun control legislation prepared for the Solicitor General confirmed that it is mainly the warrantless power under subsection 101(2) rather than the warrant power under subsection 101(1) that is put to use. The Report continued:

The predominant characteristics of the situations which have given rise to both s. 101(1) and s. 101(2) searches has been that the individuals involved, although not "criminals" *per se*, are exhibiting emotional instability or violence in circumstances or surroundings where firearms are easily accessible. So, search and seizure in the interests of safety most often arises in domestic or neighbourhood disputes. ... We have found one or two jurisdictions where s. 101(2) has been employed to facilitate searches of known or suspected "criminals". These searches may not be in technical contravention of the section. But, if the proposition that both ss. 101(1) and (2) were intended for use in "behavioural" rather than "criminal" situations is correct, then such searches can be viewed as an abuse of the intent of the section.⁵⁰⁵

428. The Report, then, distinguishes between the type of safety factors presented by an individual's behaviour and the type presented by his status in the eyes of the police, suggesting that it is upon the former that the legislation is properly focused. Leaving aside for the moment the question of the section's possible tolerance of searches based on status, it is worth inquiring whether in fact the former type of safety factors do present a valid justification for search. Why should behaviour that does not constitute a criminal offence leave the individual vulnerable to intrusion by the police? This paper has tendered a responsive view of the criminal law, and has rejected the proposition that the interests of criminal law enforcement require the conferment of powers to make intrusions of a purely preventive nature.⁵⁰⁶ Is such a general view inappropriate in the context of firearms searches?

429. We suggest that to regard the issue as one of preventing crime or not preventing crime may be misleading, for the concern with the prospective use of firearms by emotionally unstable persons does not stop at the prevention of *crime*. Rather it extends to the prevention of *injury*, whether or not the commission of a *crime* is entailed. Once this is appreciated, it is apparent that the justification for special search and seizure powers for firearms resides not in criminal law enforcement, but rather in the second aspect of section

101: comprehensive regulation of the possession of weapons. This concern, in a sense the more sweeping of the two in scope, is founded on the comparatively modern principles of public health and safety legislation rather than the traditional objectives of criminal law. Indeed, the growth of gun control legislation over the past one hundred years has been characterized by the expansion of laws from prohibitions against criminal conduct to include regulatory features such as permits and registration, and recording procedures.⁵⁰⁷ While the latter have been embraced in the *Criminal Code* itself, it is important to recognize that they are not in truth “criminal law”; they do not in themselves denounce or prohibit actions, condemn those who commit them, or penalize offenders. Rather, much as explosives are covered by the *Explosives Act*,⁵⁰⁸ the acquisition, possession and use of weapons are subjected to regulation in the interests of public safety. And while these interests often coincide with the enforcement of criminal law, this is not necessarily the case.

430. Perhaps the best example of a weapons seizure conducted on a health and safety basis occurred in *Re Thomson*, a case that involved a large cache of explosives and weapons.⁵⁰⁹ While some of the explosives and weapons were possessed illegally, many of them were not. In finding that grounds existed for the seizure, Phillips Prov. Ct. J. focused not on specific instances of illegality, but on general factors to do with the occurrence of a fire in the neighbourhood and the susceptibility of the weapons to theft as a result of media coverage of the existence of the cache.⁵¹⁰

431. One’s perception of the acceptability of the present section 101 as an instrument of gun control depends in some part upon one’s perception of the acceptability of regulatory gun control legislation in general. That a “gun is a dangerous object”, the assertion underlying the 1977 amendments, is not questioned here; nor is the basic regulatory scheme set up as a result of those amendments. Whether or not this scheme truly belongs in the *Criminal Code* is a fair question. For constitutional purposes, it has been determined by the Alberta Court of Appeal that section 101 is valid federal legislation under the Criminal Law power in subsection 91(27) of the *Constitution Act, 1867*.⁵¹¹ It might be observed that the regulatory aspects of gun legislation, like those of explosives legislation, might easily be placed in another statute, but recommendations in this respect are beyond the scope of this paper; unlike obscene publications and hate propaganda, the relevant provisions cover far more than *in rem* procedures.

432. If one accepts the “regulatory” aims and provisions of gun control legislation, one must still question whether the present search and seizure provisions in section 101 are appropriate. Insofar as regulatory searches involve a different set of premises than those underlying search and seizure powers to enforce criminal law, the matter may deserve attention in another study. The following preliminary comments are directed specifically to ensuring that these regulatory powers are not distorted into a general mandate to conduct the discretionary searches of suspected criminals, noted and criticized in the *Progress Report* prepared for the Solicitor General.

433. It is important to note that some police materials instruct peace officers to use their power with circumspection. The Metropolitan Toronto Training Précis comments that “this legislation will be very helpful to police officers in emergency situations where members of the public are in danger and there is no time to obtain a warrant”. It goes on to warn, “extreme care must be taken by all officers to ensure that this power is not abused”.⁵¹² It is also true that some police forces appear to be taking a cautious view of their powers under section 101, instructing officers that the section is applicable to searches of places rather than persons. On the other hand, other forces consulted by the Commission defended retention of the provision on the basis of the need to conduct personal search activities.⁵¹³ At the least, the situation with respect to searches of persons under section 101 ought to be clarified. The larger issue, however, remains: how the ambit of the section may be restricted so that it is confined to its legitimate purposes. In this regard, two suggestions are offered.

434. First, the power to search and seize should be linked more closely to the *in rem* application. As in the case of obscene publications and hate propaganda, it is the *in rem* hearing that represents the essential, long-term regulatory decision: whether the relevant items should be allowed to remain in the private individual’s possession. Search and seizure powers, according to the *in rem* models established under sections 160 and 281.3, should be regarded as ancillary provisions designed to bring the item under state control pending the adjudication of the matter. Accordingly, it should be made clear that the prohibition against possession justified in the “interests of safety” is the long-term deprivation contemplated by an order under subsection 101(6) and not simply the brief interference that may result from an officer’s actions. It is noteworthy that while the Attorney General must make a return to a magistrate, this in itself does not start the *in rem* procedure. To do so, another application to

the magistrate must be made under subsection 101(4); in the absence of such an application within thirty days, the articles seized must be returned. This disjunction permits the police to set up a parallel system of regulation: to make seizures, detain the items temporarily, and return them to the owner without invoking the essential regulatory mechanism of the *in rem* proceeding. The disjunction should be corrected and the search for, and seizure of, items linked directly to the *in rem* hearing, as is the case under sections 160 and 281.3.

435. Second, the grounds for search and seizure should incorporate a reasonable belief that the person concerned is actually in possession, custody or control of a weapon. This belief was implicit in the wording of the former section 105, which allowed seizure of weapons but not searches for them. While it would seem justifiable to enable a peace officer to search for a weapon possessed in dangerous circumstances, it would appear unnecessary to go so far as to sanction a “fishing expedition”. To leave the person susceptible to search so long as it is perceived that he ought not to have a weapon, is to sanction a form of inspection inappropriate to an *in rem* procedure. While the *in rem* proceeding is inherently regulatory in nature, it possesses many features analogous to the “rule of law” protections built into criminal law. For example, it makes deprivation of the individual contingent upon an adjudication that the relevant possessions fall within the designated class. Under sections 160 and 281.3, the responsiveness of the procedure extends to the search and seizure stage. A peace officer is not entitled to perform inspections to ascertain whether an individual is in possession of the designated items, but to search only if there are reasonable grounds to believe that he in fact possesses them. It is not clear why any legitimate searches performed in the interests of gun regulation cannot be authorized within similar constrictions.

I. Entry to Prevent Danger to Life

436. Many of the recommendations in this Working Paper have related to aspects of search and seizure powers directed to the preservation of human life and safety.⁵¹⁴ As indicated earlier, however,⁵¹⁵ the responsibilities of a police officer as “keeper of the peace” expand beyond search and seizure activities. Insofar as we are concerned here exclusively with powers of search and seizure, we make no recommendation concerning the retention or modification of this historical role.

CHAPTER TEN

Enforcing the Rules

I. Introduction

RECOMMENDATIONS

47. A procedure should be instituted to implement the principle that illegally obtained evidence should not be admitted at trial, where its use as such would tend to bring the administration of justice into disrepute. The details of this procedure will be developed in the Working Paper on Post-Seizure Procedures.

48. Consideration should be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.

437. Enforcement of the legal rules governing search and seizure encompasses both “internal” and “external” enforcement mechanisms. “Internal” mechanisms enforce the rules by instilling awareness of, and obedience to, legal procedures through institutions and structures associated with the police and the issuers themselves. It is somewhat trite to observe that to the extent that an internal system can accomplish these objectives, it possesses advantages over resort to “external” mechanisms: bolstering morale and cohesiveness among the officials involved, and even more importantly, working to prevent procedural violations rather than addressing them after the fact.⁵¹⁶

438. Examples of internal controls such as training courses for police and justices of the peace have been noted and lauded in the

course of this paper.⁵¹⁷ Even initiatives so basic as the updating of forms in the wake of relevant case-law represent a form of internal control, a step taken to ensure that future activities stay within the law as redefined. Indications that some of the forces and court offices are upgrading control of their practices are encouraging. The high incidence of illegality demonstrated by the Commission studies, however, shows more than a need to tighten up internal enforcement. It raises the question: What is and should be done when internal enforcement fails? It is this question, the question of external controls, to which the following discussion is directed.

439. Theoretically, an individual whose person, vehicle or premises have been searched by a peace officer has three alternative ways in which to challenge the legality of the search or seizure.⁵¹⁸ First, if objects have been seized, he can apply to a court to deny the police the right to retain them or use them for investigative or evidentiary purposes. Second, he can initiate criminal or disciplinary proceedings against the issuer or executor of the warrant. Finally, he can seek to recover damages for the intrusion through civil proceedings. Until recent constitutional developments, however, the legal and practical limitations on these alternative courses have been such that they have fallen short of providing significant vindication or protection of individual interests against intrusion by the police.

440. Certain aspects of this situation, may well be changed by virtue of section 24 of the *Canadian Charter of Rights and Freedoms*:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

While the exact scope and meaning of the provisions of this section must await judicial determination, there are a number of clear limitations in it that are relevant to our analysis.

441. It is apparent that the section does not purport to cover enforcement of all rules governing search and seizure powers. Rather it is triggered specifically by a violation of constitutionally guaranteed rights and freedoms. In the case of search and seizure powers, this

means the constitutional standard of “reasonableness” set out in section 8 of the *Charter*.⁵¹⁹ Nor does it comprehend all possible enforcement mechanisms. In that section 24 contemplates an application to a court of competent jurisdiction, it does not seem to cover internal disciplinary procedures or conventional criminal prosecutions against the violators of those rights. And insofar as it focuses on the violation of individual rights, the section does not relate at all to wider regulatory mechanisms of enforcement.

442. Accordingly, the following observations are not structured exclusively around section 24 of the *Charter*. Rather, we approach the subject in three parts: (1) traditional ways of challenging a search or seizure through civil, criminal and complaint procedures, (2) proceedings relevant to the exclusionary principle and restoration of things seized, and (3) regulatory monitoring.

II. Traditional Alternatives

443. The primary alternatives traditionally available to a person aggrieved by a search or seizure are criminal, civil and complaint proceedings. (Although prerogative writs are also traditional, we consider them in the next section in conjunction with the exclusionary and restoration issues to which they in some part relate.) The problems relating to criminal, civil and complaint proceedings against officers involved in criminal law enforcement are not peculiar to search and seizure. Allegations of violence, in the course of incidents of arrest and custodial interrogation in particular, have attracted recent attention.⁵²⁰ We do not undertake in this paper to provide solutions to these problems, partly because they go beyond the scope of this Working Paper, but also because we doubt whether any solutions to those problems would be likely remedies for some of the more prevalent problems relating to search and seizure. Accordingly, we discuss the traditional remedies mainly to show why other enforcement mechanisms are desirable.

A. Criminal Prosecutions

444. These procedures are mainly relevant to allegations against the police. The only provision that might be used to prosecute

judicial function to an officer whose position is often less than independent. Statutes in some provinces make Crown lawyers “advisers” to the justices;²⁴⁷ in this capacity, Crown counsel have influenced dispositions of privately sworn complaints. Does this right to “advise” extend to applications initiated by the police? The legislation would appear to countenance this situation, leaving the justice in a position of potential conflict: he might have to decide, “judicially”, an application in relation to a case his adviser is likely to prosecute.

205. The issues of appointment, qualification, instruction and responsibilities of justices have been studied extensively in Great Britain;²⁴⁸ and recent American jurisprudence has been scrupulous in attempting to ensure neutrality on the part of the issuer, going so far as to invalidate warrants issued by state Attorneys General acting as justices of the peace.²⁴⁹ In Canada, the matter has received some attention at the provincial level, where constitutional jurisdiction over Provincial Court judges, magistrates and justices resides.²⁵⁰ The problems of the offices of the issuers of search warrants differ from locale to locale, as do the traditions of the office, and it is not intended to present an ideal formula here. But whether the problems are resolved through abolition of the position of justice or improvement or reorganization of the office, it is important that the provinces undertake the initiatives necessary to implement effective changes. Search warrant issuance, like other adjudicative functions under the *Criminal Code*, is only as judicial as the persons responsible for it.

F. The Participation of Crown Counsel

RECOMMENDATION

18. More use of Crown or private police counsel would improve the quality of applications for warrants. However, the Crown’s participation in the process should remain discretionary. While issuers of warrants should remain free to request the Crown’s participation in appropriate cases, the Crown should be a submitter rather than an adviser to the issuer.

