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PART TWO:

DEVELOPING A NEW REGIME

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CHAPTER FOUR

The Approach to Reform

I. Limits of Law Reform

1. The focus of this Working Paper is the reform of legal rules governing crime-related powers of search and seizure. This focus both reflects and entails the acceptance of certain limitations. Among these is the jurisdictional limitation discussed earlier: the recognition that legal powers under provincial as well as federal legislation are used by peace officers to enforce the criminal law.¹ Other limitations upon our task bear on the relationship between procedural law and criminal law enforcement practice. We recognize that there is a point at which rules of criminal procedure must allow for the disparate influences of the institutions and localities by, and in which, the criminal law is enforced. And we must also take account of the limited value offered by legal reform in itself as a solution to problems of police practice.

A. Disparate Influences

2. Rules of criminal procedure aim in part to standardize the practices they govern. The extent to which the standardizing impulse is carried in a particular regime is reflected in the detail to which these rules are reduced. It would be possible to devise a set of rules governing crime-related powers of search and seizure so thorough that if put into practice, they would make uniform, say, the fine print

on an inventory of items seized from Bonavista, Newfoundland to Vancouver, British Columbia. We believe, however, that such a set of rules would be undesirable, for it would be insensitive to the legitimate influences that various institutions and localities bring to the enforcement of criminal law.

3. Policing in Canada is organized and maintained at federal, provincial and municipal levels. This complex situation reflects constitutional allocations of jurisdiction. On the one hand, law enforcement within each province has been viewed primarily as a matter coming within the classification of "administration of justice", which is assigned to provincial legislatures under subsection 92(14) of the *Constitution Act, 1867*. As a result,

each province has enacted legislation placing obligations for policing and the maintenance of law and order on local authorities, such as municipalities, and others. These obligations have then been discharged, in certain cases, by the creation of municipal and provincial police forces or, by contracting for the supply of policing services from the provincial police force (if there is one) or from the R.C.M.P.²

In addition to decisions respecting policing, subsection 92(14) gives the provinces responsibilities for the administration of the system of officials assigned the warrant issuing functions of justices of the peace.³

4. On the other hand are the responsibilities assumed by the Royal Canadian Mounted Police. As well as performing a contractual role in provincial policing, the R.C.M.P. fulfils certain responsibilities of a national character, including the enforcement of federal statutes other than the *Criminal Code*, the policing of the Northwest Territories and the Yukon, and the protection of national security.* Constitutional authority for these duties has been perceived to derive from the "peace, order and good government" clause in section 91 of the *Constitution Act, 1867*.

5. This state of different levels and structures of policing produces certain variations in practice, orientation and capability, which may reflect on the search and seizure activities carried out by a particular force. For example, the Royal Canadian Mounted Police has been associated with a distinct capability of policing sophisticated non-violent property crimes, an orientation that entails relatively frequent seizures of business records. Small local forces, on the other

* Since this Working Paper was drafted, Bill C-157, which would significantly modify the role of the R.C.M.P. as regards national security, was introduced in Parliament.

hand, may be directed towards little more than a “watchman” function, using motor vehicle checks to monitor individuals within their jurisdictions.⁴ Even when performing similar functions, the R.C.M.P. is often seen to be more technical and regulated in its approach than municipal forces.⁵

6. This assortment of policing structures complements other variables pertaining to the areas and communities within Canada in which criminal law and procedure are applied. The size, history and composition of the community served by a police force, and the patterns of criminal activity peculiar to it, all contribute significantly to the character of local law enforcement. On the question of community size, for example, the Task Force on Policing in Ontario observed that while there was evidence of a breakdown of communication between the police and individuals in larger centres, closer relationships were being maintained in smaller communities.⁶ This state of relations affects the degree to which police feel it appropriate to resort to specific powers as opposed to less formal, consensual approaches. In interviews with police officers in various Canadian forces, Commission researchers were told of the increased likelihood of obtaining citizen co-operation in rural settings.

7. The delicate task in developing rules of search and seizure is to strike the correct balance of standardization. In exercising restraint in this regard, we do not diminish the importance of police accountability for law enforcement policies and activities; rather, we recognize that such accountability may be achieved at the institutional and local levels as well as through a federally imposed system of procedural rules. But even this limited position assumes that changing or imposing legal rules is meaningful in defining actual police practice. It is to this assumption that we now turn.

B. Legal Rules and Actual Practice

8. That legal rules do not necessarily govern the practice of law enforcement is hardly a controversial proposition. In the present context of search and seizure powers, we have already referred to the empirical studies which show widespread deviation from warrant standards,⁷ and acknowledged that warrantless powers are difficult to monitor.⁸ One might wonder accordingly whether changing the rules could have any meaningful impact on existing problems. In order to

address this issue, it is useful to consider certain aspects of the relationship between police powers and police practice.

9. Rules defining police powers have a specific function in Anglo-Canadian tradition — they set out exceptions to the ordinary prohibitions against intrusions upon an individual's person, private domain and possessions.⁹ While this function is a critical one it is also in a sense quite modest. Our legal tradition does not purport to devise permissible enforcement strategies or define situations in which intrusions *should* be performed. Rather, it establishes when intrusions *may* be performed, by requiring that when law enforcement officers determine to pursue an investigation through an intrusive action, they justify the intrusion, obtain the proper authorization and perform it within the limits set down in the law.

10. Accordingly, it has been observed by social scientists that legal rules serve a secondary, “enabling” function:

[A]ccording to legal ideas, the enforcement of the criminal law is supposed to be governed by the rule of law and the principle of legality....

In practice, the system operates according to men who use laws to accomplish their enforcement tasks. The law is very enabling in this respect, because it is effectively formulated for the pragmatic use and benefit of law enforcement agents, allowing them to accomplish crime control in accordance with their organizational interests.¹⁰

That law enforcement personnel “use laws to accomplish their enforcement tasks” is not in itself an alarming notion. Indeed, so long as the law “used” by police in turn exerts control over their resort to intrusive conduct, the situation is quite consistent with the tradition of the rule of law. The problem begins if and when the law ceases to exert this control and becomes instead a set of rules with merely symbolic value.

11. How does procedural law, so to speak, lose its grip? A number of factors are relevant. Particularly in the case of warrantless powers, the application of rules is confided to police personnel whose experience and involvement in an investigation cannot be realistically separated from their decision-making tasks. Peace officers often advert to proceeding on “gut feelings” that defy quantification. Yet although the peace officer's frame of reference is instinctive, the law envisages him applying legal criteria, often elaborate in nature, to his decision to intrude.

12. Another problem resides in the inevitable gaps and conflicts in the factual pictures to which the law must be applied. Whether or

not a warrant is used, it is often difficult to be assured of achieving accurate conclusions as to the basis upon which, and the manner in which, the intrusion took place. As one commentator has observed:

That otherwise honorable citizens resort to lying as a defense against police is well established. It is also clear that some police officers lie to justify action they have taken. The task of getting at the truth is further complicated because many of the people with whom the police have contact are unscrupulous individuals. Hard-core criminal offenders do not hesitate to make a false allegation if they think it might help to cloud the issue of their own guilt.¹¹

Where the ambiguity or conflict in a factual picture relates to the application of a police power, effective review or monitoring of the power becomes difficult.

13. In practice, particularly at the search and seizure stage of an investigation, peace officers have considerable control over the factual pictures that determine the application of their legal powers. Detectives in particular work in conditions of “low visibility” to the outside world, and indeed other officials, such as superior officers and warrant-issuers, rely heavily on the investigator’s account. Although recent developments have opened documentation from search warrant proceedings to public scrutiny and hence introduced higher visibility into these proceedings,¹² the facts that underline an investigation and, indeed, a consequent decision to apply for a search warrant inevitably will and must remain within the primary control of the police. This state of control admits the possibility of manipulation of facts and inferences to obtain the legal authorization for, or subsequent condonation of, intrusive police activity.

14. Finally, there is the fact that not only police strategies but also police objectives may be defined outside rules of criminal procedure. Just as the criminal law is sometimes enforced through the use of search and seizure powers in regulatory legislation, so too the powers afforded in criminal procedure are subject to use for the broader purposes of order maintenance, which are not strictly related to criminal law enforcement.¹³ The resort to crime-related search powers to serve such purposes is as inevitable as the discretion built into these powers. Insofar as such purposes continue to inform the use of crime-related search and seizure powers, it is evident that reform of these powers will be of limited impact on police practice.

15. It would be naïve to expect that the tensions between law and practice would be completely resolved through alteration of the existing legal rules; to address these tensions comprehensively, one must delve into the administrative and policy structures governing

police work. But this does not make reform of the rules a worthless task. Even those commentators who have argued for an emphasis on extra-legal initiatives to address police discretion concede that there is merit in clearly defining the scope of the legal powers conferred upon the police.¹⁴ Indeed, insofar as the legal rules are obsolete and confused, they may be perceived as inviting the disregard or manipulation they sometimes receive at the hands of the police.

16. Moreover, to concede that police practice inevitably will diverge from the law to some degree does not justify a refusal to strive to ensure that it complies with the law to the greatest extent possible. The ideal of a criminal law enforcement system in which agents of the State are confined to the exercise of powers accorded by law has been implicit in the traditional notion of the rule of law which pre-existed Canadian Confederation.¹⁵ If this ideal model has not been attained, nevertheless it has served historically as a valuable goal for the participants in this system. That this goal is still a valid one is underlined by two provisions of the new *Canadian Charter of Rights and Freedoms* which have been already discussed: section 7, which articulates the right to liberty and security of the person, and section 8, which affords security against unreasonable search or seizure.¹⁶ To assert the uncontrollability of police discretion by legal rules is to concede that these provisions, as well as the procedural rules for crime-related searches and seizures, are meaningless symbols. We neither make nor accept this concession.

II. Guidelines for Law Reform

A. Codification

17. The present law of search and seizure is complicated by the coexistence of common law and statutory sources of authority. We believe that it would be beneficial to move to a purely statutory scheme of law. This is not to suggest that the content of common-law rules ought to be discarded; rather, the intention is to incorporate those valuable policies and procedures presently found in the common law into a harmonious and coherent code of crime-related powers of search and seizure.

18. There are a number of reasons why extra-statutory powers ought not to be maintained. The first of these is the need for clarity. In its recent Report, the Royal Commission on Criminal Procedure examined search and seizure law in England and Wales and concluded:

A principal theme of the evidence put to us has been the need to place on a rational basis and bring into line with modern conditions these procedures and practices, some of which date at least from the last century and in which anomalies are apparent. There is a consensus in favour of codification and rationalisation of the provisions.¹⁷

While Canada has not experienced problems of vague, expanded common law powers to the same degree as England, there is still a sufficient degree of uncertainty in some areas to justify taking a similar approach to that of the Royal Commission. For example, the permissible ambit of the search incidental to arrest, while generally conceded to extend to areas within the individual's control, remains undefined. And the parameters of common law "consent" search by the police — questions such as when it may be performed and what may be seized — have never been addressed thoroughly by Canadian courts.