206. At present, there is no formal requirement that Crown counsel be involved in the application for a search warrant, and in

had conducted an illegal search without warrant were given absolute discharges.⁵²⁶

B. Complaint Procedures

447. Short of initiating a criminal charge against the peace officer, an individual may present his grievance to the police authorities themselves by lodging a complaint. This step may lead to remedial action being taken by supervisory personnel or to the initiation of disciplinary proceedings.⁵²⁷ Yet as a response to intensive search and seizure, relatively few complaints appear to be made, at least in the case of the R.C.M.P. During the course of a six-month study conducted by the force in 1979, 26 complaints were received regarding search. Statistics for seizures were smaller: 18 complaints were made. In those cases in which it was deemed appropriate to take action, the consequences were the most informal possible — in seven search cases and one seizure case, the officer was “counselled”.⁵²⁸ Similar indications of the infrequency of complaints related to search and seizure were reported by Spiotto in 1973, with particular reference to Toronto.⁵²⁹

448. The Marin Report, issued in 1976, recognized that not all individuals who feel aggrieved by R.C.M.P. action take the step of making a complaint, and identified four particular reasons for such failures:

- the individual concerned did not know how to bring the complaint to the attention of the Force;
- he felt that to complain would “do no good” as the Force would simply “cover up”;
- he feared that some form of retaliation by the Force would follow the lodging of a complaint;
- upon seeking the advice of others, he was discouraged from pursuing the complaint further.⁵³⁰

While it is dangerous to generalize from observations made about one particular police force, observers suggest that the concerns expressed in the Marin Report are applicable to other forces.⁵³¹

C. Civil Proceedings

449. While the common law has regarded public officials as being liable to persons injured by their unlawful acts, it has taken

account of the difficulties facing judicial decision-makers. For example, in *Cave v. Mountain*, the Court distinguished between the absence of jurisdiction, which could lead to liability, and an error of judgment, which could not.⁵³² Today, the common law position has become complicated by statutory provisions at both the federal and provincial levels.

450. The first federal provision brought into play is section 717 of the *Criminal Code*, which becomes relevant on an application to quash a search warrant:

Where an application is made to quash a conviction, order or other proceeding made or held by ... a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice ... or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it.

The wording of the section is permissive, and confers a discretion upon the court. Nonetheless, recent decisions would indicate that the order is granted almost automatically upon the invalidation of a search warrant; indeed, the expression "usual order" has even been used.⁵³³ Perhaps the most surprising instance of such an order occurred in the *Den Hoy Gin* case, in which it was found that the police officer concerned had sworn a false information. Nonetheless, the usual order for protection was made.⁵³⁴ On the other hand, in *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, the British Columbia Supreme Court refused to grant protection to the police officer executing the search, reasoning that an order should be made only where material before the Court shows neither any suggestion of bad faith nor ulterior motive on the part of the police nor any impropriety in the execution of the seizure.⁵³⁵

451. Quite aside from the protection afforded by section 717, the liability of an officer executing a warrant is circumscribed by subsection 25(2), which reads:

Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

The good faith tests inherent in the two provisions are virtually identical; the difference between the sections is found in the context

of their application. While section 717 may only be invoked on a pre-trial application, subsection 25(2) may be raised in the civil proceedings themselves. Neither provision, however, would appear to protect the officer against liability arising from acts not authorized on the face of the warrant.

452. The justice of the peace, as well as the peace officer, are provincially appointed officials. Accordingly, the provincial legislatures have taken their own steps to enact protective rules. There has been a certain difference in approach with reference to the common law position. A number of provinces have maintained the distinction between judicial errors committed within the decision-maker's jurisdiction, and errors that themselves are pertinent to the question of jurisdiction.⁵³⁶ Other provinces have given blanket protection to their justices, provided that their powers of decision are exercised in good faith.⁵³⁷

453. An argument may be made that the alternative of civil proceedings offers a certain balance as a means of enforcing rules of police conduct. Tort law, runs the argument, "confers on private individuals the competence to decide whether they have been hurt enough by some such abuse to make them want to undertake the trouble and expense of inflicting a necessary penalty on the defendant".⁵³⁸ The problem with this argument is that the institutional restrictions upon inflicting this penalty are so formidable as to discourage all but the most intent of private individuals. Aside from the statutory hurdles and the costs of litigation, both of which can be formidable, there is the problem of quantifying damages. When the intrusion has caused considerable deprivation of privacy and dignity, but little obvious physical or economic injury, the individual faces formidable obstacles in obtaining a sizeable judgment. This may be particularly true when the individual is from an economic or social group associated in a jury's eyes with criminality.⁵³⁹

454. Once again R.C.M.P. statistics show infrequent use of the available civil remedies. In the years 1978 and 1979, six civil claims were initiated in connection with searches with warrant; another six claims were launched with respect to other searches.⁵⁴⁰ The claims included allegations of the warrant's invalidity, improper execution, and violation of solicitor-client privilege. These statistics do not include the more frequent claims for damages arising out of legal searches, such as payment for doors lawfully knocked down in the course of narcotics or drugs searches. Since legality is not in issue in such claims (and indeed payment is understood to be made on an *ex gratia* basis), they cannot be considered to reflect the use of civil

proceedings to enforce the rules attending searches and seizures. Indeed, the greater frequency of claims for physical damages than for wrongful intrusions tends to prove the point that tortious remedies are more appropriate for physical and economic injuries than less concrete ones. Once again, the Commission's findings confirm earlier research by Spiotto, who concluded that "where the illegal conduct involved is an illegal search and seizure, very few [tort] actions appear to have been brought".⁵⁴¹

D. The Need for Alternatives

455. That resort is rarely made to criminal, civil or complaint proceedings in order to challenge the legality of search and seizure laws is hardly a controversial proposition; police and Crown counsel admitted as much to Spiotto in the course of his studies in the early 1970s.⁵⁴² An explanation frequently offered for this circumstance has been that, due to high training standards among law enforcement personnel (*viz.* the effectiveness of internal enforcement), there are, in fact, few incidents of illegality.⁵⁴³ In the light of evidence that the rules are not being followed, however, we suggest that the true explanation for the absence of challenges is less reassuring: no effective mechanism for remedying the relevant violations has been available under Canadian law.

456. Part of the problem may lie in obstructive aspects of the procedures traditionally available. There is no doubt that a great deal of improvement could be made to criminal, civil and complaint procedures to make them more accessible to the individual aggrieved. In civil proceedings, for example, full solicitor-client costs could be awarded to private litigants and minimum figures set for damage awards for illegal uses of police powers.⁵⁴⁴ So too, the section 717 protection order, which is granted virtually as a matter of course, could be more vigorously opposed by counsel in cases in which a warrant is quashed. This would remove an existing obstacle to

subsequent action against the participants in the warrant process. Enhanced procedures to ensure the objectivity and thoroughness of prosecutions of police officers might allay perceptions of the ineffectiveness of criminal charges as an enforcement mechanism. But would such improvements really address the problem at the root of the present crisis?

457. That these remedies are not used to enforce the rules governing search and seizure may have less to do with the remedies themselves than with the way these rules are breached. The kind of illegality disclosed by the Commission's studies would rarely be a blatant manifestation of abuse. Peace officers conducting an organized search under a defective warrant or professionally frisking an individual whom they have no statutory authority to search may not be performing acts that create serious economic or physical damage. In the absence of such damage, an individual whose person or premises are searched may not even know that the police have done anything wrong. Canadians, as commentators have noted, tend to accord legitimacy to the actions of authority figures such as peace officers.⁵⁴⁵ When the basis of illegality resides solely in a statutory distinction or evaluation of a document, the individual is in effect spared the obvious visible abuse that might provoke a challenge to the intrusion.

458. It may be argued that the less traumatic illegalities in the warrant process neither cause the injuries nor deserve the kind of censure associated with violent abuses of individual rights. However, this does not excuse or justify the evident laxity in enforcement of the procedural rules that exists today. Indeed, it is the focus of the present remedies on blameworthiness and individual loss that is at the heart of the problem of enforcement. For the damage done by prevalent procedural illegality is not simply the individuated kind that may be met by tort and criminal actions. Rather it also relates to values at the same time more abstract and more pervasive — the values inherent in the rule of law which underlies our criminal law enforcement system.

459. If it be accepted that it is important to breathe some life back into the model of a criminal law enforcement system bound by rules that authorize intrusions upon individual rights, it is necessary to look to alternatives outside the traditional remedies. One is to institute an effective procedure to implement the exclusionary principle set out in section 24 of the *Charter*. Another is to establish regulatory mechanisms to monitor and encourage police compliance with the rules.

III. The Exclusionary Principle and Restoration of Things Seized

A. Before the *Charter*

460. Before the enactment of the *Canadian Charter of Rights and Freedoms*, prerogative remedies and common law rules of evidence provided the grounds upon which a person affected by a seizure could seek to influence the disposition of things seized. These means, however, were quite limited. According to the Supreme Court of Canada decision in *Wray*, relevant evidence that had been improperly or illegally obtained could only be excluded if it were gravely prejudicial to the accused, of tenuous admissibility and of trifling probative value.⁵⁴⁶ Although an application for prerogative relief has long been established as a means of challenging a seizure with warrant, the capacity to use this alternative to affect the disposition of things seized has not been clearly defined. In order to appreciate this latter alternative's usefulness for this purpose it is worthwhile to briefly canvass the pre-*Charter* law on point.

461. In the *Kehr* case, it was held that the issuance of a search warrant, being of a judicial character, could be reviewed by a superior court in *certiorari* proceedings.⁵⁴⁷ These proceedings have generally been simplified over the past seventy years, and the application today may simply be styled "an application to quash", but the powers and role of the reviewing court have remained essentially the same. Basically, superior courts have justified their intervention in the issuance process on three grounds: that the information failed to give the justice of the peace jurisdiction to issue the search warrant; that the justice failed to exercise his discretion judicially; and that the search warrant issued failed to comply with legal requirements. In effect, these grounds have enabled reviewing courts to quash warrants for all but the most trivial formal defects.

462. A critical question which has remained unresolved in Canadian law, however, is that of the reviewing court's discretion regarding disposition of the items seized under a warrant found to be unlawful. While the *Bergeron* case⁵⁴⁸ established that a superior court may order the return of such items to their owner as an incident of its power to quash, the decision specifically refrained from deciding whether an order could ever be made that would allow the Crown to

retain items it required for evidentiary purposes, despite the quashing of the warrant authorizing their seizure. Such an order was made in *Black*,⁵⁴⁹ a case that the Supreme Court of Canada distinguished in *Bergeron*. A principled stand against the *Black* decision has been taken in *Alder*, Moshansky J. stating that “to allow the police to retain articles illegally seized under a defective search warrant which has itself been quashed strikes me as a mockery of the law”.⁵⁵⁰ On the other hand, numerous courts have made orders similar to that in *Black* since the *Bergeron* case, and the Supreme Court itself has recently declined to consider the matter anew.⁵⁵¹

463. Until recently, Canadian search and seizure law had focused primarily on the application to quash as the mechanism by which the detention of illegally seized items could be challenged. The result was a state of discrimination in favour of instances in which an item had been seized with warrant and, within this context, in which the illegality pertained to the issuance rather than the execution of the document. This focus, however, has been broadened in two recent cases from British Columbia: *Capostinsky* and *Butler*.

464. In *Capostinsky*,⁵⁵² the plaintiff applied by way of replevin proceedings for the return of blood samples taken from him by a doctor without his consent and later seized by the police pursuant to a search warrant. Berger J. held that the warrant was a nullity, since it described no offence known to law, and ordered the return of the sample on alternative bases: as a matter of inherent jurisdiction in quashing the warrant, or an application of the remedy of replevin. The implication of this view, that a court could order restoration of items illegally seized when no warrant was involved, was picked up in *Butler*,⁵⁵³ in which the British Columbia Supreme Court, exercising its inherent jurisdiction, ordered the return of personal items seized from the petitioners pursuant to their arrest.

465. In addition to the above-noted applications, there currently exist a number of statutory procedures under which individuals may regain items seized from them by the police: subsections 101(4), 160(2), 281.3(2) and 446(1) of the *Criminal Code*, subsection 10(5) of the *Narcotic Control Act* and subsection 37(5) of the *Food and Drugs Act*. Since these proceedings expressly consider the validity of continued *detention* of the items seized rather than the legality of their *seizure*, however, they cannot be regarded as enforcement mechanisms governing the exercise of police powers. These proceedings will be addressed in detail in the Working Paper on Post-Seizure Procedures, which concerns the procedures for determining the admissibility of things illegally seized, as well as

those necessary to ensure the restoration of takings, the preservation of evidence and the forfeiture of contraband.

466. A limitation of the available procedures has been that a successful application has not prevented the police from subsequently making a seizure of the same objects under newly acquired authority. In the course of discussions, both Crown counsel and defence lawyers offered a number of reasons why resort might be made to this option. These included using a successful application to pressure the Crown into plea bargaining, obtaining a preliminary decision on the question of legality before launching a civil suit, using the finding of legality to fight extradition to the United States, and embarrassing police witnesses at jury trials with the fact that their evidence had been gained at least in part through means determined to be illegal.

467. There was little enthusiasm for the prospect that the application could effectively accomplish what it might appear to have been designed for: nullifying the action taken illegally under it. Such a prospect has in effect been dimmed by decisions such as *Black*.⁵⁵⁴ Indeed, the Crown has even on occasion gone so far as to concede the illegality of warrants before the reviewing court and simply filed materials to support its contention that the seized items have evidentiary significance. While such a position has reflected a certain realism and judiciousness on the part of Crown counsel in evaluating warrant documents, it has robbed the quashing application of its supervisory function, making it in essence a superior court inquiry into the questions of necessity which are specifically addressed in restoration procedures. This circumstance may change significantly, however, in the light of the enactment of section 24 of the *Charter*.

B. The *Charter* and Disposition of Things Seized

468. The impact of section 24 of the *Charter* upon the restoration of things seized and evidentiary rules of admissibility is a matter which Canadian courts are just beginning to address. It is clear that no remedy will lie under this section unless there has been a violation of the applicant's constitutional rights. If this requirement is met, subsection 24(1) allows for a court of competent jurisdiction to dispense an appropriate and just remedy, which in proper cases could include an order to restore a thing unconstitutionally seized.

Subsection 24(2) specifically empowers the court to exclude evidence if the administration of justice would be brought into disrepute by its admission. Although the circumstances in which these provisions will be triggered remain, for the present, a matter of uncertainty, the Commission believes that it would be timely to suggest procedures for challenging the legality of seizures, the detention of things seized, and the admissibility of evidence seized. As we take the view that these matters all pertain to the disposition of things seized, we shall defer our recommendations in this regard until the publication of our Working Paper on Post-Seizure Procedures.

IV. A Monitoring Panel

469. A balanced exclusionary rule could accomplish much towards the achievement of a law enforcement system bound by the rules that define its legal powers. Yet, however valuable it may be in “normative” terms, such a rule may not in itself be effective in ensuring actual widespread compliance with these rules. This is because an exclusion order is essentially conceived as a remedy granted in response to an individual incident of wrongdoing; like other remedies, it depends on both the initiative of an aggrieved individual to apply for it, and the willingness of a court to grant it. Whatever regulatory effect the rule has been accorded has been based on the perception that the possibility of exclusion of evidence acts as a deterrent on illegal police conduct. This perception is on the wane, however. While the American exclusionary rule, for example, was once promoted as a deterrent,⁵⁵⁵ both recent case-law⁵⁵⁶ and empirical studies⁵⁵⁷ have disputed its significance as a deterrent. Moreover, insofar as the problems of non-compliance with legal standards are attributable to warrant issuers, the notion of a deterrent effect is simply inapplicable: the issuer has no apparent stake in the outcome of the police investigation and prosecution. To speak of enforcing the rules of search and seizure through external controls, therefore, entails looking at mechanisms other than an exclusionary rule.

470. It is necessary, in fact, to go beyond variations on remedies to be dispensed in deserving cases and look at the questions of controls in wider, regulatory terms. For the problem of illegality is more than

simply the sum of those individual conflicts brought before the courts. Rather, it may involve patterns of practice within police and judicial organizations as a whole. Such patterns of practice were evident in the results of the Commission's warrant survey: the detailed elements on Vancouver documents, for example, as opposed to the terse presentation on those from Montréal. In order to address these patterns, it is important to consider ways in which the practices of organizations as a whole can be addressed.

471. It is widely accepted that the most effective external controls upon the police are those that reinforce internal mechanisms. As one commentator has observed:

[E]xternal controls should be designed in a manner that reinforces the internal systems of discipline upon which primary dependence continues to be placed. They should be oriented not towards the control of individual misconduct, but rather should be directed at a review of the conditions that make such misconduct possible.⁵⁵⁸

While there are many possible mechanisms of this kind to be explored and assessed, one specific measure which could have a valuable regulatory effect is advanced here.

472. We suggest that panels of representatives from the judiciary and the criminal bar could be established with continuing mandates to examine and evaluate the regularity and legality of search warrant documents in particular Canadian jurisdictions. Such evaluations, as well as including the legality of the information and warrant, could cover the return on the warrant with its attached inventory of items seized. In essence, such panels could continue and expand upon the functions performed by the judicial panel utilized in the present study. Like the sample selected for evaluation by the judicial panel, the documents monitored by such panels could be selected on a random basis. Not only could the findings of such bodies be made the subject of consultations with the individual police forces and court officials so as to bolster internal enforcement mechanisms, but they could also be made available to the public to indicate the extent of compliance with legal standards.

473. The effective monitoring of search warrants is arguably a necessary step towards fulfilling the policy recognized in the *MacIntyre* case, viz. that public scrutiny of search warrant documents is necessary to ensure that abuse will not go undetected.⁵⁵⁹ While public access remains a laudable goal, it is not in itself likely to result in detection of deficiencies, particularly those of a legal nature. Such detection, rather, requires informed analysis, and

in order to put individual cases in perspective, this analysis should be conducted on a systematic basis. Indeed, since it would focus on the larger pattern of activity rather than the individual case, a monitoring panel would not jeopardize the privacy and law enforcement interests at stake in *MacIntyre*. By preserving the anonymity of individuals affected by the monitored searches and presenting the results in cumulative form, the proposed mechanism would reduce to negligible any risk of prejudice to either a concerned individual or the investigation against him.

474. Police and justicial powers have tended to come under scrutiny recently in the specific context of Royal Commissions appointed in response to publicized incidents of alleged abuse or impropriety. To cite a few recent examples in Canada, there have been the Laycraft Inquiry, conducted in the wake of the Royal American Shows investigation in Alberta;⁵⁶⁰ the Pringle Report, commenced in response to a mass strip-search conducted at a motel in Fort Erie, Ontario;⁵⁶¹ and, of perhaps most recent significance, the McDonald and Keable Commissions.⁵⁶² While such Commissions may serve the public interest in investigating specific instances of alleged abuse, their inquiry is often focused on the outrageous and specific to the detriment of presenting the everyday, general picture. The words of an American Task Force Report on the police may well be applicable to Canada:

Where there has been inquiry into police practice, it has commonly been precipitated by a crisis, has been directed towards finding incompetence or corruption, and whatever the specific finding, has failed to give attention to the basic law enforcement issues involved.⁵⁶³

475. In fact, some systematic monitoring of facets of crime-related procedures has been introduced into Canada in recent years. Of direct relevance is the ongoing evaluation of gun control legislation being conducted for the Solicitor General of Canada.⁵⁶⁴ While the scope of the evaluation encompasses a range of aspects far broader than police adherence to legal procedures, the reporters have included conclusions about the legality of existing police practices in their *First Progress Report*; for example, they have criticized abuse of the return procedures in warrantless firearms searches.⁵⁶⁵

476. Considering the strong provincial constitutional interest in regulating search warrant practice, derived from provincial jurisdiction over the "administration of justice",⁵⁶⁶ we believe that such monitoring panels should be established on a provincial or local level. By institutionalizing such panels at these levels, the aim of building external mechanisms onto internal structures is likely to be better

served, with respect both to provincial and local police forces and to the provincial courts responsible for the issuance of search warrants. For example, monitoring the performance of justices of the peace in issuing search warrants could be built into any provincial initiatives undertaken to improve the training and qualification of holders of this office.

477. Monitoring exercises would not have to be conducted on a constant basis; periodic review of representative random samples could be sufficient for the regulatory task envisaged here. Moreover, it should be emphasized that, since the present monitoring proposal would focus on the documents already required by law, it would not represent any additional burden upon the police themselves. Any organizational burdens placed upon court administrators responsible for the collation of these documents, as well as the responsibilities, expenses and efforts entailed in assembling a monitoring panel, seem justifiable in the interests of effectively regulating the important and exceptional powers granted for the purposes of search and seizure.

Endnotes

1. See text, *supra*, Part One, paras. 97-100.
2. Alan Grant, *The Police — A Policy Paper* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1980), p. 16.
3. Although the *Criminal Code* frequently confers warrant issuing functions on “a justice”, the organization of Provincial Court officials and the assignment of functions of the “justice” to other judicial ranks remains within provincial discretion. See text, *supra*, paras. 198-205.
4. Grant, *supra*, note 2, pp. 36-38.
5. This is indeed the perception of many municipal and R.C.M.P. officers themselves. For example, when asked whether they used consent forms, a group of municipal officers responded, “No. That’s for the R.C.M.P.”.
6. Task Force on Policing in Ontario, *Report* (Toronto: 1974), p. 24.
7. See text, *supra*, Part One, paras. 212-227.
8. See text, *supra*, Part One, para. 228.
9. See text, *supra*, Part One, paras. 11-13.
10. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 11.
11. Herman Goldstein, *Policing a Free Society* (Cambridge: Ballinger, 1977), p. 160.
12. *MacIntyre v. Attorney General of Nova Scotia* (1982), 40 N.R. 181 (S.C.C.).
13. The distinction between “law enforcement”, which necessarily involves a violation of the law and “order maintenance”, which, though often entailing a legal infraction, involves a dispute or potential disorder, has been drawn by James Q. Wilson, *Varieties of Police Behavior* (Cambridge: Harvard University Press, 1968), pp. 83-84.

14. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), pp. 90-91.
15. See text, *supra*, paras. 42-45.
16. See text, *supra*, Part One, paras. 100-113.
17. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), pp. 25-26 (hereinafter cited as the "RCCP Report").
18. See text, *supra*, Part One, paras. 100-113.
19. Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976), p. 24.
20. *Robbins v. California* (1981), 69 L. Ed. 2d 744.
21. In *New York v. Belton* (1981), 69 L. Ed. 2d 768, the United States Supreme Court, on facts involving a vehicle search quite similar to those in *Robbins*, made a contrary finding as to the legality of the policeman's actions. In the recent decision of *United States v. Ross* (unreported, June 1, 1982), the Court attempted again to resolve the uncertainty in the area.
22. Martin L. Friedland, *Access to the Law* (Toronto: Carswell, 1975), p. 64.
23. American Law Institute, *Model Code of Pre-Arrest Procedure* (1975) (hereinafter cited as the *ALI Code*).
24. Australian Law Reform Commission, *Criminal Investigation* (Report #2) (Canberra: Australian Government Publishing Service, 1975) and the *Criminal Investigation Bill, 1981*.
25. RCCP Report, *supra*, note 17.
26. See text, *supra*, paras. 31-34.
27. See text, *supra*, Part One, paras. 117-125.
28. See text, *supra*, paras. 64-69.
29. *Criminal Investigation Bill, 1981*, *supra*, note 24; sections 56-62 deal with search and seizure.
30. *ALI Code*, *supra*, note 23.
31. See text, *supra*, Part One, paras. 67-79.
32. See text, *supra*, Part One, paras. 71-79.
33. *Jones v. United States* (1959), 362 U.S. 257.
34. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.).
35. Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer", in *Studies in Canadian Tort Law*, edited by Allen

- M. Linden, (Toronto: Butterworths, 1968), pp. 430-33.
36. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II (London: E. Rider, 1800), p. 113.
 37. See John Kaplan, "Search and Seizure: A No Man's Land in the Criminal Law" (1961), 49 Cal. L. Rev. 474, at p. 478.
 38. See text, *supra*, paras. 46-50.
 39. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965), p. 188.
 40. *Ibid.*, p. 208.
 41. *Ibid.*, p. 188.
 42. Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979), p. 156.
 43. Dicey, *supra*, note 39, pp. 195-196.
 44. *Canadian Charter of Rights and Freedoms*, sections 7, 8, 9, 11, 15.
 45. Leon Radzinowicz, *A History of English Criminal Law*, vol. IV (London: Stevens and Sons, 1956), p. 163.
 46. Jeremy Bentham, *Principles of Morals and Legislation*, vol. I (London: T. Payne & Son, 1789), pp. 367-368.
 47. E. C. S. Wade, "Police Search" (1934), 50 L.Q.R. 354, at p. 364.
 48. See text, *supra*, paras. 43-45.
 49. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1976), p. 3.
 50. See the *Criminal Code*, R.S.C. 1970, c. C-34, ss. 450(2)(d), 452(1)(f), 453(1)(i), and 457(7)(b).
 51. In fact, the party whose premises are searched may not even be a suspect. See text, *supra*, paras. 324-330.
 52. Ericson, *Making Crime*, *supra*, note 10, p. 148. Among 96 suspects involved in the investigation studied, 27 were subject to searches of their property.
 53. See text, *supra*, Part One, para. 71.
 54. *Re Liberal Party of Québec and Mierzwinski* (1978), 46 C.C.C. (2d) 118 (Qué. S.C.), at p. 122.
 55. The survey's strategy, methodology and results have been presented in consultation documents prepared for each of the seven cities surveyed. These documents are presently being revised for publication within a single volume. For more details, see note 262, Part One.

56. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196 (Ont. H.C.)
57. Aside from the case of the common law warrant, this would appear to be the requirement, for example, of section 25 of the *Metropolitan Police Courts Act*, 2 & 3 Vict., c. 71, which provided for stolen goods found in the course of search to be conveyed before a magistrate. Under section 26, "such magistrate" could find the possessor guilty of a misdemeanour.
58. *An Act for the Forging and Counterfeiting of Foreign Bills of Exchange*, 43 Geo. 3, c. 139, s. 7.
59. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (Ont. H.C.), at pp. 266, 271.
60. *Dillon v. O'Brien* (1887), 16 Cox C.C. 245, at p. 249.
61. *Leigh v. Cole* (1853), 6 Cox C.C. 329, at p. 332.
62. R.S.C. 1970, c. E-10, s. 29(7).
63. The distinction between seizure and surveillance has been elaborated in Part one, *supra*, paras. 28-37. Search and seizure powers authorize obtaining "pre-existing information" only.
64. *Access to Information Act*, S.C. 1980-81-82, c. 111, Sch. I, s. 3.
65. *Rex v. Burgiss* (1836), 7 Car. & P. 488, 173 E.R. 217 (C.P.).
66. David G. Price, "Police Seizure of Bank Accounts under Section 29, *Criminal Law Amendment Act, 1975*" (1976-77), 19 *Crim. L.Q.* 86.
67. *Banque Belge pour L'Etranger v. Hambrouck*, [1921] 1 K.B. 321 (C.A.).
68. For a discussion of the nature of the bank's relationship to its depositor, see Ian F. G. Baxter, *The Law of Banking and the Canadian Bank Act*, 2nd ed. (Toronto: Carswell, 1968), pp. 9-11.
69. *Regina v. Cuthbertson*, [1981] A.C. 470 (H.L.).
70. *Leigh v. Cole*, *supra*, note 61, pp. 330-31.
71. See text, *supra*, paras. 123-137.
72. See text, *supra*, paras. 423-435.
73. *Re Thomson*, unreported, August 28, 1979 (Ont. Prov. Ct.).
74. See notes 503 and 504, *infra*.
75. *ALI Code*, *supra*, note 23, s. 210.3(1)(b).
76. *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(b).
77. *Criminal Code*, R.S.C. 1970, c. C-34, s. 283.