19. The current situation regarding "consent" search also points to another problem with extra-statutory powers — the absence of generally applicable procedural safeguards. If it is accepted that certain conditions should be satisfied when the police request individuals to consent to infringements on their person, private domains or possessions, then it becomes useful to articulate these conditions in legislation. While it may be beneficial to allow procedures to be accommodated to differing local traditions and conditions, the present law goes much further than this; it permits individual police forces to decide whether the individual will be granted any measure of protection at all. Indeed, the absence of standard procedures is not only detrimental to the interests of individuals; some peace officers interviewed by Commission researchers were concerned that their tasks were made more difficult by the absence of clear guidelines.

20. In addition, some degree of significance should be attached to the introduction of constitutional protection against "unreasonable search and seizure".¹⁸ While the fact that a search or seizure power is granted at common law does not render that power "unreasonable", it may admit a heightened potential for uncertainty as to the limitations governing the exercise of the power. This may be particularly the case where the power is a warrantless one; the removal of warrant

protections, which incorporate certain “reasonableness” features, may be perceived to create some onus to ensure that similar or substitute features are built into the warrantless power. The most effective context for meeting this onus is a statutory regime.

21. The advantages of codification have been expounded for the Law Reform Commission in considerable detail in a previous Study Paper, *Towards a Codification of Canadian Criminal Law*. The authors of the study concluded:

Codification would thus enhance the two qualities that society looks for in the law: predictability and certainty. The lawyer who can refer to a code for guidance will find it easier to determine the impact of a particular law and to predict how the courts are likely to apply it in given cases. He will find that legal rules are not made rigid by codification, they simply become more precise and certain with greater opportunity for continuous adaptation to new conditions and society’s changing needs.¹⁹

We conclude that these values apply to the law of search and seizure and that a codification in this area is therefore in order.

B. Simplification, Balance and Control

22. Precision and certainty would not be advanced much further by a codification if that codification remained as complex and mystifying as the system it replaced. A problem that has arisen in the American law of search and seizure is that some of the distinctions drawn by the courts between various fact situations are bewildering to judges, legal scholars and police officers alike. This has led the United States Supreme Court in some cases in recent years to favour the drawing of a “bright line” — a clear demarcation between legal and illegal activities of warrantless search and seizure.²⁰ Paradoxically, some of the “bright lines” that have been drawn are themselves quite elusive.²¹ The importance of avoiding such entanglements in Canada may have become heightened by the prospect of augmented remedies for breach of constitutional rules offered by section 24 of the new *Canadian Charter of Rights and Freedoms*.

23. Aside from assisting specialists in the law enforcement system, simplification of the rules promotes the objective of enabling the individual affected to be informed of the peace officer’s legal position. It is true that the achievement of this objective may be complicated by factors quite independent of the organization and nature of the legal rules; these factors were canvassed in a study

conducted for the Law Reform Commission of Canada entitled, *Access to the Law*. The study observed, however:

Almost all the people we encountered at various information sources agreed that the major problems with the present form of statutes are their technical and convoluted language, the inadequate or non-existent indexing, their complex structure, and the difficulty in keeping track of recent amendments.²²

Simplifying search and seizure procedures would address these problems at least in part.

24. The goal of simplification must inevitably be compromised, however, by the need to balance the interests at stake in the design of search and seizure powers and to take account of the variables that differentiate the situations which demand the exercise of these powers. These variables include the object of search (e.g., stolen property, narcotics), the subject of search (e.g., a person, place or vehicle), the urgency of the situation, the attitude of the individual affected, the seriousness of the offence under investigation, other particular circumstances of the case, the likely extent to which the particular provisions will be relied upon and the potential for abuse. If the goal of simplification cannot be permitted to suppress recognition of all of these variables, however, it may entail on occasion giving priority to some of them at the expense of others.

25. Informing the task of developing a new regime of rules is the paramount consideration of keeping the ambit and variety of the provisions controllable. The struggle to select and balance out the various relevant factors may be discerned in a number of recent law reform initiatives and codifications: the *Model Code of Pre-Arraignment Procedure* developed by the American Law Institute,²³ the *Criminal Investigation Bill* flowing from the recommendations of the Australian Law Reform Commission,²⁴ and the recommendations of the Royal Commission on Criminal Procedure in England.²⁵ The exact balance proposed in each case differs somewhat, but the need to prevent the sum of the individual powers from becoming unmanageable remains a common and paramount goal in all cases. This is our goal as well.

C. A Comprehensive Approach

26. One could approach the task of reforming crime-related search and seizure laws in two different ways. One could accept the

structure of the present rules as a basis, and move through the various aspects of existing procedures, discussing appropriate modifications along the way; or one could start from square one: not only changing the context of the rules where appropriate, but also organizing them into a new structure. This Working Paper takes the latter course, for to take the former is to concede to one of the basic problems with the existing rules — the structural incoherence of their arrangement.

27. The incoherence of the present state of the law has stemmed from the historical tendency to allow individual crime-related problems to dictate the adoption of individual procedures. This paper adopts a different approach: that procedural rules as an initial matter must cut across the distinctions between various offences and found themselves instead on factors relating to offences generally. This approach is implicit in most *Criminal Code* procedures from arrest to trial to appeal. There are not, for example, different arrest provisions for murder, drug possession, precious metals, fraud and firearms offences; there is rather a code of procedure that covers grounds for arrest without warrant (sections 449 and 450), the issuance of warrants (section 455.3), the laying of informations (sections 455 and 455.1) and post-arrest procedures (sections 451, 452 and 453). While distinctions are made between certain offences and classes of offenders, these distinctions derive not from historical particularization but from the need, within a set of general rules, to take account of such social interests as the need to protect the public and ensure the accused's attendance at trial.

28. There is no valid reason why search and seizure rules should not begin from such a general basis; indeed, the virtues of such an approach for warrant procedures were recognized somewhat when the present section 443 of the *Criminal Code* was enacted ninety years ago. But the usefulness of section 443 as an organizational framework for a general set of rules is limited. For one thing, it applies to searches with warrant only and thereby associates grounds for intrusion with a specific mode of authorization, an association we will shortly reject.²⁶ For another, the proliferation of special provisions since section 443 was enacted makes it somewhat misleading to view this section as the comprehensive warrant regime it once was. While still the broadest and most utilized of the warrant regimes, section 443 is essentially one of many. To develop a comprehensive set of rules, one must draw on all of the various grounds and procedures and not merely on section 443.

29. The adoption of a fresh structural approach does not entail a wholesale rejection of the present rules. On the contrary, these

rules and the policies underlying them are the obvious starting points in a discussion of what the content of the general rules ought to be. The approach taken in this paper basically brings these rules and policies into a central and accessible focus, where they can be evaluated effectively. Accordingly, in Chapters Five, Six and Seven, we develop a set of rules applicable to search and seizure generally. In Chapters Eight and Nine, we assess the legitimacy of departing from the general rules to meet the demands presented by special problems. Finally, in Chapter Ten, we address the apparent problem of the enforcement of procedural rules.

III. Underlying Premises

30. Before beginning the discussion of appropriate rules, it is useful to recognize and explain two premises upon which it is predicated. Firstly, this paper accepts that the question of the grounds upon which searches and seizures are justified is separate from, and prior to, that of the procedures by which they should be authorized. Secondly, it adopts the presumption that the only means of authorizing any search should be a warrant, unless it is shown that resort to the warrant is inappropriate.

A. Separating Justifications from Procedures

31. Under the present state of the law, grounds or justifications for intrusive searches and seizures are identified with their modes of authorization. One might speak, for example, of grounds for searching premises with warrant, comprehending within this description all of the grounds for obtaining warrants in the various statutory provisions discussed in the previous Chapter. To know the legal justifications for searches and seizures in general, one must piece together the grounds for search with warrant with the grounds for search under other procedural mechanisms. In fact, there is a considerable overlap between the justifications offered within the different procedural contexts. That these justifications are identified with their modes of authorization owes more to their history of

growth in separate strands than to any meaningful difference between them.

32. Consider, for example, the warrantless search incidental to arrest. What is the justification for the intrusion this power authorizes? To simply answer “the arrest itself” is to beg the question; why should an officer arresting an individual be allowed to search him and seize items from his possession? The case-law gives a number of different answers: the fruits of the offender’s crime may be in his pockets, there may be other evidence of the offence concealed on his person, or he may be carrying a weapon which could injure his captors and aid his escape.²⁷ The interests inherent in these answers — denying the fruits of crime to the offender, obtaining evidence to prove the offence, protecting the police and other members of society — are indeed inherent in warrant provisions as well: sections 443 and 101 of the *Criminal Code* and the relevant sections of the *Narcotic Control Act* and the *Food and Drugs Act*.

33. This is not to say that the fact of arrest is irrelevant to the question of whether or not a search is justified. Indeed, this paper adopts the position that the protective rationale for search is stronger when arrest has occurred than when it has not.²⁸ However, what is critical here is that while the items sought may be identical in an arrest situation and a search of premises, the search in the former case may be performed without warrant, while the latter search may not. Why? The answer lies in the circumstances under which the search is conducted. In performing a search incidental to arrest, a peace officer is presented with a situation of heightened urgency. For example, to delay searching an arrested person for a stolen watch until a warrant is obtained increases the possibility that he will get rid of the item, whereas the delay in obtaining a warrant to search a home for the same item does not entail the same degree of danger.

34. The discussion of the interests that justify intrusive searches and seizures is thus separate from that of the circumstances which determine the procedure that ought to be employed to authorize them. And of the two issues, it is justification that is logically prior. There is no point in deciding how to authorize an intrusion until and unless the intrusion is deemed to be worthy of authorization. This order of priority has been recognized in the codifications proposed by both the Australian Law Reform Commission²⁹ and the American Law Institute.³⁰ In each case, the model code begins by establishing objects of search and seizure (*viz.* objects in which the State has a sufficient interest to justify the intrusions consequent upon an exercise of these powers). Then, the

model legislation goes on to set out the procedures under which these objects may be obtained. This order of priority will be followed in this Working Paper.