78. *Criminal Code*, R.S.C. 1970, c. C-34, s. 312.
79. *Criminal Code*, R.S.C. 1970, c. C-34, s. 295.
80. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 4.
81. *Food and Drugs Act*, R.S.C. 1970, c. F-27, ss. 34 and 42.
82. *Criminal Code*, R.S.C. 1970, c. C-34, s. 159(1).
83. See text, *supra*, paras. 331-338.
84. Out of 1,825 executed warrants captured in our survey, 340 were for stolen property. See note 55, *supra*.
85. *R. v. Percival and MacDougall* (1971), 2 C.C.C. (2d) 585 (B.C. S.C.).
86. *Devoe v. Long*, [1951] 1 D.L.R. 203 (N.B. C.A.).
87. *Regina v. Kotrbaty* (1978), 5 C.R. (3d) S-13 (B.C. S.C.), at p. S-15.
88. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(6).
89. *Smith v. The Queen* (1975), 27 C.C.C. (2d) 252 (F.C. T.D.).
90. *Re Hicks and The Queen* (1977), 36 C.C.C. (2d) 91 (Man. C.A.).
91. Incorporated into what is known as *R.I.C.O.* (Rackateer Influenced and Corrupt Organizations) legislation, *in rem* proceedings are found in 18 U.S.C. ss. 1964. These provisions do not deal with all profits of crime but rather those which have been invested in commercial enterprises.
92. *The Business of Crime, An Evaluation of the American R.I.C.O. Statutes from a Canadian Perspective* (hereinafter cited as the "Henderson Report") (Victoria: British Columbia Attorney General, 1980).
93. See text, *supra*, paras. 414-422.
94. *Criminal Code*, R.S.C. 1970, c. C-34, s. 420(1).
95. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 3; *Criminal Code*, R.S.C. 1970, c. C-34, ss. 88 and 89.
96. See text, *supra*, paras. 65-66.
97. Our four-month survey of writ use in seven Canadian cities disclosed 100 incidents in which narcotic and drug writs were used. Use of drug writs was reported in five of these cities: Edmonton (20 instances), Montréal (3), Toronto (8), Winnipeg (10) and Vancouver (59). No incidents of writ use were reported in Fredericton or Saint John. The results of this survey are being assembled for publication in a separate Study Paper.
98. *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 34.
99. *Criminal Code*, R.S.C. 1970, c. C-34, s. 309(1).

100. *Criminal Code*, R.S.C. 1970, c. C-34, s. 159(1)(a).
101. *R. v. Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (Ont. Prov. Ct.).
102. *House of Commons Debates*, 1959, vol. V, p. 5547 (July 6, 1959).
103. See, for example, the *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (LeDain Commission) (Ottawa: Information Canada, 1973), p. 130. Although amphetamines were recognized as dangerous, it was recommended that an offence of simple possession *not* be established due to the likelihood of ineffective and discriminatory enforcement of such a provision.
104. See text, *supra*, paras. 414-422.
105. See Lee Paikin, *The Issuance of Search Warrants: A Manual* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1980), p. 41.
106. See note 55, *supra*.
107. *Re Worrall*, [1965] 2 C.C.C. 1 (Ont. C.A.), at p. 5.
108. *Nimbus News*, *supra*, note 101, p. 321.
109. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (Ont. Prov. Ct.).
110. *Ghani v. Jones*, [1970] 1 Q.B. 693 (C.A.), at p. 709.
111. Not one instance of a warrant issued under paragraph 443(1)(c) showed up in the judicial panel sample selected in our warrant survey.
112. These were among the objects commonly cited as seized by peace officers reporting in our warrant survey. See note 55, *supra*.
113. Kaplan, note 37, *supra*, p. 478. See also Frederick Pollock and F. W. Maitland, *The History of English Law*, 2nd ed., vol. 2 (Cambridge: University Press, 1911), p. 474.
114. *Re Hicks and The Queen*, *supra*, note 90, p. 96.
115. See text, *supra*, paras. 423-435.
116. *Criminal Code*, R.S.C. 1970, c. C-34, s. 247.
117. *Criminal Code*, R.S.C. 1970, c. C-34, s. 76.1.
118. See, for example, *The Child Welfare Act*, R.S.M. 1970, c. C-80, s. 9(1).
119. *ALI Code*, *supra*, note 23, s. 210.3(1)(d).
120. *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(a), as amended April 30, 1979.
121. *Eccles v. Bourque, Simmonds and Wise* (1975), 27 C.R.N.S. 325 (S.C.C.), at p. 326.

122. This power was recognized by the Ouimet Committee in its report: *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 59 (hereinafter cited as the "Ouimet Report"). See text, *supra*, Part One, paras. 129-130.
123. See text, *supra*, para. 37.
124. See text, *supra*, Part One, paras. 229-232.
125. Ericson, *Making Crime*, *supra*, note 10, p. 154.
126. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61.
127. *ALI Code*, *supra*, note 23, s. 240.2.
128. See text, *supra*, Part One, paras. 221-225.
129. Ouimet Report, *supra*, note 122, p. 41.
130. Project on Law Enforcement Policy, Arizona State University Law School, "Model Rules for Law Enforcement: Warrantless Searches of Persons and Places" (1973), 9 *Crim. L. Bull.* 645, at p. 680.
131. Ericson, *Making Crime*, *supra*, note 10, p. 154.
132. Arthur Maloney, "The Court and the Police Functions in the Developing of Effective Canadian Corrections" (1960), 2 *Crim. L.Q.* 164, at p. 177.
133. Ouimet Report, *supra*, note 122, p. 119.
134. Harry Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968), p. 76.
135. *Chromiak v. The Queen* (1979), 49 C.C.C. (2d) 257 (S.C.C.).
136. *Criminal Code*, R.S.C. 1970, c. C-34, s. 234.1.
137. See text, *supra*, para. 20.
138. See Martin R. Gardner, "Consent as a Bar to Fourth Amendment Scope — A Critique of a Common Theory" (1980), 71 *J. Crim. L. & Criminology* 443. Gardner's article also canvasses authorities against this position.
139. *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609.
140. *Boudreau v. The King*, [1949] S.C.R. 262, at p. 269.
141. *Goldman v. The Queen* (1979), 51 C.C.C. (2d) 1.
142. *Ibid.*, p. 24.
143. *Rosen v. The Queen* (1979), 51 C.C.C. (2d) 65, at p. 75.
144. *Goldman v. The Queen*, *supra*, note 141, p. 24.
145. *Schneckloth v. Bustamonte* (1972), 412 U.S. 218, at pp. 248-249.

146. See, for example, Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada* (New York: M. E. Sharpe, 1980).
147. RCCP Report, *supra*, note 17, p. 37.
148. Instructions regarding consent search were included in R.C.M.P., *Operational Manual* from "O" Division, circulated in 1977. Other divisions of the R.C.M.P. told our researchers that they did not use such guidelines.
149. David Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell, 1979), p. 61.
150. *Report of the Commission of Inquiry Relating to the Security and Investigation Services Branch within the Post Office Department* (Ottawa: Supply and Services, 1981), p. 159.
151. RCCP Report, *supra*, note 17, p. 37.
152. *Criminal Investigation*, *supra*, note 24, p. 97.
153. *Laporte v. Laganière J.S.P.* (1972), 18 C.R.N.S. 357 (Qué. Q.B.), at p. 365.
154. *Leigh v. Cole*, *supra*, note 61.
155. *Bessell v. Wilson* (1853), 20 L.T. 233.
156. Dangerous driving, according to subsection 233(4) of the *Criminal Code*, R.S.C. 1970, c. C-34, is a hybrid offence; accordingly, an officer could release an accused after arrest under paragraph 452(1)(b).
157. *ALI Code*, *supra*, note 23, s. 230.2
158. This matter is being addressed by the Law Reform Commission of Canada in a separate Working Paper.
159. See *New York v. Belton*, *supra*, note 21; *Robbins v. California*, *supra*, note 20; and *United States v. Ross*, *supra*, note 21.
160. See text, *supra*, paras. 146-147.
161. *Chimel v. California* (1960), 395 U.S. 752, at p. 763.
162. RCCP Report, *supra*, note 17, p. 63.
163. See, for example, *R. v. Stonechild* (1981), 61 C.C.C. (2d) 251 (Man. Co. Ct.) and *R. v. Landry* (1981), 63 C.C.C. (2d) 289 (Ont. C.A.). The latter case, which is on appeal to the Supreme Court of Canada, may conflict with *Eccles v. Bourque, Simmonds and Wise*, *supra*, note 121.
164. See, for example, the dissent of Frankfurter J. in *United States v. Rabinowitz* (1950), 339 U.S. 56, at p. 79.
165. See text, *supra*, paras. 211-219.

166. *Coolidge v. New Hampshire* (1971), 403 U.S. 443.
167. See text, *supra*, paras. 267-270.
168. See text, *supra*, paras. 288-298.
169. See text, *supra*, paras. 32-33.
170. See text, *supra*, Part One, para. 125.
171. See text, *supra*, paras. 32-33.
172. *ALI Code*, *supra*, note 23, s. 230.1(2).
173. *Gottschalk v. Hutton* (1921), 36 C.C.C. 298 (Alta. C.A.), at p. 302.
174. See text, *supra*, paras. 423-435.
175. *United States v. Ross*, *supra*, note 21.
176. *Eccles v. Bourque, Simmonds and Wise*, *supra*, note 121, p. 330.
177. See text, *supra*, Part One, para. 98 for an explanation of why narcotic and drug legislation is considered to be "crime related".
178. See note 97, *supra*.
179. *Criminal Code*, R.S.C. 1970, c. C-34, s. 312; *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 3.
180. See text, *supra*, Part One, para. 54.
181. Search powers related to motor vehicles may be found in provincial liquor legislation. R.S.B.C. 1979, c. 237, s. 67; R.S.A. 1980, c. L-17, ss. 115, 117; 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.
182. *Chambers v. Maroney* (1969), 399 U.S. 42, at pp. 50-51.
183. *ALI Code*, *supra*, note 23, s. 260.3.
184. RCCP Report, *supra*, note 17, p. 30.
185. See text, *supra*, paras. 157-163.
186. *Chromiak v. The Queen*, *supra*, note 135.
187. *Robbins v. California*, *supra*, note 20.
188. *New York v. Belton*, *supra*, note 21.
189. *United States v. Ross*, *supra*, note 21.
190. See text, *supra*, Part One, paras. 55-56.
191. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 60(1)(d).
192. Elisabeth Scarff, Ted Zaharchuk, Terrence Jacques and Michael

McAuley, *Evaluation of the Canadian Gun Control Legislation: First Progress Report* (Ottawa: Supply and Services, 1981), pp. 129-133.

193. *United States v. Rubin*, 474 F. 2d 262 (3d. Circ.) cert. denied (1973), 414 U.S. 833, at p. 268. See also: Linda Mullenbach, "Warrantless Residential Searches to Prevent the Destruction of Evidence" (1979), 70 J. Crim. L. & Criminology 255.
194. RCCP Report, *supra*, note 17, p. 33.
195. *ALI Code*, *supra*, note 23, s. 230.1(1).
196. *Ibid.*, Commentary, p. 263.
197. RCCP Report, *supra*, note 17, pp. 26-27.
198. See text, *supra*, Part One, para. 81.
199. Advisory Committee on Drug Dependence [Home Office], *Powers of Arrest and Search in Relation to Drug Offences* (London: Her Majesty's Stationery Office, 1970), p. 39.
200. Richard V. Ericson, *Reproducing Order* (Toronto: University of Toronto Press, 1982), p. 157.
201. See note 55, *supra*.
202. See text, *supra*, Part One, paras. 19-21.
203. *R. v. Whitfield*, [1970] S.C.R. 46.
204. L. H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975), pp. 50-51. See *Barnett and Grant v. Campbell* (1902), 21 N.Z.L.R. 484 (C.A.) at p. 493, *per* Cooper J.
205. *Dillon v. O'Brien*, *supra*, note 60.
206. The following are examples of things, possession of which constitutes an indictable or hybrid offence under the *Criminal Code*, R.S.C. 1970, c. C-34: a forged passport (s. 58(3)), a concealed weapon (s. 87), a prohibited weapon (s. 88), an unregistered restricted weapon (s. 89), a stolen credit card (s. 301.1), property obtained by crime (s. 312) and counterfeit money (s. 408). In addition, there are the possession offences under section 3 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and sections 34(2) and 41 of the *Food and Drugs Act*, R.S.C. 1970, c. F-27.
207. *Criminal Code*, R.S.C. 1970, c. C-34, s. 450(1)(b).
208. See text, *supra*, para. 158.
209. *The Brixton Disorders, 10-12 April, 1981*, Report of an Inquiry by the Rt. Hon. Lord Scarman, Cmnd. 8427 (1982), pp. 56-61.
210. See, for example, the 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").

211. See, for example, Peter K. MacWilliams, "Illegality of Random Searches" (1979), 27 Chitty's L.J. 199.
212. *Moore v. The Queen*, [1979] 1 S.C.R. 115; *Dedman v. The Queen* (1981), 59 C.C.C. (2d) 97 (Ont. C.A.).
213. See text, *supra*, paras. 257-258.
214. *Re Worrall*, *supra*, note 107, p. 11. Although Roach J.A. was writing in dissent, the majority did not disagree on this point.
215. *Re Den Hoy Gin* (1965), 47 C.R. 89 (Ont. C.A.).
216. See Arthur Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates" (1973), 64 J. of Crim. L. and Criminology 270.
217. *Campbell v. Clough* (1979), 61 A.P.R. 249 (P.E.I. S.C.), at p. 251.
218. See note 55, *supra*.
219. *R. v. Colvin; Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), at p. 11.
220. See text, *supra*, Part One, para. 219.
221. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).
222. See *United States v. Chadwick* (1977), 433 U.S. 1, at p. 9, *per Burger C.J.*
223. See P. A. Kolers, "Readability" in Friedland, *supra*, note 22, pp. 136-8.
224. James Fontana, *The Law of Search Warrants in Canada* (Toronto: Butterworths, 1974), p. 7.
225. *Re Pacific Press and The Queen*, *supra*, note 34.
226. Ericson, *Making Crime*, *supra*, note 10, pp. 152-53.
227. For case-law on forum-shopping in the context of arrest warrants, see *R. v. Allen* (1974), 20 C.C.C. (2d) 447 (Ont. C.A.).
228. Recent Canadian cases on particularity include *Re Abou-Assale and Pollock and The Queen* (1978), 39 C.C.C. (2d) 546 (Qué. S.C.), *PSI Mind*, *supra*, note 59, and *Royal American Shows Inc. v. The Queen*, [1975] 6 W.W.R. 571 (Alta. S.C.).
229. See *The Issuance of Search Warrants*, *supra*, note 105, p. 17.
230. See also the approach of the Advisory Committee on Drug Dependence, *supra*, note 199, p. 42.
231. *Re Newfoundland & Labrador Corp. Ltd.* (1974), 6 Nfld. & P.E.I.R. 274 (Nfld. C.A.).

232. *Re Abou-Assale and Pollock and The Queen*, *supra*, note 228.
233. *Regency Realities Inc. v. Loranger* (1961), 36 C.R. 291 (Qué. S.C.).
234. The judicial panellists evaluating the Montréal documents (and indeed the judicial panel as a whole) were provided with *The Issuance of Search Warrants*, *supra*, note 105, a handbook prepared for the Commission. The handbook outlined all of the relevant cases, including *Abou-Assale* and *Regency Realities Inc.* In evaluating the documents, it is evident that the panellists were inclined towards the stricter view adopted in the latter case. See note 262, Part One, *supra*.
235. *Re Lubell and The Queen* (1973), 11 C.C.C. (2d) 188 (Ont. H.C.), at p. 190.
236. For a discussion of informer privilege, see *Bisaillon v. Keable and Attorney General of Québec* (1980), 17 C.R. (3d) 193 (Qué. C.A.), at p. 232, *per* L'Heureux-Dubé J.A.
237. *Re Newfoundland & Labrador Corp. Ltd.*, *supra*, note 231, p. 281.
238. See *Royal American Shows Inc. v. The Queen*, *supra*, note 228. According to the Laycraft Report, the fact that the basis of the search warrant application was an intercepted communication was unknown to Mr. Justice Cavanagh, who heard the motion to quash the search warrant: *Royal American Shows Inc. and Its Activities in Alberta, Report of a Public Inquiry* (June, 1978), p. B-27.
239. The only exceptions to this rule are found in sections 101, 160, and 281.3 of the *Criminal Code*, R.S.C. 1970, c. C-34.
240. See, for example, *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 24(3).
241. New Brunswick actually retains justice of the peace legislation. *The Justice of the Peace Act*, R.S.N.B. 1952, c. 122, was not consolidated in the 1973 revised statutes, but nor has it been repealed. Justices are simply no longer appointed in the province.
242. Alberta Board of Review, *Administration of Justice in the Provincial Courts of Alberta* (1975), at p. 18 (hereinafter cited as the "Kirby Report").
243. See note 55, *supra*.
244. See sections 455.3, 457, 465, and 720 of the *Criminal Code*, R.S.C. 1970, c. C-34, respectively.
245. Pringle Report, *supra*, note 210, p. 20.
246. Royal Commission of Inquiry into Civil Rights, *Report Number One* (1968), p. 518. (hereinafter cited as the "McRuer Report").
247. *The Crown Attorneys Act*, R.S.O. 1980, c. 107, s. 12(h), and *The Crown Attorneys Act*, R.S.M. 1970, c. C330, s. 6(1)(b).

248. Royal Commission on Justices of the Peace, 1946-48, *Report* (London: Her Majesty's Stationery Office, 1948), and *The Training of Justices of the Peace in England and Wales* (London: Her Majesty's Stationery Office, 1965).
249. *Coolidge v. New Hampshire*, *supra*, note 166.
250. The Kirby Report, *supra*, note 242, and the McRuer Report, *supra*, note 246, are two examples.
251. Kirby Report, *supra*, note 242, p. 20.
252. Law Reform Commission of Canada, *Control of the Process* [Working Paper 15] (Ottawa: Information Canada, 1975), p. 41.
253. ALRC, Report #2, *supra*, note 24, p. 95.
254. See, for example, *People v. Aguirre* (1972), 103 Cal. R. 153. For a discussion of oral search warrant cases, see Paul D. Beechen, "Oral Search Warrants: A New Standard of Warrant Availability" (1973), 21 U.C.L.A. L. Rev. 691, at p. 694.
255. For an excellent example of an oral warrant system at work, see Charles E. Bell, "Telephonic Search Warrants" (1976), 5 San Diego City L. Enforcement Q. 10.
256. Beechen, *supra*, note 254, p. 702.
257. Bell, *supra*, note 255.
258. Hale, *supra*, note 36, p. 150.
259. Hawkins, while speaking expressly of warrants to arrest, encompasses within this subject the warrants to search for stolen goods which Hale had developed. In so doing he concedes that a warrant could be directed to "any constable or even a private person". See William Hawkins, *A Treatise of the Pleas of the Crown*, vol. II, 8th ed. (London: Sweet and Maxwell, 1824), p. 130.
260. *Criminal Code*, R.S.C. 1970, c. C-34, s. 449(3).
261. *Hetu v. Dixville Butter and Cheese Association* (1908), 40 S.C.R. 128, at p. 132.
262. Law Reform Commission of Canada, *Control of the Process*, *supra*, note 252, p. 41.
263. This proposition may be traced to the seventeenth-century philosopher, Thomas Hobbes. See Hobbes, *Leviathan* (London: Penguin, 1968), pp. 227-8, and also Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (New York: Franklin, 1883), p. 184.
264. *Fanning v. Gough* (1908), 18 C.C.C. 66 (P.E.I. S.C.).
265. *R. v. Solloway & Mills* (1930), 53 C.C.C. 271 (Ont. S.C. A.D.).

266. *Re Old Rex Café* (1972), 7 C.C.C. (2d) 279 (N.W.T. Terr. Ct.).
267. *Re Goodbaum and The Queen*, *supra*, note 221.
268. Hale, *supra*, note 36.
269. For example, of the section 443 warrants captured in our survey that were valid by day only, 87% were executed by day. See note 55, *supra*.
270. See the *French Code of Criminal Procedure*, article 59 (12-31-57); the translation used in preparing this study was by Kock, *The French Code of Criminal Procedure* (South Hackensack, New Jersey: Rothman, 1964). Substantial amendments to this Code, sharply curtailing the role of the *juge d'instruction*, were recently introduced, but these did not affect the provisions relevant to the present study.
271. *Crimes Act* 1914 (Cwlth., No. 12), s. 10.
272. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61(4)(b)(ii).
273. William E. Ringel, *Searches & Seizures, Arrests and Confessions* (New York: Clark Boardman, 1972), p. 243.
274. *Regina v. Execu-Clean Ltd.*, unreported, January 30, 1980 (Ont. H.C.).
275. See note 55, *supra*.
276. *R. v. Adams*, [1980] 1 All E.R. 473 (C.A.).
277. See note 55, *supra*.
278. See *The Liquor Control Act*, R.S.M. 1970, c. L160, s. 244(1).
279. See the RCCP Report, *supra*, note 17, p. 36, and the *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61(5)(a)(iii) and s. 61(5)(b)(iv).
280. For other expiry periods see the *ALI Code*, *supra*, note 23, s. 220.2(2)(g) (5 days), and the *American Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(c)(1) (10 days).
281. Metropolitan Toronto Police, *Training Précis, Search of Persons and Premises* (March, 1978), p. 19.
282. See note 55, *supra*.
283. *Chic Fashions (West Wales) Ltd. v. Jones*, [1968] 2 Q.B. 299 (C.A.), at p. 313.
284. See text, *supra*, paras. 316-321.
285. *Stanley v. Georgia* (1969), 394 U.S. 557, at p. 572.
286. See text, *supra*, paras. 267-270.
287. Law Reform Commission of Canada, *The General Part — Liability*

and Defences [Working Paper 29] (Ottawa: Supply and Services, 1982), p. 111.

- 288. See text, *supra*, paras. 271-298.
- 289. See text, *supra*, para. 412.
- 290. *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.). See also *Harbison v. Chicago, R.I. and R.R. Co.* (1931), 37 S.W. Rep. 2d 609 (Mo. Sup. Ct.).
- 291. Ontario Police College, *Probationary Constable Training Outline*, Part A, No. 5, p. 1.
- 292. Metropolitan Toronto Police, *Training Précis, Narcotics & Drugs Programme*, Appendix (September, 1977), pp. 47-48.
- 293. See text, *supra*, paras. 288-298.
- 294. *Semayne's Case* (1603), 5 Co. Rep. 91a, 77 E.R. 194 (K.B.), at p. 195.
- 295. *Wah Kie v. Cuddy (No. 2)* (1914), 23 C.C.C. 383 (Alta. C.A.).
- 296. *Eccles v. Bourque, Simmonds and Wise*, *supra*, note 121, p. 330.
- 297. See *Dunfee v. State* (1975), 346 A. 2d 173 (Del. Supr.), and *U.S. v. Johns* (1972), 466 F. 2d 1364 (C.A. 5th Cir.).
- 298. *U.S. v. West* (1964), 328 F. 2d 16 (C.A. 2d Cir.).
- 299. *Levitz v. Ryan*, *supra*, note 290.
- 300. *ALI Code*, *supra*, note 23, s. 220.3(4).
- 301. On some warrants issued in Montréal at the time of our warrant survey, the "reasonable grounds" on the information were duplicated on the warrant due to use of carbons. However, these grounds were usually specified merely as "police investigation".
- 302. See text, *supra*, paras. 304-315.
- 303. RCCP Report, *supra*, note 17, p. 29.
- 304. *Levitz v. Ryan*, *supra*, note 290.
- 305. See text, *supra*, Part One, paras. 17-27 for our distinction between powers of arrest and search and seizure.
- 306. *Scott v. The Queen* (1975), 24 C.C.C. (2d) 261 (F.C.A.).
- 307. RCCP Report, *supra*, note 17, p. 29.
- 308. *French Code*, *supra*, note 270, arts. 57, 66, and 96.
- 309. Metro Toronto Police, *supra*, note 281, p. 19.
- 310. *Entick v. Carrington* (1765), St. Tr. 1067.
- 311. *Federal Rules of Criminal Procedure* 18 U.S.C. Rule 41(d).

312. RCCP Report, *supra*, note 17, p. 36.
313. See text, *supra*, paras. 131-133.
314. See text, *supra*, paras. 237-238.
315. *Coolidge*, *supra*, note 166, p. 467.
316. *Ibid.*, p. 468.
317. Sheldon R. Shapiro, *Annotation: Search and Seizure: Observation of Objects in "Plain View" — Supreme Court Cases* (1972), 29 L. Ed. 2d 1067, at p. 1069.
318. *Ibid.*, p. 1073.
319. *Coolidge*, *supra*, note 166, pp. 467-68, 471.
320. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(1)(b).
321. *R. v. Jaagusta* (1974), 3 W.W.R. 766; followed in *R. v. Erickson* (1978), 39 C.C.C. (2d) 447 (Ont. Dist. Ct.).
322. Pringle Report, *supra*, note 210.
323. *Ibid.*, pp. 59 and 72. Slightly different instructions, permitting strip searches "on reasonable and probable grounds that the suspect has physical possession of evidence or a weapon", were found in a 1977 divisional R.C.M.P. Operational Manual.
324. See note 55, *supra*.
325. *Ybarra v. Illinois* (1979), 444 U.S. 85.
326. See, *The Brixton Disorders*, *supra*, note 209.
327. *Ybarra*, *supra*, note 325, uses both "reasonableness" and "probable cause" criteria.
328. *Terry v. Ohio* (1967), 392 U.S. 1.
329. RCCP Report, *supra*, note 17, p. 29.
330. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 57(1).
331. See text, *supra*, Part One, para. 81.
332. See notes 23-24, *supra*, as well as sections 101 and 353 of the *Criminal Code*, R.S.C. 1970, c. C-34.
333. This comment may also be directed at section 101, which permits searches without warrant when search with warrant would be impracticable. The history of section 101 discloses that the warrant provision was enacted before the provision for warrantless search and that when the latter was introduced it was envisaged as applicable only in exceptional cases. See text, *supra*, Part One, paras. 173-177.
334. See text, *supra*, Part One, para. 207.