B. The Warrant as General Requirement

35. This paper has already acknowledged the characterization of the warrant as a judicial, particular mode of authorization.³¹ These features respectively purport to ensure that no intrusion occurs until the existence of a justification for it has been objectively determined, and that the scope of the intrusion requested and permitted is clear to applicant, adjudicator, executor, and any individual affected by the exercise of the power. These safeguards are rooted in the common law's perception that the intrusions which may flow from the authority to search and seize are serious ones, and therefore ought to be carefully controlled. Although empirical evidence points to certain shortcomings in the control over police discretion exerted by warrant procedures, it also shows that warranted searches remain relatively constrained compared to warrantless ones. In addition to the control factors introduced before the intrusion takes place, the warrant procedure with its reliance on documentary authority possesses certain advantages in terms of review.

36. If it is accepted that respect for individual rights is still a critical social value, then it follows that the control the warrant purports to exemplify ought to be generalized as much as possible. The preference for controlled intrusions over discretionary ones was indeed central to the acceptance of search powers in the first place; Hale could only validate the power conferred by the warrant by incorporating into this mode of authorization the features which would ensure that the power was not improperly exercised.³²

37. Although times have changed considerably since Hale's day, the argument for carefully controlled searches is still vital; if it is clearly unrealistic to advocate a hard and fast prohibition against intrusions without warrant, the preference in favour of warrants remains. This preference has been explicitly articulated in American jurisprudence³³ and is arguably implicit in the Canadian cases, such as *Pacific Press*, which have adopted strongly protective positions.³⁴ In the task of developing rules, this preference argues for the streamlining of procedures to make the warrant a more efficient, accessible and therefore utilized mode of authorization. As a matter

of basic principle, it argues that the warrant is always *an* appropriate device for authorizing a search and seizure. In other words, there should not be any instance in which, the justification for intrusion being present, the authorization for intrusion cannot be received through a warrant. The question of whether or not another alternative ought to be made available to a prospective searcher resolves itself into a discussion of whether or not circumstances of particular situations render compulsory resort to warrant procedures impracticable or unnecessary. The comprehensive discussion of these circumstances is reserved for Chapter Six of this paper.

38. It may be argued that statutory preference for a warrant is somewhat misleading and misconceived in that modern practice makes warrantless intrusions the rule rather than the exception. An argument to this effect has been made with particular reference to arrest.³⁵ On the other hand, the frequent use of the warrant in searches of premises is proof that even under the highly disorganized state of the present law, a warrant requirement is not ignored in practice. Conceding that circumstances often prompt and indeed justify an officer's decision to proceed without the warrant does not mean that there is no point to viewing the power to so proceed as an exception to a general requirement. The generality of the requirement is not a matter of factual likelihood, but rather one of preference, in principle; this principle merely requires that before a warrantless intrusion can be permitted in a particular case, it must be established that resort to the warrant is inappropriate.

CHAPTER FIVE

Justifications for Intrusion

I. Criminal Law Enforcement

39. Criminal law mirrors, or should mirror, a society's perception of its fundamental values. Violations of the prohibitions protecting these interests may lead to serious infringements upon an individual's liberty and privacy. These infringements appear most stark in the context of sentencing the offender following an adjudication of his guilt. However, the primary issue in the discussion of police powers is that of the justification for intrusion prior to an adjudication of guilt. The thesis adopted in this paper is that these justifications are rooted in the need to effectively respond to and prosecute the commission of a criminal offence.

40. The enforcement of criminal law has not always been so elevated among interests. Although the apprehension of felons was one of Hale's articulated aims in his promulgation of search warrants,³⁶ the only items that could be seized under their authority were the stolen goods themselves. Indeed, for centuries, a necessary basis of the seizure of goods was the belief that their possessor was not entitled to them. This extended not merely to stolen goods but also to contraband, and even, according to the opinions of some commentators, to the instruments of crime, to which primitive notions of fault, justifying confiscation, appear to have been attached.³⁷

41. That the State need no longer assert a superior property claim in order to justify seizure is a product both of the decline of property from its sanctified plateau, and the rise of criminal law

enforcement as a dominant social concern. The great landmark in this latter development³⁸ was the institution of the police force in the nineteenth century; soon afterwards, the case-law began to recognize criminal law enforcement as a strong interest, which could justify seizures in its own right. An accused's proprietary rights in items of evidentiary value, for example, became subordinated to the State's need to preserve proof of guilt for trial. This expansion of the basis for seizure, however, carefully respected certain limitations. These limitations, which have remained in place up to the present day, reside in the "responsive" nature of the criminal justice system.

A. The Sequence of Crime and Response

42. It seems trite to observe that the accusation and prosecution of a criminal offence, around which our system of criminal procedure is built, are responsive measures. The prosecution pursues the charge, and the charge itself responds to the initiation of the offence it comprehends. But the fact that our criminal law enforcement system is founded on this sequence of crime and response to crime is itself noteworthy. A responsive, accusatorial system is by no means the only obvious structure according to which a State can enforce its laws; indeed, England itself experienced its share of inquisitorial bodies, such as the Star Chamber and the High Commission. That the accusatorial system has prevailed is attributable in large part to the recognition of a concept that has achieved an elevated status over the years: the rule of law.

43. The first principle of the rule of law was formulated by Dicey as follows:

[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.³⁹

Followed literally, this principle might be interpreted so as to preclude pre-trial intrusions upon "body or goods", such as seizure and arrest. However, in a later passage Dicey quite clearly countenanced the existence of pre-trial powers so long as they were not exercised "in any manner that does not admit of legal justification".⁴⁰

44. Although the wide application of the rule of law to such concerns as the powers of administrative agencies is perhaps problematic in this day and age, the specific thrust of this first principle is cogent and sound. Dicey took his inspiration, not only from British history, but from a reading of European politics that led him to conclude that “wherever there is discretion, there is room for arbitrariness”.⁴¹ Accordingly, the “legal justification” for intrusion had to be clearly defined in terms of individual conduct. It might be said that Dicey recognized that an individual should not be vulnerable to state intrusion because of the kind of person he is, but rather only because of the kind of act he may have committed.⁴²

45. Dicey himself declared that the protection of liberties was afforded by a tradition of judicial decisions rather than by a set of rules in constitutional documents.⁴³ Today, however, his principles are to some extent enshrined in the *Canadian Charter of Rights and Freedoms*: equality before the law, the protection against arbitrary detention, the right to a fair trial and, most importantly for our purposes, the security against unreasonable search and seizure.⁴⁴ More significantly, perhaps, they have served as assumptions upon which much intrusive legislation has been based. But while these expressions of the rule of law confirm its continued vitality at a general level, they leave open many critical issues as to its application in the day-to-day reality of criminal law enforcement. In particular, it is worth enquiring how the restraining principles mesh with the mandate of the modern police force.

B. The Modern Police Force and Crime Prevention

46. It is fair to say that much of the impetus for the creation of the modern police organization sprang from the need for systematic crime prevention. The 1829 general instructions to the newly formed London force read in part:

It should be understood, at the outset, that the principal object to be attained is “the prevention of crime”. To this great end every effort of the Police is to be directed. The security of person and property, and all the other objects of a Police Establishment, will thus be better effected, than by the detection and punishment of the offender after he has succeeded in committing the crime....⁴⁵

By and large, however, this preventive strategy was expressed in non-intrusive exercises, such as patrols, rather than in intrusive ones.

Even the most vehement of the crime prevention theorists of the eighteenth and nineteenth centuries in England drew the line at actually intruding upon individual rights before an offence had been committed. Bentham, for example, the great exponent of “prophylactic” measures, recognized this limitation quite expressly: the task of the police, he stated, should be “to intervene as soon as an offence may announce itself in various manners”.⁴⁶

47. The years since the introduction of the police force have seen discussions of new and efficient techniques of law enforcement. Yet the principle that the police ought not to intrude upon individual rights until an offence has been initiated has not been seriously challenged. Is this principle still a valid one? The argument against it may be put in straightforward terms: prevention is better than cure.⁴⁷ By acting in advance of the commission of the offence, this argument runs, the police ultimately benefit everyone concerned. The public is spared the cost consequent upon the violation, the criminal justice system is relieved of the burden of a prospective prosecution, and the individual himself suffers a relatively minor infringement compared to the detention, trial and sentence which would potentially await him if the crime were actually perpetrated.

48. The problem with this argument is that it seriously compromises individual security. It is possible to couch preventive powers in terms of reasonable beliefs or suspicions, but once these beliefs or suspicions cease to be attached to clearly defined and perceived conduct, their “reasonableness” ceases to provide meaningful protection. Personality becomes a factor in susceptibility to intrusion. The problem has an acute contemporary dimension; insofar as “proactive” strategies involve the police in performing intrusions based on perceptions of a person’s criminal propensities rather than the belief that he has committed a particular crime, they create the kinds of dangers that Dicey feared.⁴⁸ That such intrusions have been carried out under the surface of a system that ostensibly applies the rule of law has enabled policy-makers to avoid facing a critical question: Is the prevention of crime an objective of sufficient importance to justify derogating from traditionally expressed limitations upon criminal law enforcement?

49. Ultimately the answer to this question reflects the values of the decision-makers. In our Report, *Our Criminal Law*, we recognized limitations upon sentencing techniques:

Above all, our society has too much respect for freedom and humanity to countenance measures stern enough to make deterrence really

bite.... In short, the very nature of our society prevents our criminal law from fully organizing the future.⁴⁹

The same values insist upon limitations at the earlier stages of criminal law enforcement. That the prevention of crime is an important social goal is undeniable; its pursuit through both traditional methods such as patrol, and relatively modern ones such as public education and participation programmes, is to be encouraged. But out of an overriding respect for individual rights, the general rule must be that intrusions upon these rights can only be justified following the initiation of an offence.

50. This does not mean that an intrusion cannot have a preventive aspect to it; indeed, one of the basic reasons for infringements upon the interests of an individual who has committed an offence is to safeguard the public against its repetition. This is perhaps most evident in the *Criminal Code* provisions dealing with arrest, detention and bail;⁵⁰ the need to “prevent the continuation or repetition of the offence or the commission of another offence” must be considered by the arresting officer, the officer in charge, and the judicial official presiding at the show-cause hearing. The legitimacy of this factor, which has also been relevant to search incidental to arrest, is accepted in this Working Paper. So long as the intrusion is performed after the initiation of a relevant crime, it is not objectionable merely by virtue of its preventive effect.

C. Search and Seizure as Responsive Powers

51. Though our system of criminal procedure may be built around the accusation and prosecution of a criminal offence, the relationship between powers of search and seizure and these procedural touchstones is a qualified one. In practice, searches both with and without warrant are often carried out without any charges being laid as a result.⁵¹ Conversely, many investigations and prosecutions are conducted without resort to any power of search and seizure.⁵² Although associations between search and prosecution continue to exist in law, they are more flexible than those that characterized early search and seizure powers which were specifically focused upon suspects or apprehended criminals. This focus may have remained relatively constant in the laws governing warrantless searches of persons; if such searches are now statutorily authorized in cases other than arrest, they are still associated with

items, such as weapons or drugs, possession of which by the individual affected is likely to comprise an offence. In the case of search with warrant, however, the focus has changed substantially.