335. Of personal searches in the course of executed *Narcotic Control Act* and *Food and Drugs Act* warrants reported in our warrant survey, 22.4% were reported to involve strip search and 0.1%, internal search. The corresponding figures for other kinds of warrants were 5.3% and 0.5%. See note 55, *supra*.
336. See text, *supra*, para. 273.
337. *Giordano v. State* (1953), 100 A. 2d 31 (Md. C.A.).
338. *Rex v. Gibson* (1919), 30 C.C.C. 308 (Alta. S.C.).
339. *Royal American Shows Inc.*, *supra*, note 228.
340. See text, *supra*, Part One, para. 232.
341. See *State v. De Simone* (1972), 288 A. 2d 849 (N.J. Sup. Ct.), for a discussion of the problem.
342. *Criminal Investigation*, *supra*, note 24, p. 58. The ALRC recommendations were implemented in the *Customs Amendment Act* 1979 (Cwlth., No. 92), s. 6, under which searches of body cavities must be authorized by warrant and carried out by a medical practitioner.
343. Pringle Report, *supra*, note 210, p. 63.
344. Advisory Committee on Drug Dependence, *supra*, note 199, p. 39.
345. Pringle Report, *supra*, note 210.
346. See for example, the Ontario Police College, *Search and Seizure Précis* (1976), p. 31.
347. *Laporte v. Laganière J.S.P.*, *supra*, note 153.
348. *Rochin v. California* (1981), 342 U.S. 165.
349. Louis S. Goodman and Alfred Zack Gilman (eds.), *The Pharmacological Basis of Therapeutics*, 4th ed. (New York: Macmillan, 1970), p. 381 (cocaine), p. 247 (morphine and other opiates), p. 108 (barbiturates).
350. *Scott v. The Queen*, *supra*, note 306, p. 269.
351. See text, *supra*, paras. 271-275.
352. This statement of R.C.M.P. policy was set out in the Pringle Report, *supra*, note 210, p. 60.
353. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.1.
354. *MacIntyre v. Attorney General of Nova Scotia*, *supra*, note 12, p. 194.
355. *Ibid.*, p. 205.
356. *MacIntyre v. Attorney General of Nova Scotia and Grainger* (1980),

38 N.S.R. (2d) 633, at p. 655.

- 357. *MacIntyre v. Attorney General of Nova Scotia*, *supra*, note 12, p. 192.
- 358. *Realty Renovations Ltd. v. Attorney General of Alberta* (1978), 44 C.C.C. (2d) 249, at p. 253. This conclusion was also reached by the British Royal Commission on Criminal Procedure. See RCCP Report, *supra*, note 17, p. 36.
- 359. *Privacy Act*, S.C. 1980-81-82, c. 111, Sch. II, s. 3.
- 360. See the United States *Freedom of Information Act*, Title 5 U.S.C. (1976), s. 552(b)(e)(7) which exempts: "investigatory records compiled for law enforcement purposes ... to the extent that the production of such records would ... constitute an unwarranted invasion of personal privacy."
- 361. *Kimber v. The Press Association Ltd.*, [1893] 1 Q.B. 65 (C.A.), at p. 68.
- 362. *MacIntyre v. Attorney General of Nova Scotia*, *supra*, note 12, p. 191.
- 363. See text, *supra*, paras. 460-468.
- 364. *Canadian Bill of Rights*, s. 1(f). See also the *Canadian Charter of Rights and Freedoms*, s. 2(b).
- 365. *Re F.P. Publications (Western) Ltd. and The Queen* (1979), 51 C.C.C. (2d) 110.
- 366. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 457.2(1) and 467(1).
- 367. Of the 1,879 executed warrants reported in our warrant survey, 14.6% involved searches of telephone companies.
- 368. See, for example, J. S. Williams, *The Legal Protection of Privacy* (Ottawa: Information Canada, 1974).
- 369. See text, *supra*, para. 296.
- 370. *ALI Code*, *supra*, note 23, ss. 280.2(2).
- 371. See text, *supra*, Part One, note 262.
- 372. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 495.
- 373. *Criminal Code*, R.S.C. 1970, c. C-34, s. 629.
- 374. See text, *supra*, Part One, note 262.
- 375. *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C. S.C.), at p. 341.
- 376. 42 U.S.C. 2000 aa 11.
- 377. See text, *supra*, paras. 62-63.

378. *Business Practices Act*, R.S.O. 1980, c. 55, s. 12(1).
379. The Uniform Law Conference of Canada was held in Saskatoon, August 16-25, 1979. The freezing order scheme was adopted by the Criminal Law Section. See the Uniform Law Conference of Canada, *Proceedings of the Sixty-First Annual Meeting* (1979), p. 44.
380. Henderson Report, *supra*, note 92. Attached to the Report was draft legislation. Interim freezing orders were covered in section 6.
381. 18 U.S.C. 1963 (b). For a discussion of the scope of freezing orders under American legislation, see Harry Myers and Joseph P. Brzostowski, *Drug Agents' Guide to Forfeiture of Assets* (Washington: U.S. Gov't. Printing Office, 1981), pp. 331-333.
382. *West Mercia Constabulary v. Wagener*, [1982] 1 W.L.R. 127 (Q.B.).
383. *Criminal Law Amendment Act*, 1978, (Bill C-21), s. 59. The sealing procedure set up by this legislation was endorsed by the Canadian Bar Association in a motion calling for protection of the solicitor-client privilege: Resolution No. 11, passed August 28, 1980.
384. As this Working Paper is being completed, no decision in *Mierzewski* has been delivered by the Supreme Court.
385. *R. v. Colvin*, *supra*, note 219.
386. *Combines Investigation Act*, R.S.C. 1970, c. C-23.
387. *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70 (F.C.A.), at pp. 78-79.
388. *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 232.
389. Manitoba Law Reform Commission, *Report on Enforcement of Revenue Statutes* (1979), pp. 24-25.
390. *Canadian Charter of Rights and Freedoms*, s. 2(b).
391. *Zurcher v. Stanford Daily* (1978), 436 U.S. 547.
392. *The Privacy Protection Act of 1980*, introduced in response to the *Zurcher* case, contains provisions which would in large measure overrule the majority opinion, subject to a number of exceptions, including the need to intervene in cases of national security and danger to human life. It is now unlawful to search for or seize "work product" materials in the possession of journalists: 42 U.S.C. 2000 aa.
393. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 494.
394. See text, *supra*, paras. 324-330.
395. *Senior v. Holdsworth; Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23.
396. *Ibid.*, p. 34.

397. *Reid v. Telegram Publishing Co. Ltd. and Area* (1961), 28 D.L.R. (2d) 6.
398. *McConachy v. Times Publishers Ltd.* (1964), 49 D.L.R. (2d) 349.
399. *Rapport de la Commission d'enquête sur des opérations policières en territoire québécois* (Québec: Gouvernement du Québec, 1981) (hereinafter cited as the "Keable Report").
400. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law* (Second Report); (Ottawa: Supply and Services, 1981) (hereinafter cited as the "McDonald Report").
401. Keable Report, *supra*, note 399, p. 423. McDonald Report, *supra*, note 400, p. 1019.
402. Keable Report, *supra*, note 399, pp. 247-308.
403. *Ibid.*, p. 259.
404. McDonald Report, *supra*, note 400, pp. 115-117.
405. A public submission to the McDonald Commission by the R.C.M.P. concluded that "when the legality of intelligence probes is considered, their legality is less than clear".
406. The McDonald Report's position was criticized in a memorandum, dated June 14, 1981, prepared for the Department of Justice by the law firm of Lang, Michener, Farquharson and Wright. It was released by the Department on August 27, 1981, along with a memorandum by the Honorable Wishart Spence, the former puisne judge of the Supreme Court of Canada.
407. *Re Bell Telephone Company of Canada*, *supra*, note 56, p. 197.
408. *Ghani v. Jones*, *supra*, note 110, and *Eccles v. Bourque, Simmonds and Wise*, *supra*, note 121, are cited in the Lang, Michener memorandum, note 406.
409. *Colet v. The Queen* (1981), 57 C.C.C. (2d) 105 (S.C.C.).
410. *R. v. Dass* (1979), 47 C.C.C. (2d) 194 (Man. C.A.); leave to appeal to the Supreme Court of Canada denied at p. 214 .
411. *United States v. Dalia* (1979), 441 U.S. 238.
412. See, for example, *Wah Kie v. Cuddy (No. 2)*, *supra*, note 295. In American case-law it has been held that the "no knock" rule is not confined to covert entry: *United States v. Dalia*, *supra*, note 411, pp. 247-248.
413. McDonald Report, *supra*, note 400, p. 1019.
414. *Ibid.*, pp. 592-598.

- 415. *Ibid.*, pp. 571-572.
- 416. *Ibid.*, pp. 594-596 and in particular, subsections (2)(a) and 8(c) of the proposed legislation.
- 417. See text, *supra*, Part One, paras. 78-79.
- 418. McDonald Report, *supra*, note 400, pp. 140, 570.
- 419. See text, *supra*, paras. 42-50.
- 420. See text, *supra*, Part One, para. 73.
- 421. McDonald Report, *supra*, note 400, p. 108.
- 422. See text, *supra*, paras. 55-60.
- 423. *MacIntyre v. Attorney General of Nova Scotia*, *supra*, note 12.
- 424. See Recommendations 26, 27, 28, 29, 35 and 36.
- 425. *McDonald Report*, *supra*, note 400, p. 1019.
- 426. *Ibid.*, pp. 115-117.
- 427. *Ibid.*, p. 116.
- 428. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.22. See also Canada, House of Commons, *Standing Committee on Justice and Legal Affairs, Minutes of Proceedings*, June 5, 1973, p. 13: 6 and *House of Commons Debates*, November 27, 1973, p. 8199.
- 429. Louise Savage, "An Analysis of the Federal and Provincial Annual Reports relating to the Use of Court Authorized Electronic Surveillance by Law Enforcement Officials in Canada" (an unpublished study prepared for the Law Reform Commission of Canada, 1979), pp. 69-76.
- 430. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 178.12(3) and 178.23(3).
- 431. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.14.
- 432. See text, *supra*, paras. 55-61.
- 433. See the Keable Report, *supra*, note 399, pp. 241-308, 349-379.
- 434. *Gouled v. United States* (1921), 255 U.S. 298, at p. 306.
- 435. *United States v. Dalia*, *supra*, note 411, p. 247.
- 436. See, for example, Bill C-26, 1977-78, which would have added a mail-opening power to the *Criminal Code*. See also Recommendation 268 of the McDonald Report, *supra*, note 400, p. 1113.
- 437. See text, *supra*, Part One, paras. 84-95.
- 438. See, for example, *Payton v. New York* (1979), 445 U.S. 573, at pp. 583-584.

439. R.S.C. 1970, c. C-40, s. 139.
440. R.S.C. 1970, c. E-12, s. 76.
441. These requirements are set out in the 1980 R.C.M.P. Operations Manual.
442. See text, *supra*, para. 321.
443. See text, *supra*, Part One, para. 71.
444. Solicitor General Robert Kaplan has indicated his willingness to apply greater safeguards, but at the time of completion of this Working Paper, he has not put forward specific proposals. See "Kaplan Pushing to Renovate R.C.M.P. Search and Seizure Power", *Globe & Mail*, October 30, 1981.
445. These proposals were contained in a press release, dated April 6, 1978, issued by the Minister of Justice. See also "Ottawa Retreats from Its Intention to Abolish Long-running Search Writs", *Globe & Mail*, March 14, 1978.
446. *Re Writs of Assistance*, [1965] 2 Ex. C.R. 645.
447. See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, November 26, 1981, p. 56: 38, for statements of Solicitor General Robert Kaplan in this regard.
448. See note 97, *supra*. While 80% of writs reported in our survey resulted in something being seized, 63% resulted in the seizure of the object which the officer specified in his account of the grounds for search. The figures for *Narcotic Control Act* and *Food and Drugs Act* writs are higher: 94% and 71%.
449. See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, November 26, 1981, p. 56: 25. See also the Ouimet Report, *supra*, note 122, pp. 65-67.
450. See text, *supra*, Part One, para. 210.
451. See note 163, *supra*.
452. See text, *supra*, paras. 211-219.
453. Ouimet Report, *supra*, note 122, pp. 65-67.
454. A possession offence was reported in 29% of the 165 instances of writ use, a trafficking offence (including possession for the purpose of trafficking) in 28.5%. Heroin was reported as sought in almost half of the possession cases.
455. ALRC, *Criminal Investigation*, *supra*, note 24, p. 92.
456. Bill C-53, 1980-81, s. 11. [Ed. note: See S.C. 1980-81-82, c. 125, s. 12].
457. But see *R. v. Foster; Ex parte Royal Canadian Legion Branch 177*,

[1964] 3 C.C.C. 82 (B.C. S.C.).