52. It used to be that the prerequisite to the performance of a search with warrant was not merely the initiation of an offence, but a distinct charge or accusation. Hale's warrant, for example, was issued in response to a complaint against the individual in possession of the stolen goods; when executed, it authorized an arrest as well as a search.⁵³ This requirement has long since been abandoned, however. In *Re Liberal Party of Québec and Mierzwinski*, Barrette-Joncas J. concluded,

[t]he case authority recognizes that the name of an accused or of an eventual accused is not necessary to obtain a search warrant.⁵⁴

Indeed, as we confirmed in our warrant survey, a substantial number of warrants are executed against parties whom the police do not even suspect to be implicated in the offence; 20% of the warrants examined by the judicial panel we assembled fell within this category.⁵⁵

53. It is quite proper for the police to decide to conduct the search first, then lay any charge disclosed by the investigation. This sequence is a sensible one, both because the laying of a charge is ultimately a more lasting infringement upon the individual, and because of the increased likelihood of the destruction of evidence after the charge has been laid. Moreover, in the case of search without warrant, any factor of urgency that made the obtaining of a warrant impracticable would similarly militate against the prior laying of a charge. It remains critical, however, to ensure that search and seizure powers are exercised only in situations in which the interests of criminal law enforcement are sufficiently served to justify the intrusion at stake. These interests may be identified by looking to the purpose of search and seizure: to obtain things, funds or information. The question thus becomes: What categories of things, funds or information should the police be empowered to search for and seize in response to the initiation or commission of a criminal offence?

54. Posing the question in this manner involves assumptions that depart from the traditional legal approach somewhat. First, it assumes that obtaining pre-existing information from the persons, places or vehicles to be searched is as valid a form of the exercise as actually taking *things*. Yet the traditional approach, as embodied in the *Bell Telephone* case,⁵⁶ has been to restrict search, at least with warrant, to the physical taking of things to be used as evidence. Similarly, insofar as we contemplate the acquisition of control over

funds in intangible form, we also expand beyond restrictive interpretations of present law. Before proceeding to define the classifications of objects that should be seizable under crime-related procedures, therefore, it is useful to clarify the inclusion of information and funds within the ambit of these procedures.

D. Things, Funds and Information

RECOMMENDATION

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.**

(1) Things and Information

55. The first search warrants were for concrete things: stolen goods or instruments of crime, over which the State or the applicant for the warrant could assert a superior property interest to that of the possessor. The effect of the seizure was to hold the item until it was either confiscated or restored. Yet if the evidentiary nature of the item seized was not explicitly recognized in the early legislation, this does not mean that the item was unavailable to the trier of fact; indeed the trier of fact for charges of possession of stolen goods was likely to be the same magistrate to whom the goods were presented following the seizure.⁵⁷

56. Indeed, the evidentiary purpose of items seized began to creep into legislation in cases of felonies, specifically coinage offences, which the justice or magistrate could not himself try; it then became his reduced function to secure the items for their use at a future trial.⁵⁸ Once this new purpose became explicit, it became apparent that the goods were not simply being seized for restoration or confiscation; rather, they were being used also for the information

they afforded to the trier of fact. And as modern police began to take over investigative duties, the recognition began to emerge that the recipients of the information disclosed by the items were not simply the eventual triers of fact, but also the police themselves. The current law clearly sanctions the use of seized items for police investigation; in the *PSI Mind Development Institute* case, the warrant was described as one of the “procedures and aids lawfully available” to the police “to conduct their own investigations”.⁵⁹

57. The use of a search power to provide information to the police was manifest quite early in the case of the warrantless search incidental to arrest. In *Dillon v. O'Brien*, the preservation of the material evidence of guilt was recognized as a justification for detention of an arrested person’s possessions.⁶⁰ Yet, in a sense, the search of the person incidental to arrest had long since implicitly recognized another sort of informational interest: the ascertainment of whether or not the person was concealing a weapon that could endanger his captor;⁶¹ in other words, it was the information as to the presence of the thing, not the thing itself, that was primarily important.

58. Once the informational aspect of things or the presence of things is regarded as a separate and sufficient basis for intrusion, it is illogical to exclude forms of obtaining information that do not constitute the physical taking of items from the definition of seizure. In fact, the acquisition of information in secondary, recorded form is likely to cause a good deal less inconvenience to the affected individual than the physical taking of things revealing that information. Consider, for example, the following situation. A murder is committed on X’s premises, without any involvement by X. Bullet holes are found in a number of pieces of furniture. It is clear that under paragraph 443(1)(b) of the *Criminal Code*, the police could obtain a warrant to seize the furniture; on the other hand, there is no clear authority which would allow them to enter X’s premises without X’s consent, and merely photograph and measure the bullet holes. Yet the intrusiveness of the exercise is far greater in the former case.

59. The alternative of recording information rather than removing items from premises is explicitly recognized in subsection 29(7) of the *Canada Evidence Act*, which covers searches for documents in financial institutions, and provides in part:

[U]nless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything therein shall, as regards

the books or records of such institution, be construed as limited to the searching of such premises for the purpose of inspecting and taking copies of entries in such books or records.⁶²

While it may be that financial institutions have a particularly acute interest in keeping their records on their own premises, the principle in favour of minimal disruption of an individual's interests is a general one. Where the photographing of information, rather than the taking of things, is sufficient to serve the interests of law enforcement, it should be not only authorized but encouraged. This encouragement entails some modification to evidentiary rules as well as laws of search and seizure; as such, the subject is beyond the scope of this Working Paper. What can be done here is to recommend that the definition of seizure encompass making copies or taking photographs. To ensure that search and seizure powers are not used as a pretext for surveillance of premises, it should be made clear that the definition does not include recording any events occurring subsequent to the commencement of the intrusion.⁶³

60. The definition of seizure also should include the collection of data from computers. There is, in principle, no reason why information that would be seizable if contained in a document should be immune from seizure because it is stored in a computer record. Equal treatment of documents and computer records appears, for example, in the proposed federal freedom of information legislation, under which access is granted to government records:

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.⁶⁴

We accept that a similar breadth of definition is appropriate to search and seizure laws.

61. Permitting police officers to photograph objects or obtain information from computers creates certain dangers of invasion of privacy. Because these activities are less physical or visible than the removal of objects, apprehensions may be raised of systematic monitoring of individuals without their knowledge. While appreciating such concerns, we do not accept that they dictate that search and seizure laws be confined to primitive technological methods. Such a result would discriminate in favour of the technologically sophisticated criminal. Rather, in expanding search and seizure law, we seek to make the acquisition of information subject to the same

principles and protections as the acquisition of things. In part this entails certain procedural decisions, which will be discussed in later Chapters. Primarily, it requires that the same categories which limit things subject to seizure also cover information recorded or stored in other ways.

(2) *Funds*

62. The final component of our recommendation is directed towards clarifying the situation with respect to financial accounts. We begin with the observation that illegally obtained money in tangible form has long been seizable. For example, the 1836 English case of *Burgiss* held that coins found in possession of a prisoner charged with forgery could be retained on the basis that there was reasonable ground to suppose that the coins were proceeds of the crime.⁶⁵ Proceeds, of course, may be converted into different forms of property, and Anglo-Canadian courts have recognized the legitimacy of following the money for purposes of restitution insofar as it can be traced through these conversions. Specifically, it has been noted that the mere fact that money has passed through a bank account does not impede the common law right to trace.⁶⁶ Moreover, by virtue of the extended definition of “property” in section 2 of the *Criminal Code* so as to include “a right to recover or receive any money or goods”, it has been suggested that offences concerning property may cover the possession of funds in accounts.⁶⁷ We firmly agree with these positions.

63. The problem with respect to seizing the money in the account under present crime-related law is that subsection 443(1) of the *Criminal Code* refers to seizure of “anything” fitting within the designated classifications, an expression that may not cover intangible forms of obligation represented by a debt or loan.⁶⁸ In the recent House of Lords decision in *Cuthbertson*, for example, it was found that a forfeiture provision covering “anything” related to drug offences did not apply to profits of drug trafficking held in bank accounts since these were not “tangible things”.⁶⁹ While the merits of this decision might be debated and perhaps ultimately resisted by Canadian authority, it would seem prudent to explicitly cover funds in financial accounts in search and seizure provisions intended to apply to them.

II. Objects of Seizure

RECOMMENDATION

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.

64. In this subchapter, we develop a definition of “objects of seizure”, *viz.* those objects that will always justify a search or seizure, whether with a warrant or, if an exception to the warrant requirement obtains, without one. An examination of the statutes and jurisprudence discloses that there are five classifications of things, funds or information in which the criminal law enforcement system traditionally has asserted an interest. These are things, funds or information:

- (a) necessary for the physical protection of peace officers and other individuals;**
- (b) which represent the “fruits of crime”, an expression comprehending both the “takings” and “profits” received in connection with an offence;**
- (c) which are possessed in circumstances constituting an offence;**
- (d) which provide evidence of the commission of an offence; and**
- (e) which are the instruments or means by which an offence has been or may be committed.**

Our recommendation, which is set out following paragraph 100, condenses and rationalizes these classifications. To explain our position, however, it is useful to analyse them in turn. In addition, it is relevant to consider the use of search powers to rescue persons detained illegally.

A. Protection

65. Traditionally, this justification for intrusion has been associated with common law searches incidental to arrest. However, it also finds expression today in section 101 of the *Criminal Code*, which allows searches for, and seizures of, various weapons on the basis of a belief that “it is not desirable in the interests of the safety” of the individual searched, or of any other person, that the individual have a weapon in his possession, custody or control. In practice, as might be expected, protective searches are most frequently conducted upon the person of the individual and are usually performed without a warrant.

66. What is immediately remarkable about protection as a justification is that it looks not to the past, nor even to the present, so much as to the future. In other words, at first glance it seems to reverse the sequence of crime and response to crime which is integral to intrusive practices under our law enforcement system. When put in the context of an arrest, however, the sequence is restored; the arrest is itself a response to the commission of an offence, and the search, insofar as it is protective, basically serves to effectuate the arrest by preventing escape, and ensuring the safety of the police and the public. As was recognized in *Leigh v. Cole*, “the police ought to be fully protected in the discharge of an onerous, arduous and difficult duty — a duty necessary for the comfort and security of the community”.⁷⁰ We develop proposed rules regarding protective search and seizure incidental to arrest later in this paper.⁷¹

67. It might be argued that “the interests of safety” test in section 101 is simply an extension of the rationale underlying the protective search incidental to arrest. The significance of the extension cannot be overemphasized, however. By failing to conform to a sequence of crime and response to crime, the provision opens the door to the dangers of focus on criminal propensity rather than conduct, the projection of uncertainty into the criminal law, and the fostering of opportunities for arbitrary intervention. The legitimacy of the provision as a necessary measure to deal with the use of firearms basically involves an argument for an exception to a general rule, and the topic will be discussed accordingly later in this paper.⁷²

68. The seizure of weapons for protective purposes essentially subordinates the individual’s possession of the weapon (if it is indeed his own) to the interests of safety of the peace officer and/or of other individuals. The State asserts no superior property interest in the

weapon; in fact, the legislation has recognized, to some extent, the propriety of compensating an individual for the loss of his weapon under such circumstances in which no offence has been committed. Such, at least, was the finding in the *Thomson* case, a decision of the Ontario Provincial Court interpreting section 101, in which an individual was entitled to the proceeds from a judicially sanctioned sale of certain weapons taken from her possession.⁷³ The legal situation in case of a purely protective seizure is to be contrasted with that obtaining in the case of seizures of weapons illegally possessed or used in the commission of a crime; by virtue of sections 100(3) and 446, such weapons are forfeited.

69. The protective rationale for search and seizure may overlap with other justifications. There are many sections of the *Criminal Code* prohibiting or regulating the use and possession of weapons.⁷⁴ Accordingly, a weapon often may be reasonably believed to have been possessed in circumstances constituting an offence or it may serve as evidence in a prosecution for a violent crime. When neither of these circumstances obtains, however, we conclude that as a general rule the protective rationale is not a sufficient justification for an intrusive search or seizure outside the context of arrest. Thus, we do not include a separate classification concerning protection in our basic definition of “objects of seizure”.

B. Fruits of Crime

70. The term “fruits of crime”, which appears in both the *ALI Code*⁷⁵ and the American Federal Rules,⁷⁶ actually embraces two distinct classifications of items. First, there are those things or funds that either correspond to or represent the proceeds of transactions traceable to property wrongfully taken from a victim who is its rightful possessor. Examples of this classification under present law would include stolen property,⁷⁷ property received from fraud, forgery, extortion or the sale of stolen property,⁷⁸ and a motor vehicle taken without the consent of the owner.⁷⁹ For the sake of precision, this classification will be called “takings”. Second, there is property that represents income from the commission of an illegal act, such as the sale of prohibited narcotics,⁸⁰ restricted or controlled drugs,⁸¹ or obscene publications.⁸² Unlike takings, this income does not rightfully belong to anyone other than the individual searched; however, the State has often asserted that it is entitled to confiscate

it, since the individual would not have received it had he remained obedient to the law. This classification will be referred to as “profits”.

71. A number of procedural and technical problems arise with respect to both of these classifications — problems pertaining, for example, to the depositing and mixing of funds in bank accounts. These problems will be discussed later in this paper.⁸³ Our immediate concern is with the justifications for seizing these classifications of things under crime-related search and seizure powers.

(1) *Takings of Crime*

72. The recovery of takings is the oldest justification for search with warrant, dating back to the time of Hale. In practice, takings are frequently identifiable as the objects of such searches, even though the warrant itself is likely to specify that the property is sought as “evidence of an offence”.⁸⁴ The same objective has also appeared in the context of search incidental to arrest. In the *Percival and McDougall* case, for example, an application for return of money used as exhibits at trial was refused, partly on the basis that the money, taken from the accused upon their arrest, was stolen.⁸⁵

73. A purpose of the State’s acquisition of control over takings is their return to the victim of the offence. Indeed the law has long recognized that the victim himself has certain remedial powers to recapture chattels wrongfully possessed by another.⁸⁶ The involvement of the State introduces a new element into the situation; the State, in effect, acts as intermediary in a restitutionary transaction. The final step in the process may be made by means of an order at the end of trial, under section 655 of the *Criminal Code*, which provides for the restoration of “property obtained by the commission of the offence”. This is not, of course, the only restitutionary provision available; in the *Criminal Code* one also finds section 653 (which allows a court to make an order of compensation for loss of property), section 654 (which provides for compensation to *bona fide* purchasers), and paragraph 663(2)(e) (which makes restitution a possible condition of a probation order). We do not accept, however, that search and seizure provisions should anticipate restitution in this wide sense. Rather, we take the view that objects seized must be traceable to objects wrongfully taken.

74. The reason for our position derives from Dicey’s principle prohibiting punishment before conviction. The seizure of takings and their return to their rightful possessor, while undoubtedly

inconvenient to the party searched, is primarily redistributive rather than punitive; it re-establishes the pattern of holdings that existed before the offence was committed. Indeed, the power under section 655 to make a final distribution of property is not dependent upon a conviction; rather it springs from the State's interest in ensuring that at the end of the trial process, everyone involved has what belongs to him. To deprive the accused of such property is not punishment in a true sense; he is not denied anything the State recognizes as a rightful possession.

75. On the other hand, the seizure of objects not traceable to the offence itself is essentially punitive. Not only does it anticipate the conviction of the accused and the making of a restitution order as an incident of sentencing, it also effectively punishes him before trial, by denying him items that are indisputably his own. Unless the State has a distinct justification for the control of these things, such as their use as evidence, we propose that their seizure and detention before trial be unacceptable.

76. On the other hand, we accept the legitimacy of seizure of items traceable to the original takings. In adopting this position, we refer to the extended definition of "property" found in section 2 of the *Criminal Code*, which includes property into, or for which, other property has been converted or exchanged. As well as applying to restitution proceedings under section 655, this definition could be used at present in conjunction with section 312 of the *Criminal Code* to obtain a section 443 search warrant for objects traceable to the crime at issue; where an information alleged commission of possession of "property obtained by crime", a justice could issue a warrant to seize the items on the basis that they comprised "anything ... in respect of which an offence" had been committed. While agreeing with the principle served by such construction, we find it unnecessarily complex. Accordingly, we recommend that a classification of takings be included in the definition of "objects of seizure" and that this classification itself incorporate by reference the relevant part of the definition of property.

(2) *Profits of Crime*

77. The common law has also asserted a strong interest in denying an individual any profits from a crime he has committed. Where these profits are not traceable to a victim of the offence, the courts have asserted their susceptibility to forfeiture to the Crown.

This policy has been evident in recent sentencing decisions concerning drug trafficking. In the *Kotrбаты* case, for example, Berger J. imposed a fine that deprived the accused of profits made from the sale of heroin.⁸⁷ Should this policy be recognized at the search and seizure stage, as well as in the context of sentencing?

78. Profits of an offence, as such, would appear to be seized relatively infrequently. This may be attributed to a number of factors. Unlike stolen property, profits almost always first come into the offender's possession in the form of money, which is difficult to follow. So too, since the payer of the money is likely to be implicated in the offence, he is less likely to be co-operative with the police than a victim of a theft or fraud; accordingly, the difficulties of following and segregating funds are compounded. Indeed, the most likely opportunities for seizing profits would appear to be either situations in which undercover police are parties to the exchange of funds, such as drug purchases, or situations in which the offence itself, gaming or betting for example, involves the use of money.

79. In fact, no crime-related search and seizure law mentions the possibility of seizing or detaining profits as such. In the case of section 181 of the *Criminal Code*, money may only be seized and detained if it is "evidence" of a gaming offence. While money is often seized in narcotics and drugs searches as either evidence or "any other thing ... in respect of which" an offence has been committed, the evidentiary potential of the money must be established if a restoration application is made by its lawful possessor.⁸⁸ Recently, some police and prosecutors have taken the view that warrants under subsection 443(1) of the *Criminal Code* may be used to seize profits by alleging that such profits constitute property possessed contrary to section 312.

80. The issue of the seizure of profits deserves clarification. We take the view that only when and if profits of crime are either illegal to possess or declared forfeit should the State have the power to seize them. In strict terms of ownership, profits, unlike takings, belong to the searched individual; indeed, in the *Smith* case, Addy J. went so far as to assert that "an absolute right of property" was at stake in restoration proceedings regarding moneys seized in a drug investigation.⁸⁹ And unlike the case of takings, no other individual stands to suffer if profits are dispersed by their possessor before his conviction; if the State cannot exact its penalty upon the money of the accused, there are other variables of sentencing that may be adjusted accordingly.⁹⁰ It may be argued that the deprivation of profits ought not to be just one in a number of sentencing options, and

that an individual ought to be denied such ill-gotten gains. Steps to implement such a policy, in the form of *in rem* divestiture procedures, have been introduced into American organized crime statutes⁹¹ and discussed here in Canada.⁹² For reasons that will be elaborated later, however, we believe that *in rem* procedures ought not to exist in a *Criminal Code*.⁹³ As to whether or not possession of profits of an offence is at present or should be a crime in itself, we take no position in the present paper. Absent such a crime, we adhere to the position that steps to acquire profits must await sentencing.

81. Given the position outlined above, we find it unnecessary to specify a separate classification for “profits of an offence”. If possession of such profits is itself a crime, their seizure will be clearly mandated under the classification, which we are about to develop, of “objects possessed in circumstances constituting an offence”.

C. Objects Possessed in Circumstances Constituting an Offence

82. There is a direct connection between offences that deprive individuals of the right to possess certain items, and search and seizure powers; the latter enforce the prohibitions that the former define. The prohibition on individual possession may still, as in the case of counterfeiting provisions, be linked to an assertion of ownership by the State;⁹⁴ more often, it simply reflects a perception of dangers that attend possession. The paramount examples of such a perception are those inherent in narcotics and drugs legislation, and in the weapons provisions in the *Criminal Code*.⁹⁵ Searches for, and seizure of, narcotics are quite frequent in practice under all modes of authorization, including the writ of assistance. As indicated earlier, weapons searches are also quite frequent and occur predominantly without warrant.⁹⁶ Although a moratorium on writ applications has been imposed, the Commission survey of writ usage indicated that, particularly in Edmonton and Vancouver, the existing writs were commonly employed in *Narcotic Control Act* and *Food and Drugs Act* searches.⁹⁷

83. Although some of the items seized may be used for evidentiary purposes, the scope of the seizure we envisage is not restricted to what is required for these purposes. It is difficult to argue that the police, finding a large shipment of counterfeit money,

for example, should seize only that portion of it that would enable them to prove the offence. Since the person cannot lawfully possess any of the money, it follows that he should be deprived of all of it. The matter is not so simple, however, where the item is illegal to possess only for a particular purpose. This category of item includes controlled drugs,⁹⁸ burglary tools,⁹⁹ obscene publications and crime comics.¹⁰⁰

84. First, since mere possession of the items is not an offence, it follows that there is no justification for seizing them, unless grounds exist for believing that the possessor has the requisite illegal purpose in mind. This qualification would appear to be recognized in existing legislation. Subsection 37(2) of the *Food and Drugs Act*, for example, makes it clear that the drug must be one “by means of or in respect of which an offence ... has been committed”; an offence would not be committed by a possessor of amphetamines, for example, unless and until the “purpose of trafficking” attended the possession.