- 458. See text, *supra*, Part One, paras. 145-146.
- 459. Foster, *supra*, note 457.
- 460. Of the searches of bawdy- and gaming-houses reported in the warrant survey, 125 were performed with section 443 warrants, 82 with section 181 warrants. This was largely a product of the situation reported in Montréal, in which the relevant figures were 109 and 55 respectively. Toronto and Edmonton also showed a division of gaming- and bawdy-house searches between section 443 and section 181 warrants. See *supra*, Part One, note 262.
- 461. *Re Sommerville's Prohibition Application* (1962), 38 W.W.R. 344 (Sask. Q.B.), at p. 351.
- 462. *Rockert v. The Queen*, [1978] 2 S.C.R. 704.
- 463. Law Reform Commission of Canada, *Our Criminal Law*, *supra*, note 49, p. 35.
- 464. See text, *supra*, paras. 97-100.
- 465. See text, *supra*, Part One, paras. 178-180.
- 466. Law Reform Commission of Canada, *Theft and Fraud* [Working Paper No. 19] (Ottawa: Supply and Services, 1977), p. 57.
- 467. See, for example, Ontario Police College, *Search and Seizure Précis* (May, 1976), p. 27.
- 468. Statistics provided by Canadian Centre for Justice Statistics.
- 469. *Ibid.*
- 470. See, for example, *The Prevention of Cruelty to Animals Act*, R.S.B.C. 1979, c. 335.
- 471. See note 467, *supra*.
- 472. See note 55, *supra*.
- 473. In what was intended as a pilot study of warrantless search practices, the Law Reform Commission carried out a self-reporting survey in a downtown Toronto division over a ten-day period. Of the 371 person searches and 73 vehicle searches captured, 19.4% and 35.6% respectively were reported as including drugs as an object.
- 474. *Misuse of Drugs Act 1971*, s. 23(3) (U.K.).
- 475. RCCP Report, *supra*, note 17, p. 33.
- 476. *Payton v. New York*, *supra*, note 438, pp. 586-587.
- 477. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 60(1), and ALRC, *Criminal Investigation*, *supra*, note 24, p. 96.

478. *Misuse of Drugs Act 1975*, (Cwlth., No. 112) s. 18(2).
479. See text, *supra*, paras. 147-150.
480. See text, *supra*, Part One, para. 159.
481. *Ybarra v. Illinois*, *supra*, note 325.
482. Pringle Report, *supra*, note 210, p. 70.
483. See note 55, *supra*. Seizures of objects "in clear view" accounted for 47.3% of marijuana seizures and 10% of chemicals seizures. Corresponding figures for "cupboards, drawers, files, etc." were 47.4% and 43.6%.
484. S.C. 1960-61, c. 35, s. 10; S.C. 1960-61, c. 37, s. 1.
485. See text, *supra*, paras. 244-249.
486. See text, *supra*, Part One, para. 139. If the search and seizure powers were removed from the *Narcotic Control Act*, R.S.C. 1970, c. N-1, *Goodbaum*, *supra*, note 221, would arguably lose its value as a precedent and the general rules in the *Criminal Code*, R.S.C. 1970, c. C-34, would be applicable to narcotic searches.
487. See text, *supra*, para. 50.
488. See text, *supra*, paras. 42-44.
489. See, for example, *R. v. Penthouse Magazine* (1977), 37 C.C.C. (2d) 376 (Ont. Co. Ct.).
490. *R. v. Pipeline News* (1971), 5 C.C.C. (2d) 71 (Alta. Dist. Ct.).
491. In *R. v. Penthouse International Ltd.* (1979), 23 O.R. (2d) 786, for example, the Ontario Court of Appeal handed down its decision eighteen months after the seizure.
492. See the Law Reform Commission of Canada, *Study Paper on Obscenity* (December, 1972), p. 66. At pp. 131-134 of the study, there is a tabulation of replies to a survey of local police practices. Only in Ottawa, Ontario, which reported 248 warrants issued under section 160 in 1970, could the use of these warrants be termed frequent. In Montréal, by contrast, one warrant was reported issued in 1971-72, as opposed to 222 section 159 prosecutions.
493. *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 691.
494. This viewpoint may indeed have certain limitations. As Laskin C.J.C. pointed out in his dissent (at p. 682), the focus on the form of a prohibition rather than its substance invites a legislature to attempt by prior restraint what it cannot do by defining an offence and prescribing *post facto* punishment. However, by the same token, the mere fact that legislation is concerned with a subject-matter that could be dealt with

constitutionally under the criminal law power does not mean that the legislation is itself criminal law.

- 495. See, for example, Mark M. Krotter, "The Censorship of Obscenity in British Columbia: Opinion and Practice" (1970), 5 U.B.C. L. Rev. 123.
- 496. W. A. McKean, "The War against Indecent Publications" (1965), 1 Otago L. Rev. 75.
- 497. 18 U.S.C. 1465.
- 498. *Customs Tariff*, R.S.C. 1970, c. C-41, s. 14. "Books, printed paper ... or representations of any kind of a treasonable or seditious, or of an immoral or indecent character" are prohibited under schedule C, No. 99201-1.
- 499. See text, *supra*, paras. 65-69.
- 500. See text, *supra*, Part One, para. 176.
- 501. Martin L. Friedland, "Gun Control: The Options" (1975-76), 18 Crim. L.Q. 29, at p. 36. This article portrays much of the history of gun control legislation in Canada.
- 502. See the memorandum prepared by the National Police Committee for the Protection of Citizens, appended to the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirtieth Parliament, p. 43: 175.
- 503. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 84-87.
- 504. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 88 and 89.
- 505. *First Progress Report*, *supra*, note 192, p. 130.
- 506. See text, *supra*, paras. 46-50.
- 507. Friedland, *supra*, note 501, pp. 40-46.
- 508. *Explosives Act*, R.S.C. 1970, c. E-15.
- 509. *Re Thomson*, *supra*, note 73.
- 510. *Ibid.*, pp. 15-16.
- 511. *Attorney-General of Canada v. Pattison; Attorney-General of Canada v. Metcalfe* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.).
- 512. Metropolitan Toronto Police, *Search of Persons and Premises* (March, 1978), p. 4.
- 513. *Ibid.*, p. 2. While the Metropolitan Toronto Police Department's instruction materials include a restrictive interpretation of section 101, other forces' materials often simply recite the section itself, with its inherent ambiguities. In the *Progress Report* prepared for the Solicitor General, *supra*, note 192, it was noted that the researchers had found "one or two jurisdictions where subsection 101(2) has been

employed to facilitate searches of known or suspected criminals". (*Report*, p. 131).

514. See Recommendations 2, 7, 8, 9 and 46 in particular.
515. See text, *supra*, Part One, paras. 129-130.
516. A noted proponent of "internal controls" is Professor David Bayley of the University of Denver, whose paper "American, Japanese and Western European Systems of Accountability over the Police", as yet unpublished, was presented at the International Conference on Police Accountability at the University of British Columbia, January 30, 1980. See also, Bayley, "The Limits of Police Reform" in *Police and Society*, edited by D. Bayley (Beverly Hills: Sage Publications, 1977), p. 219.
517. See text, *supra*, Part One, para. 226.
518. In addition to challenging a search perceived to be illegal after the fact, an individual could try to prevent it either through physical obstruction or a court injunction: *Solloway Mills & Co. v. Attorney General of Alberta* (1930), 53 C.C.C. 306 (B.C. C.A.). In the former case, the alternative is both physically and legally risky; the latter is of limited effectiveness since it permits peace officers to return to search if they subsequently obtain proper authorization.
519. See text, *supra*, Part One, para. 97-100.
520. See, for example, "Charges of Mayhem on the Beat", *MacLeans*, March 15, 1982, p. 51.
521. *R. v. Coutellier, Cobb and Cormier*, unreported, June 16, 1977 (Qué. Sess. Ct.).
522. Weiler, *supra*, note 35, pp. 443-44.
523. James Spiotto, "The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule", [1973] 1 J.P.S.A.A. 36, at p. 47.
524. The information as to all civil and criminal proceedings initiated against R.C.M.P. members was obtained from the R.C.M.P.'s own national files by Commission research personnel. Only actions involving challenges to legality were taken into consideration. Thus, civil suits that involved, for example, claims for damages incurred during execution of a search or by virtue of detention of goods seized, were excluded from the study if the claims conceded, or refrained from questioning, the legality of the R.C.M.P. members' actions. The study covered all challenges made that resulted in the opening of an R.C.M.P. file at headquarters during the years 1978 and 1979.
525. *R. v. Ella Paint* (1917), 28 C.C.C. 171 (N.S. C.A.).
526. *Coutellier, Cobb and Cormier*, *supra*, note 521.

527. For an excellent discussion of complaint procedures, see Goldstein, *supra*, note 11, pp. 157-186.
528. The R.C.M.P. did not keep national files for complaints made against its members that did not involve civil or criminal proceedings. However, a study of complaints made against the force nation-wide was completed by its own Internal Affairs Branch in the winter of 1980. The study covered a six-month period ending on September 30, 1979, during which 1,042 complaints were received. Of these, 26 related to searches and 18 to seizures. The results of the study received by the Commission did not distinguish between searches executed with or without warrants or writs of assistance.
529. Spiotto, *supra*, note 523, p. 47.
530. Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police, *Report* (Ottawa: Information Canada, 1976), p. 50.
531. See, for example, Herman Goldstein, "Administrative Problems in Controlling the Exercise of Police Authority" (1967), 58 Jour. of Crim. Law, Crimin. and Pol. Sc. 160, at pp. 167-168.
532. *Cave v. Mountain* (1840), 1 Man. & C. 257, 133 E.R. 330 (C.P.).
533. *Re Alder and The Queen* (1978), 37 C.C.C. (2d) 234 (Alta S.C.), at p. 252.
534. *Den Hoy Gin*, *supra*, note 215.
535. *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, [1964] 3 C.C.C. 381, at pp. 386-387.
536. For example, see the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 3; *The Justices and Magistrates Protection Act*, R.S.N.S. 1967, c. 157, ss. 2 and 3; and *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, ss. 4 and 5.
537. See *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 37; *The Provincial Court Act*, S.A. 1971, c. 86, s. 15(3); and *The Provincial Judges Act*, S.M. 1972, c. 61, s. 12.
538. Weiler, *supra*, note 35, p. 445.
539. *Ibid.*, p. 448.
540. See *supra*, note 524.
541. Spiotto, *supra*, note 523, p. 45.
542. *Ibid.*
543. *Ibid.*
544. Weiler, *supra*, note 35, p. 449.

545. A recent book on topic is Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada*, *supra*, note 146. See also Ericson, *supra*, note 10, p. 138.
546. [1971] S.C.R. 272, 293 *per* Martland J. This position has been codified in section 22 of the *Canada Evidence Act, 1982* (Bill S-33), introduced in the Senate and given first reading in Parliament on 18 November 1982.
547. *R. v. Kehr* (1906), 11 O.L.R. 517 (Ont. Div. Ct.).
548. *Bergeron v. Deschamps* (1977), 33 C.C.C. (2d) 461 (S.C.C.).
549. *Re Black and The Queen* (1973), 13 C.C.C. (2d) 446 (B.C. S.C.).
550. *Re Alder and The Queen*, *supra*, note 533, p. 251.
551. *Re Model Power (A Division of Master Miniatures Ltd.) and The Queen*, unreported, October 1, 1979 (Ont. H.C.); affirmed January 25, 1980 (Ont. C.A.); leave to appeal denied March 11, 1980 (S.C.C.). *Re Atkinson and The Queen* (1978), 41 C.C.C. (2d) 435 (N.B. S.C.); *Re Barton* (1979), 60 A.P.R. 631 (N.B. Q.B.); *R. v. Pomerleau*, unreported, February 14, 1979 (Qué. C.A.).
552. *Capostinsky v. Olsen*, unreported, April 3, 1981 (B.C. S.C.).
553. *Re Butler and Butler and Solicitor General* (1981), 61 C.C.C. (2d) 512 (B.C. S.C.).
554. *Re Black and The Queen*, *supra*, note 549.
555. See, for example, *Elkins v. United States* (1964), 364 U.S. 206, at p. 217.
556. See, for example, *Stone v. Powell* (1976), 428 U.S. 465, at pp. 482 (*per* Powell J.) and 498 (*per* Burger C.J.).
557. See, for example, J. David Hirschel, *Fourth Amendment Rights* (Lexington: D.C. Heath, 1979).
558. Goldstein, *supra*, note 531, pp. 171-172.
559. *MacIntyre v. Attorney General of Nova Scotia*, *supra*, note 12.
560. Laycraft Inquiry, *supra*, note 238.
561. Pringle Report, *supra*, note 210.
562. See notes 399 and 400, *supra*.
563. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Police* (Washington: U.S. Government Printing Office, 1967), p. 34.
564. *First Progress Report*, *supra*, note 192.

565. *Ibid.*, p. 131.

566. *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(14).

PART THREE:

SUMMARY

OF

RECOMMENDATIONS

Things, Funds and Information

1. To accord with modern techniques of acquiring and storing things and information, it should be specified that powers of seizure may authorize:

- (a) taking photographs of a thing which is an “object of seizure”;**
- (b) obtaining records which are “objects of seizure”, regardless of the physical form or characteristics of the storage of the records; and**
- (c) acquiring control over funds which are “objects of seizure” in financial accounts.**

Objects of Seizure

2. “Objects of Seizure” means things, funds and information which are:

- (a) takings of an offence;**
- (b) evidence of an offence; or**
- (c) possessed in circumstances constituting an offence.**

“Takings of an offence” means stolen property or other property taken illegally from the victim of an offence. It includes property into, or for which, takings of an offence originally in the possession of an individual have been converted or exchanged.

Persons Illegally Detained

3. In addition to their powers regarding “objects of seizure”, peace officers should be empowered to search for and rescue persons detained in circumstances constituting an offence.