85. Second, the scope of intrusion justified as a response to such an offence is called into question. Plainly, it would be legitimate to seize those items or that quantity of substance which serve an evidentiary purpose. But what about the rest? It might be argued that since it is not *per se* illegal for these items to be possessed privately, the State has no basis for acquiring control over them. In the *Nimbus News* case, for example, it was observed that conviction of an offence of possession of obscene matter for the purpose of distribution would not in itself make continued possession of the magazines unlawful.¹⁰¹ The logic of this position would dictate that items such as obscene publications or controlled drugs be left with their possessor unless required at trial. Yet the shortcoming of such a conclusion is obvious: it countenances the possibility that the unseized items will be distributed or used in precisely the illegal manner apprehended when the search was authorized.

86. To address this possibility we recommend expanding the scope of seizure to include all the relevant items. In a sense this is a preventive measure; indeed, it is the capacity to seize all offensive publications that has been said to distinguish the preventive power of search under *in rem* proceeding provisions from the conventional section 443 power.¹⁰² However, the rationale for comprehensive seizure of, say, illegally possessed amphetamines, is not entirely preventive; rather, the seizure aims to stop the continuation or repetition of an offence — the further pursuit of the purpose of trafficking. Since the illegal possession precedes the intrusion, it is

plain that the seizure falls within the sequence of crime and response to crime which is fundamental to criminal procedure. It is also relevant to note that, at least in the case of controlled drugs and offensive publications, the absence of an offence covering simple possession does not necessarily represent any perception that possession in itself is harmless to society. Rather, it may reflect a decision to focus the attention of criminal law enforcement institutions upon the distributor rather than the possessor.¹⁰³ Insofar as this is true, it seems somewhat self-defeating to permit the police to search and charge an individual believed to be a distributor, yet to withhold from them the power to seize from him the very items the criminal prohibition was designed to suppress.

87. This does not imply that the *in rem* procedures presently set out in the *Criminal Code* are adequate; problems with these procedures will be discussed later in this paper.¹⁰⁴ Rather, it calls for the recognition in a set of general rules of the legitimacy of seizing all items, or the whole of a substance possessed for an unlawful purpose. This position concedes the possibility of a subsequent finding being made at trial that the items or substance seized were not so possessed, a possibility that may connote a substantial and mistaken deprivation to the individual concerned in the interim. However, this possibility applies to all categories of objects: money seized as the takings of an offence, for instance, may turn out to be acquired lawfully. The concern about mistaken intrusions and deprivations must be general, expressed in standards of proof and provisions for disposition of things seized. It should not preclude the seizure of items which, in certain correctly-identified circumstances, should not be allowed to remain with their possessor.

D. Evidence of Crime

88. Particularly in connection with warrants, the evidentiary justification for search and seizure has been emphasized both by the courts and in practice. It has been estimated that over 80% of the Canadian case-law on section 443 warrants deals with informations in which exclusive reliance was placed upon paragraph (1)(b), which authorizes search for evidence of an offence.¹⁰⁵ The results of the Commission's warrant survey are even more lopsided; 134 out of 136 section 443 warrants examined by the judicial panel we assembled were issued on the basis of paragraph (1)(b).¹⁰⁶ The evidentiary

justification, of course, has long been recognized in the context of warrantless searches incidental to arrest. While Canada historically may have taken a rather brash step in allowing purely evidentiary seizures under warrant outside of arrest, accepting without apparent difficulty a rationale for intrusion questioned in other jurisdictions, this ground for search is too strongly entrenched to question seriously now.

89. To some extent, the evidentiary justification overlaps with others. Both takings of an offence and contraband may serve evidentiary purposes; a narcotic, for example, is seized not only because its possession is prohibited, but also because a conviction under narcotics legislation requires proof that the substance seized was indeed a narcotic. However, the seizure of items of exclusively evidentiary value (particularly documents) is still the predominant practice of peace officers acting under warrant. In affirming this ground for seizure, we recognize that even when lawfully possessed, the value of evidence to our criminal law enforcement system outweighs the inconvenience seizure may cause to its possessor.

90. The courts have been generally lenient in their interpretation of what constitutes "evidence" of an offence. In the *Worrall* case, Porter C.J.O. elaborated upon the meaning of the test:

It means, I think, that the Justice must consider whether the production of the articles will afford evidence which would be relevant to the issue, and would be properly tendered as evidence in a prosecution in which the alleged fraud is in issue.¹⁰⁷

In focusing upon potential relevance, the courts have, in effect, given the Crown considerable discretion; they have balked, at least at the issuance stage, at considering the *necessity* of actually taking the items away from their possessor. Necessity, rather, has only arisen in cases such as *Nimbus News*¹⁰⁸ and *Pink Triangle Press*¹⁰⁹ which have involved applications for return of items seized. This state of affairs represents a compromise of sorts. To tolerate the seizure of items that the State may not actually need for its law enforcement purpose is to concede a degree of inefficiency in the exercise of police powers. On the other hand, particularly in instances in which evidence may be buried somewhere amidst a large volume of documents, it is unrealistic to demand that the police make a binding selection of the items they intend to use before making a seizure. Accepting the validity of the compromise, however, does not mean accepting the present provisions which purportedly effect it. This is primarily a

problem of post-search procedures, and accordingly will be reserved for the Working Paper dealing with this particular subject.

E. Instruments of Crime

91. The search for instruments or means of an offence is not given precise statutory authorization in Canada, but strands of recognition do exist. Both *Narcotic Control Act* and *Food and Drugs Act* provisions and section 99 of the *Criminal Code* allow the seizure of things “by means of which” a relevant offence has been perpetrated; paragraph 443(1)(c) of the *Criminal Code* covers things “intended to be used” for serious criminal purposes; this wording, although ambiguous, would seem to contemplate not only the fitness of the thing for an offensive use, but also the actual intention of its possessor to so use it. In England, where no search warrant provision as general as section 443 exists, the “instruments” of a crime have been held to be seizable at common law.¹¹⁰

92. Indications are that warrants are used infrequently to seize instruments as such. Paragraph 443(1)(c) appears to be used rarely, if at all.¹¹¹ One area in which instruments of crime are relevant is that of drug offences; the police may wish to seize the paraphernalia associated with narcotic or drug use, trafficking and manufacturing. Since the *Narcotic Control Act* and *Food and Drugs Act* provisions do not allow for the issuance of warrants to search for such items but only for narcotics or drugs themselves, these items did not show up in warrant documents captured in the cross-country survey. However, given the officer’s power to seize these items once in possession of a warrant, they did appear in reports of seizures. Among the items often seized were pipes, scales, knives, baggies, smoking devices, and laboratory components.¹¹²

93. Instruments of an offence such as drug paraphernalia would in most cases constitute potential evidence of that offence; other instruments such as weapons might in themselves be illegal to possess or seizable on a protective basis. In any of these events, no discrete justification would be required for asserting the State’s control over the instrument as such. The question may thus be posed: Outside of their potential status as evidence, contraband or weapons seized on a protective basis, what basis is there for the seizure of instruments of an offence? There would appear to be two distinct answers to this question on the basis of common law authority.

94. First, there is the historical notion that items, once used by their owner in the commission of an offence, must be forfeited to the State. This notion has been traced to the medieval law of the "deodand" under which objects such as wagons or swords that caused injury to an individual were seized, condemned, and after purification, sold by the Crown. In essence, a degree of fault was attributed to the object itself.¹¹³ If this seems somewhat primitive, it is worthwhile to ask what interest is served by subsection 10(9) of the *Narcotic Control Act*, under which conveyances used in drug offences are forfeited to the Crown. The absence of a justification for retention of such conveyances, after seizure and pending conviction, was recognized by the Manitoba Court of Appeal in the *Hicks* case:

It is possible to order that property be forfeited even though it is not in the possession of the Crown. If such property is disposed of so as to make unenforceable an order of forfeiture, that is a fact situation that may affect the sentence to be imposed on the offender.¹¹⁴

The argument can be taken a step further. If there is no compelling reason to allow the Crown to retain a seized conveyance before forfeiture, it is difficult to see why seizure of the thing ought to be allowed in the first place, unless it serves an evidentiary function. Once again, it is worth emphasizing that the service of a sentencing function, be it punishment or deterrence, is not in itself a sufficient justification for pre-trial search and seizure.

95. The other rationale behind discrete powers to seize instruments of an offence is a preventive one; indeed, this is the rationale expressed in paragraph 443(1)(c). The primary objection to this rationale is that it violates the sequence of crime and response to crime which this paper has adopted as a basic limitation upon intrusions. Indeed, paragraph 443(1)(c) itself illustrates the arbitrariness and uncertainty that potentially flow from the most careful and narrow departure from this sequence. While it is possible to identify certain types of apparatus, such as counterfeiting equipment, as things which by their nature are susceptible to criminal use, there are many items, in themselves innocuous, which may be "intended to be used for the purpose of" committing an offence. A kitchen knife may be used to murder, a pen and paper may be used to forge documents, a test tube may be used to manufacture illicit drugs.

96. We conclude that the appropriate way in which to control the possession of truly dangerous items is to enact prohibitions against their possession. In the absence of such a prohibition, an individual should not be vulnerable to intrusion before forfeiture or sentencing because of the illegal potential of an item which he

lawfully holds. A possible exception to this rule, the case of weapons that may endanger human life or safety, will be discussed later in this paper.¹¹⁵ Given our general position, however, we do not include instruments of crime in the definition of “objects of seizure”.

F. Persons Illegally Detained

RECOMMENDATION

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.

97. Besides the things or informations the State may wish to control, the object of a search may in rare cases be a person. The usual reason why the police want to obtain control over a person is that they suspect that person of participating in an offence, and wish to arrest him. Yet there may be another reason — the person may be detained illegally by another individual. Situations of detention constituting offences under the present *Criminal Code* include kidnapping¹¹⁶ and hijacking.¹¹⁷ The police, in such circumstances, intrude in order to rescue the person, not arrest him.

98. The only crime-related search provision under existing law that recognizes this justification is section 182, which deals specifically with women in bawdy-houses. On the other hand, the purpose is explicit in a number of provincial statutes, notably those dealing with child welfare.¹¹⁸ It has been accepted in the *ALI Code* that individuals “unlawfully held in confinement or other restraint” ought to be regarded as “permissible objects of search and seizure”;¹¹⁹ an amendment to allow for search warrants for persons was recently made to the American Federal Rules.¹²⁰

99. What, then, accounts for the absence of powers to search for such persons from the *Criminal Code*? The answer may lie in a perceived absence of need. To some extent, rescue efforts might well be authorized as incidental to the arrest of an offender, and in the light of *Eccles v. Bourque*, it is likely that a peace officer would not need a warrant to enter private premises to make an arrest.¹²¹ Moreover, peace officers retain their residual common law authority to preserve the peace, a power that extends to entering premises without a warrant to prevent the commission of an offence that would

cause immediate and serious injury to a person.¹²² Police authorities, however, informed Commission researchers of a reluctance to proceed in such cases without documentary authority. Moreover, it is not inconceivable that a victim of a *Criminal Code* offence such as kidnapping might be unlawfully detained at a different location than that at which the offender is to be found.

100. We recommend therefore that peace officers be specifically empowered to search for and rescue persons illegally detained. Due to the definitional and practical distinctions between such a power and the powers to search for and seize things, funds or information, we propose that the search and rescue power be developed separately rather than recognized in a classification of “objects of seizure”. As in the case of search and seizure powers, however, the illegality of detention should be connected to a criminal offence. Otherwise, the problem arises of the potential use of a search power in lieu of the writ of *habeas corpus*. *Habeas corpus* is obtained from a superior court to test the legitimacy of a wide variety of forms of detention, including incarceration of persons committed for trial or pending deportation, confinement of the mentally ill, and custody of children. In many of these cases, the basis of the illegality is likely to be procedural impropriety, rather than the commission of an offence by the custodian. Since the basis for intrusion accepted in this Working Paper is that of responding to crime, it follows that in such cases, the search power should be inapplicable.

CHAPTER SIX

Exceptions to the Warrant Requirement

RECOMMENDATION

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.**

101. In defining the categories of “objects of seizure”, we have identified those occasions in which an intrusive search and/or seizure is justified. We now turn to defining the procedures by which individual searches and seizures should be authorized. Our basic rule is that unless it is otherwise provided, peace officers should only be empowered to search for or seize “objects of seizure” with a warrant. Our task in this Chapter is establishing the exceptions to the warrant requirement. As indicated earlier, we maintain that there are essentially two different kinds of situation in which a search or seizure should be authorized without a warrant: situations in which obtaining a warrant is unnecessary, and situations in which obtaining a warrant is impracticable.¹²³

102. The “unnecessary” standard relates basically to the understanding that searches and seizures represent intrusions upon individual rights. It follows that when the seeking of things, funds or information involves no such intrusion, it is unnecessary to confer any authorization upon the police. For example, in investigating a murder committed in a public park, the police require no exceptional power to attend at the scene, take photographs and collect physical evidence. On the other hand, such powers are relevant when the evidence of the crime is in a private home; entering the home intrudes upon the occupant’s private domain. The law recognizes, however, that an occupant may consent to the entry; once the consent has been given, the entry in effect ceases to be regarded as intrusive. We address the “consent” exception to the warrant requirement in Recommendations 5 and 6.

103. The “impracticability” test, on the other hand, contemplates situations of urgency. This test is recognized, at least implicitly, in a range of powers to make warrantless searches under existing law: the common law power incidental to arrest, and the statutory provisions relating to firearms, narcotics and drugs. The question of whether this range truly or adequately comprehends situations of urgency is one that has long merited careful examination. Our own analysis suggests that there are three classifications of urgent situations in which exceptions to the warrant requirement may be appropriate: arrest, danger to human life or safety, and potential loss or destruction of objects of seizure. We address these situations in Recommendations 7 to 10.

I. Consent

RECOMMENDATIONS

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.

A. The Need for Limitation

104. Our proposal reflects our dissatisfaction with the present law respecting “consent” search.¹²⁴ The advantages of resorting to consent as the basis of authorization for a search or seizure are many — a diminished likelihood of review, a possible psychological edge over the person searched, the less burdensome procedural requirements, and the absence of confinement to the usual “grounds of belief”.¹²⁵ While the law should continue to recognize the existence of true co-operation between a peace officer and a private individual, it is important to put the matter of consent in the context which its common law history has not supplied. It is important, that is, to regard “consent” searches as an intrinsic part of the scheme of police procedures and not as privately sanctioned transactions that fall outside the concern of the public law-maker. This view has been accepted by both the Australian Law Reform Commission and the American Law Institute, in the *Criminal Investigation Bill*¹²⁶ and the *Model Code of Pre-Arrest Procedure*¹²⁷ advanced by each respectively. It also reflects the empirical perception that police often use consent much like they use their coercive powers — to accomplish objectives pertaining to the search of suspects.¹²⁸

105. To the extent that the law encourages resort to consent as a basis of authorization, it promotes certain objectives and policies. One obvious policy relevant to the law in this area — the recognition of the dependency of police investigation upon citizen co-operation — has received widespread emphasis in Canada. As the Ouimet Committee observed, “[t]he police cannot effectively carry out their duties with respect to law enforcement unless they have the support and confidence of the public”.¹²⁹ While this recognition argues in part for keeping law in sufficient harmony with existing community values to ensure public co-operation, it also has a procedural aspect: encouraging the police to gain the co-operation of individuals rather than asserting coercive powers against them.

106. The value of reliance upon policing by consent has its limitations, however. For one thing, it has been suggested by

American sources that such reliance may have some counterproductive effect on police practice and investigations:

The seeking of consent is often an officer's substitute for the thinking, writing and "leg work" involved in obtaining a search warrant. In this context, if consent is denied, the target of the search is put on notice that the police suspect him of wrong-doing. What then occurs is either a do-it-yourself emergency, upon which the courts look with disdain, or destruction of evidence by the alerted wrongdoer. Neither of these results is acceptable.¹³⁰

While the likelihood of gaining the individual's consent might be expected to be a significant factor in a peace officer's decision to request it, the argument remains that by making resort to consent a more easily invoked option than a warrant application, the law discourages the police from obtaining a warrant in cases in which it might be truly appropriate. This argument is contradicted, however, by the empirical evidence that the police may often obtain a warrant as a back-up in case consent is not forthcoming.¹³¹

107. More significantly, the unfettered discretion to use "consent" as the basis of authorization may actually undermine the policy of promoting public co-operation with the police, if it results in submission out of apprehension rather than a true state of co-operation. An experienced Canadian criminal lawyer has observed, "[m]uch of the disrespect law violators have for authority generally can be traced to early encounters with police officers who instilled sentiments of fear into them rather than of trust and respect".¹³² The Ouimet Committee, citing this observation, called for the maintenance of fairness in procedures governing police contact with the offender.¹³³ In the matter of the "consent" search at issue in this paper, a similar concern calls for the entrenchment of rules and guidelines to help ensure that the use of this exception to the warrant requirement is restricted to appropriate cases.

108. This approach may seem to impose an unnecessary burden on the police. If an individual is prepared to give consent to another person to enter his premises or touch his person, why should the law make the second individual subject to special constraints by virtue simply of his identity as a peace officer? The answer is that it is misleading to view a peace officer's requests for permission to enter and search premises, frisk persons and take away items consequently found, on the same footing as hypothetical requests of a similar nature from private individuals. Peace officers do not only exercise special powers; they hold a special and imposing office. Accordingly, a factor of potential intimidation is presented when a private

individual is confronted with a police request. As “consent obtained by show of authority is no consent”, the danger arises that the compliance obtained from the individual is not truly consensual.¹³⁴

109. This approach may seem to conflict somewhat with recent Canadian case-law. Notwithstanding a show of authority, our courts have regarded an individual as acting voluntarily in complying with a peace officer’s request in various contexts. For example, since the *Chromiak* case it seems to be established that the response of a person faced with a demand to provide a breath sample may be considered to be voluntary.¹³⁵ Canadian authority, however, goes no further than making specific determinations of voluntariness of individual action on the facts of specific cases. It does not necessarily argue against subjecting the relevant police activity to specific statutory rules. In this regard, it is interesting to note that in *Chromiak*, the police activity of demanding a breath sample was governed by a *Criminal Code* provision.¹³⁶

110. It may be useful to emphasize here that consent to a search or seizure is primarily relevant in legal terms in cases in which either the grounds for a non-consensual intrusion do not exist or the procedures to obtain authorization for a non-consensual intrusion have not been followed. Although peace officers may seek a person’s consent as a strategic matter in cases in which they have authority for a non-consensual search, it is misleading to view consent as the legal basis for the frisk, entry, search or seizure at issue in such cases. In reality, consent is used to facilitate an activity the officer is prepared and authorized to conduct as an exercise of power. Nothing in our proposals impedes peace officers from continuing to seek compliance in such cases. Rather, our proposals affect those situations in which the authority or power to search does not exist outside of the consensual transaction. In such situations, the law envisages the individual being protected by the normal tortious and criminal prohibitions against intrusions upon private interests. Insofar as “policing by consent” entails encroachment upon such interests through acquiescence based on fear or misinformation, it undermines the force and meaning of those protections.

111. A final argument for statutory limitations is a specific application of the position advanced earlier — that the constitutional prohibition of “unreasonable search and seizure” set out in section 8 of the *Canadian Charter of Rights and Freedoms* makes it desirable to codify search and seizure procedures in conformity with the constitutional standard.¹³⁷ This argument rests on the premise that notwithstanding the existence of consent, a peace officer’s intrusion

upon an individual's interests may still amount to a "search" or "seizure". This position parallels the view articulated by some American theorists that consent cases are instances of "warrantless governmental intrusions which nevertheless remain subject to the ... standard of reasonableness" set out in the American Fourth Amendment.¹³⁸ If and how the reasonableness standard in section 8 of the *Charter* is related to consent search here in Canada are questions that remain to be resolved in our jurisprudence. It seems likely, however, that a properly obtained and truly voluntary consent could establish at least on a *prima facie* basis that the search or seizure agreed to is reasonable.

B. "Voluntariness"

112. In order to be legally effective, consent must be "voluntary". This aligns the matter of consent search with legal tests applied to contexts quite apart from that of search and seizure. Most relevant to the present study are the tests applicable to confessions and to the interception of private communications. Discussion of these tests demonstrates that the degree and nature of "voluntariness" demanded by law may differ according to the context in which it is required.