Exceptions to the Warrant Requirement

4. Unless otherwise specified, peace officers should only be empowered to search for or seize “objects of seizure” with a warrant. A warrant should not be required:

- (a) for a search performed with consent obtained pursuant to Recommendations 5 and 6;
- (b) for a search and/or seizure following arrest as specified in Recommendations 7 and 8;
- (c) for a search and/or seizure in circumstances of danger to human life or safety, as specified in Recommendation 9;
- (d) for a search of a movable vehicle in circumstances of possible loss or destruction of “objects of seizure”, as specified in Recommendation 10; and
- (e) for a seizure of “objects of seizure” in plain view, as specified in Recommendation 30.

Consent

5. A peace officer should be authorized to search without a warrant:

- (a) any person who consents to a search of his person; and
- (b) any place or vehicle, with the consent of a person present and ostensibly competent to consent to such a search.

A peace officer should be empowered to seize any “objects of seizure” found in the course of a consent search.

6. The consent should be given in writing in a document warning the person of his right to refuse to consent and to withdraw his consent at any time. The absence of a completed document should be *prima facie* evidence of the absence of consent.

Arrest

7. Peace officers should be empowered to search a person who has been arrested if such a search would be reasonably prudent in the circumstances of the case. This power should be extended to spaces within the person’s reach at the time of the search.

8. In addition to “objects of seizure”, a peace officer arresting an individual should be empowered to seize:

- (a) anything necessary to identify the arrested individual; and

- (b) any weapon or other thing that could either assist the arrested individual to escape or endanger the life or safety of the arrested individual, the peace officer or a member of the public.

Where Delay Is Dangerous to the Life or Safety of Persons

9. Where a peace officer believes on reasonable grounds that:

- (a) an "object of seizure" is to be found on a person or in a place or vehicle; and
- (b) the delay necessary to obtain a warrant would result in danger to human life or safety,

he should be empowered to search for and seize the "object of seizure" without a warrant.

Searches of Vehicles where Delay Risks the Loss or Destruction of Objects of Seizure

10. Where a peace officer has arrested a person who is in control of, or an occupant of, a movable vehicle, and believes on reasonable grounds that:

- (a) an "object of seizure" is to be found in the vehicle; and
- (b) the delay necessary to obtain a warrant would result in the loss or destruction of the "object of seizure",

he should be empowered to search for and seize the "object of seizure" without a warrant.

Issuance of Warrants

11. A justice of the peace should be empowered to issue a warrant to search a person, place or vehicle if there are reasonable grounds to believe that the person, place or vehicle is carrying, containing or concealing an "object of seizure".

12. Except as authorized in the telephonic warrant procedures set out in Recommendation 19, the application for all search warrants should be an information in writing sworn under oath. The issuer

should be empowered to question the applicant to ascertain additional facts underlying the application. However, if such facts are relied upon in the adjudication of the application, they should be attested to on the face of the information.

Documentation

13. Standard statutory forms should be drafted so as to eliminate the problems of improvised drafting that currently exist. These forms, unlike the current Form 1, should truly guide the officer in setting out the details the law requires. “Legalese” should be rejected in favour of comprehensible language. Guidelines used by the police should stress the need for thoroughness on the information and warrant rather than on exclusively administrative documents.

Judicial Discretion and Refusal to Issue a Warrant

14. A peace officer applying for a warrant should be required to disclose on the information form any previous applications made with respect to the same warrant (*viz.* a warrant to search the same person, place or vehicle for “objects of seizure” related to the same or a related transaction).

The Test to Be Met

15. A peace officer applying for a warrant should not be required to reveal facts disclosing the identity of confidential sources. However, this policy should not permit warrants to be issued on the basis of applications that fail to meet the “reasonable ground” test.

16. Section 178.2 of the *Criminal Code* should be amended so as to make clear that peace officers are not precluded from disclosing facts obtained from an intercepted private communication in the course of search warrant applications.

The Issuer

17. The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. Steps should

be taken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the *Criminal Code*. New provincial initiatives should be undertaken to examine the office of justice of the peace and either abolish or reorganize it where necessary.

The Participation of Crown Counsel

18. More use of Crown or private police counsel would improve the quality of applications for warrants. However, the Crown's participation in the process should remain discretionary. While issuers of warrants should remain free to request the Crown's participation in appropriate cases, the Crown should be a submitter rather than an adviser to the issuer.

The Telephonic Warrant

19. A telephonic warrant procedure, similar to that set out in the American Federal Rules, should be instituted in Canada. It should be available only when grounds exist to obtain a warrant under Recommendation 11 but resort to conventional procedure is impracticable. Safeguards should be implemented to ensure that a record of the proceedings is subsequently made available to persons affected, and that the warrant used by the officer is identical to that authorized by the issuer.

Execution of Warrants

20. Private individuals should continue to be entitled to apply for search warrants. Once the issuer has decided to authorize a search, however, the responsibilities of execution should lie entirely with peace officers. Peace officers should be empowered to bring into the place or vehicle to be searched any private individual whose presence is reasonably believed to be necessary to the successful execution of the warrant.

Which Peace Officer May Execute the Warrant?

21. It should be legally permissible for any peace officer within the territorial jurisdiction of the issuer to execute a search warrant.

Daytime or Night-time Execution

22. Warrants should authorize execution by day only, unless the applicant shows reasonable cause for allowing execution by night.

Deadline for Execution

23. A warrant should expire after eight days, but an applicant should be entitled to apply for a new warrant if grounds for search still exist after this period.

Scope of Search and Seizure with Warrant

24. A peace officer executing a search warrant should be empowered to search only those areas, within the places and vehicles or upon the persons mentioned in the warrant, in which it is reasonable to believe that the objects specified in the warrant may be found. A peace officer performing such a search should be empowered to seize, in addition to “objects of seizure” specified in the warrant, other “objects of seizure” he finds in plain view.

The Use of Force

25. The use of force should continue to be governed generally by the standards presently set out in subsection 25(1) of the *Criminal Code*, which recognize that a peace officer, if he acts on reasonable and probable grounds, is justified in using as much force as is necessary.

Unannounced Entry

26. In the absence of circumstances justifying either unannounced or forceful entry into private premises, a peace officer should be required to make a demand to enter in all cases. If an occupant does not comply with the demand within a reasonable time, the officer should be empowered to use force to gain entry.

Duties toward Individuals Affected by the Search or Seizure

27. Where a peace officer makes a search or seizure with a warrant, he should be required, before commencing the search or as

soon as practicable thereafter, to give a copy of the warrant to the person to be searched, or to a person present and ostensibly in control of the place or vehicle to be searched. A copy of the warrant should be suitably affixed within any place or vehicle that is unoccupied at the time of the search or seizure.

28. Where practicable, a person present and ostensibly in control of a place or vehicle should be entitled to observe the search.

29. If objects are seized in the course of a search, the individual affected should be entitled to receive an inventory of these objects on request. If the owner of the objects seized is known to be a different person from the individual whose place, person or vehicle is searched, he should be provided with an inventory without the necessity of a request. The extent of detail on the inventory should be that which is reasonable in the circumstances.

The “Plain View” Doctrine

30. If a peace officer, in the course of a lawful search or otherwise lawfully situated, discovers “objects of seizure” in plain view, he should be empowered to seize them without a warrant. In such cases, a post-search report should be filed, as specified in Recommendation 37.

Searches of Persons

31. A peace officer may search a person:

- (a) named in a search warrant;
- (b) found in a place or vehicle specified in a search warrant if:
 - (i) there is reasonable ground to believe that the person is carrying an object of seizure specified on the warrant; and
 - (ii) the issuer of the warrant has authorized the search of persons found in the place or vehicle on the face of the warrant; or
- (c) pursuant to the powers of search without warrant set out in Recommendations 5-10.

However, no “medical examination” or mouth search may be conducted except as provided in Recommendations 32 and 33.

32. No activity involving the puncturing of human skin should be authorized under search and seizure law. A “medical examination” (viz. a sexually intimate search, examination of the naked body or probing of body cavities not involving puncturing the skin) should be authorized only:

- (a) in connection with an offence of a serious nature specified by Parliament;**
- (b) pursuant to a specific warrant naming the person to be examined;**
- (c) if performed by a qualified medical practitioner; and**
- (d) if conducted in circumstances respectful of the privacy of the person to be examined.**

33. A search of the mouth of a person should be authorized only:

- (a) in connection with an offence of a serious nature specified by Parliament;**
- (b) if performed in a manner not dangerous to human life or safety;**
- (c) on the condition that the peace officer performing the search complete a post-search report, as set out in Recommendation 37.**

Search with Warrant

34. An issuer of a search warrant should be empowered to exclude persons from a search warrant hearing where it appears to him that the ends of justice will best be served by making such an order.

35. An individual affected by a search or seizure with warrant should be entitled to inspect the warrant and supporting information upon oath immediately after the execution of the warrant. Other persons should be granted access to these documents but should be subject to a prohibition against publishing or broadcasting their contents until:

- (a) upon application by an individual affected, the prohibition is revoked by a superior court judge or judge as defined in section 482 of the *Criminal Code*;**
- (b) the individual affected is discharged at a preliminary inquiry; or**

- (c) the trial of the individual affected is ended.

36. If the release of either an information or warrant would be likely to reveal the existence of electronic surveillance activities, the issuer of the warrant, upon application by the Crown or a peace officer, should be empowered to obscure any telephone number mentioned on the document and replace it with a cypher. Similarly, if the identity of a confidential informant would be jeopardized, the peace officer or issuer should be empowered to obscure the name or characteristics of the informant and replace them with a cypher. In either case, upon so doing, the issuer should attest on the document that the only facts so obscured are the digits of a specific telephone number or name and characteristics of an informant, as the case may be.

Search without Warrant

37. A peace officer should be required to complete a post-search report in the following circumstances:

- (a) where objects are seized without warrant;
- (b) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to Recommendation 24;
- (c) where a search of a person's mouth is conducted, pursuant to Recommendation 33.

The report should include the time and place of the search and/or seizure, the reason why it was made and an inventory of any items seized. It should be available on request to an individual affected by the search or seizure described in the report.

The Unsuspected Party

38. Where a party in possession of "objects of seizure" is not suspected of being implicated in the offence to which the search relates, an officer executing the search should be required generally to request the party to produce the specified objects. The officer should be empowered to conduct the search himself if:

- (a) the party refuses to comply with the request within a reasonable time; or
- (b) there is reasonable ground to believe that a request will result in the destruction or loss of the specified objects.

Financial Accounts

39. Where “objects of seizure” are reasonably believed to be in a financial account, the police should be empowered to obtain a warrant to transfer the amount of the seizable funds to an official police account under judicial control. A temporary freezing order on a financial account should be made available where police officers seize financial records that are reasonably believed to contain information that will enable them to apply for a warrant to seize funds in the account. The freezing order should be of fixed duration and limited by the amount of the seizable funds. It should be obtainable from a superior court judge or a judge designated under section 482 of the *Criminal Code*, and subject to an immediate right on the part of the individual concerned to apply for its revocation.

Solicitor-Client Privilege

40. The sealing and application procedures set out in Bill C-21, proposed in 1978, should be instituted with two new provisions — the protection should extend to materials in possession of the client as well as the solicitor, and counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application.

Searches of the Press and Other Media

41. The press should have no special protections against unreasonable search and seizure, other than those conferred by the *Charter* and by these recommendations.

Surreptitious Intrusions

42. Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Absent compelling evidence of the need for such sacrifices, the modifications should not be made in the context of criminal or crime-related investigations.

Writs of Assistance

43. The writs of assistance under the *Narcotic Control Act*, *Food and Drugs Act*, *Customs Act* and *Excise Act* should be abolished.

Other Special Powers

44. The following special provisions should be abolished:

- (a) bawdy- and gaming-house powers — section 181 of the *Criminal Code*;**
- (b) warrants for women in bawdy-houses — section 182 of the *Criminal Code*;**
- (c) special interrogation procedures for persons found in disorderly houses — section 183 of the *Criminal Code*;**
- (d) precious metals warrants — section 353 of the *Criminal Code*;**
- (e) powers to search for stolen timber — subsection 299(3) of the *Criminal Code*;**
- (f) powers to seize cocks in a cockpit — section 403 of the *Criminal Code*;**
- (g) powers to seize counterfeit money — section 420 of the *Criminal Code*;**
- (h) powers relating to narcotics and drugs — section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*.**

Obscene Publications, Crime Comics and Hate Propaganda

45. Special warrant provisions for obscene publications, crime comics, and hate propaganda should be regarded as regulatory provisions rather than legitimate components of criminal procedure. Accordingly, if they are to be retained, they should be incorporated into regulatory legislation and removed from the *Criminal Code*.

Weapons

46. Powers to seize firearms currently authorized under sections 99 and 100 of the *Criminal Code* are subsumed in the Recommendations set

out above. Section 101 of the *Criminal Code* is not a valid mechanism for the enforcement of criminal law. However, it may serve legitimate objectives as a regulatory instrument of gun control. The section should be redrafted in this light so as to:

- (a) tie the search and seizure sections more firmly to *in rem* confiscation provisions; and
- (b) permit a search to be performed only when there is a reasonable belief that the person concerned is in possession, custody or control of a weapon.

Enforcing the Rules

47. A procedure should be instituted to implement the principle that illegally obtained evidence should not be admitted at trial, where its use as such would tend to bring the administration of justice into disrepute. The details of this procedure will be developed in the Working Paper on Post-Seizure Procedures.

48. Consideration should be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.