113. The test of "voluntariness" for confessions was set out in the *Ibrahim* case as follows:

It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Hale.¹³⁹

This rule was adopted by the Supreme Court of Canada in the *Boudreau* case, in which Rand J. referred to the possibility of "doubt cast upon the truth of a statement arising from the circumstances in which it is made".¹⁴⁰

114. The application of this test to paragraph 178.11(2)(a) of the *Criminal Code*, which allows the interception of a private communication with the consent of a party to it, was rejected by the Supreme Court of Canada in the *Goldman* case.¹⁴¹ The basis of the majority decision was that certain inducements or compulsions which

could affect the truth of a confession would not influence the content of an intercepted private communication. Accordingly,

[t]he consent must not be procured by intimidating conduct or by force or threats of force by the police, but coercion in the sense in which the word applies here does not arise merely because the consent is given because of promised or expected leniency or immunity from prosecution. Inducements of this nature or compulsion resulting from threats of prosecution would render inadmissible a confession or statement made by an accused person to those in authority because the confession or statement could be affected or influenced by the inducement or compulsion. Different considerations arise, however, where a consent of the kind under consideration here is involved.¹⁴²

This assertion squared with conclusions reached contemporaneously in *Rosen v. The Queen* which concerned not a consent to intercept, but rather a consent to admit, evidence of a wire-tap at trial. In particular, the Court's observation in *Rosen* that the nature of the evidence was already "fixed and determined"¹⁴³ was cited by MacIntyre J. in *Goldman*.¹⁴⁴

115. Where should the matter stand with regard to consent to search? The reasons expressed by the Supreme Court of Canada in *Rosen* may seem relevant to search and seizure as much as to interception of communications; since the evidence that might be seized is "fixed and determined", the dangers of altering testimonial evidence in response to compulsion or inducement are inapplicable. On the other hand, there are values at stake in consent search and seizure other than those of evidentiary reliability. We are concerned also that the individual in question retain effective discretion upon his private interests. While this matter ultimately must fall to be decided by case-law, we observe that to regard as consensual the acquiescence of an individual obtained through inducement, threat or manipulation would be to undermine much of the policy we have advanced here.

C. Documentation

116. The proposals we make regarding documentation represent a departure from traditional legal approaches, which have been content to let the question of voluntariness be decided on the facts of each individual case. This position has been expressed by the United States Supreme Court as follows:

Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.¹⁴⁵

But while this position may be acceptable as a basic rule for *ex post facto* adjudication by courts, it does not respond to the need we perceive to regulate the actual transaction between police officer and the individual contacted. Nor does it take into account the serious evidentiary difficulties in accurately reconstructing the search incident at trial. Our proposals attempt to address these problems at least in part.

117. Documentary caution and acknowledgment procedures seek to regulate the consent transaction by giving the individual concerned notice of his right to refuse consent and maintain discretion over when and by whom his private interests may be compromised or infringed. It has been observed that Canadians seem to naturally accord legitimacy to police actions;¹⁴⁶ an individual confronted with a peace officer's request to search his person, vehicle or premises seems likely to assume that the police intention to conduct a search has a legal basis. Permitting this assumption to gain the actual legal foundation for the search (*viz.* the individual's own consent) is to tolerate a certain degree of finesse in police practice. In this connection it seems fair to observe that the average citizen's appreciation of the complexities of search and seizure law is understandably less than comprehensive; accordingly, the possibility that the lawfulness of a police initiative to search might be based exclusively on the consent requested might not be appreciated by the prospective consenter. An objective of our recommendation is to make the situation clear to all parties. This objective is best served if a warning to the individual is printed on the acknowledgment form; this also relieves the need for any personal onus on the peace officer.

118. Second, a written form affords clear evidence of the existence of consent. The evidentiary problems associated with consent have been recognized in many of the recent law reform initiatives undertaken in different jurisdictions. Simplifying the matter has been viewed as desirable, not only in the interests of the individual searched, who may wish to ascertain his position with respect to subsequent legal action, but also from the point of view of the peace officer; it assists him to make an informed decision as to whether to rely on consent as a basis of authorization beforehand, and to respond to any challenge to this decision after the fact.

Accordingly, the Royal Commission on Criminal Procedure in England suggested that “for the protection of the officers concerned” police officers should obtain a written consent signed by the individual.¹⁴⁷

119. In the absence of any legal requirement that any document be completed in the course of the transaction by which the peace officer receives consent from the private individual, different administrative policies regarding the use of forms and cautions appear to be adopted by various police forces.¹⁴⁸ It is also relevant to note that while documentation is not expressly required under *Criminal Code* provisions concerned with consent to interception of electronic communications, experts in the field and police instructional materials advise officers to obtain consent in writing.¹⁴⁹

120. While we recognize that there are a number of arguments that can be made against requiring documentary cautions and acknowledgments, we do not believe that these arguments refute our proposals. Many police officers commented to our researchers about the burden of more paperwork; however, it should be noted that with a properly prepared form the only person required to fill out information would be the individual affected. Some police officers also expressed the fear that by requesting confirmation of consent in writing, a peace officer might influence a consenting party to withdraw his consent. Yet some officials conceded that “a little coercion” might be involved in the unwritten consent; in this respect, we prefer the approach of another group of police officials who took the view that obtaining consent in writing would rarely be difficult in cases of true co-operation. It may be argued that production or completion of a consent form may be impracticable in certain situations; acknowledging this, we make resort to the documentary procedures a matter of evidentiary presumption as to voluntariness rather than an inflexible rule.

121. Finally, we realize that legal rules may be of limited value in achieving goals such as police deference to individual decisions not to co-operate in an investigation. Based both on empirical observations about consent search here in Canada and studies of the effects of the somewhat analogous requirements for mandatory cautions before custodial interrogations in the United States, it seems fair to query how much protection our rules will provide in everyday practice. We do not believe that the possibility of limited practical success, however, should deter us from doing what is possible at present. If the documentary procedures recommended here are

implemented and prove ineffective in practice, we concede that their utility will have to be re-examined.

122. The details and effects of obtaining written consent differ slightly from proposal to proposal among the various recent law reform initiatives. The Marin Commission has recommended that consent to searches performed by Canadian postal inspectors should be given in writing.¹⁵⁰ The British Royal Commission has recommended that the fact of consent be recorded in the officer's notebook and signed by the person concerned;¹⁵¹ indeed, this is a course of action some Canadian peace officers have deemed to be prudent at present in the absence of legal guidelines. A comprehensive and persuasive treatment of the subject has been offered by the Australian Law Reform Commission:

Although we do not wish to multiply unduly the number of pieces of paper that police officers must carry about with them, we think that the rights in question here are sufficiently important of protection to require that any consent on which the police rely in conducting a search should be acknowledged in writing. The absence of any such written acknowledgment would be prima facie evidence that no such notification was made or consent given.¹⁵²

We recommend that a scheme similar to that recommended for Australia be adopted in Canada.

II. Arrest

RECOMMENDATIONS

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.

123. The power to conduct a warrantless search incidental to arrest is a valuable and indeed necessary one. It has been justified on the basis of a number of factors, which were perhaps best summarized by Hugessen J. in the *Laporte* case: "to make the arrest effective, to ensure that evidence does not disappear and to prevent the commission of a further offence".¹⁵³ In addition to the supporting case-law on point, the legitimacy of performing searches to serve these objectives is implied by subparagraphs 450(2)(d)(ii) and (iii) of the *Criminal Code*; these provisions permit an officer to arrest a person without a warrant for relatively minor offences rather than compelling his appearance through a form of process, in order to either secure or to preserve evidence, or prevent the subsequent commission of a similar or different offence.

124. The issues that arise in connection with this power concern the limitations, if any, that ought to be placed on its exercise. There are three questions in this regard which we have addressed in our recommendation: (1) Should the search be authorized automatically upon arrest, or must other circumstances be present to justify it? (2) How far should the permitted scope of search extend? and (3) How far should the permitted scope of seizure extend?

A. Should the Search Be Automatic upon Arrest?

125. In theory, Canadian law appears to stipulate that a search incidental to arrest is authorized only if it is a reasonable precaution in the circumstances of the case; this position is derived from the influential nineteenth-century cases of *Leigh v. Cole*¹⁵⁴ and *Bessel v. Wilson*.¹⁵⁵ While these cases contemplate that there may be situations of arrest in which a personal search would be unfounded, Canadian courts have been decidedly reluctant to invalidate searches incidental to arrest. The issue is thus raised as to whether the additional requirement of reasonableness derived from British authorities serves any useful purpose. Once the grounds for arrest are present, should the police not be permitted to perform searches automatically?

126. This position offers the advantages of apparent simplicity and common sense, particularly when the arrest is seen as the initial step in placing an individual in institutional custody. It is misleading, however, to group together all arrest situations and attribute to them the factors obtaining in the archetypal instance of full-scale custodial arrest. A peace officer acting under section 450 of the *Criminal Code* may legitimately arrest a person suspected of the commission of a relatively minor offence, such as dangerous driving,¹⁵⁶ and soon afterwards, having ascertained his identity, release him with a form of process pursuant to section 452. It seems difficult to maintain that the need to perform a search in such a case would correspond to that obtaining in, for example, the situation of a robbery suspect apprehended after a chase.

127. The distinction between these two kinds of situations has been recognized in the *ALI Code*, which provides:

The searches and seizures authorized by the other Sections of this Article shall not be authorized if the arrest is on a charge of committing a "violation" ... or a traffic offense or other misdemeanor, the elements and circumstances of which involve no unlawful possession or violent, or intentionally or recklessly dangerous, conduct....¹⁵⁷

The exact parameters of any codified power of search incidental to arrest must take into account the possibilities of changes to the existing structures of arrest and, indeed, classification of offences.¹⁵⁸ It is suggested, however, that the limiting policy evident in the *ALI* provision is a sound one; it demands, at the least, that the power of search incidental to arrest should not be an automatic one in all cases.

128. A similar criticism may be advanced at a more theoretical level. To wed search to arrest is to ignore the distinct purposes that distinguish the two powers: the control of things, funds or information on the one hand, and the control over the person on the other. Laying down a rule that the former purpose can be served automatically once the latter has been achieved establishes a sequence without sense. The critical question is not: When has the freedom or dignity of the individual been sufficiently reduced to permit a warrantless search of his person or areas within his control? Rather, it is: When does the State's interest in the control of things or information outweigh the individual interest at stake? In the instance of arrest, as in all other instances, the justification for the search must come from the circumstances of the case. Accordingly, we propose the retention of the present requirement that a search be a reasonably prudent measure in order to be authorized as an incident of arrest.

B. What May Be Searched?

129. At present the power of search incidental to arrest is generally conceded to extend to areas within the control of the accused. This is a vaguely defined limitation; arguably some degree of vagueness is necessary to accommodate the exigencies of individual cases. It is useful, however, to attempt to put the matter in sharper focus by looking at the rationale for proceeding without a warrant. This rationale is the denial of access to relevant objects that may be destroyed or weapons or items that could endanger human safety or facilitate escape. This would suggest that the scope of the power should be restricted to spaces accessible to the accused at the time that the search is performed.

130. This position may appear to raise problems of uncertainty in the definition of police powers. These problems are illustrated somewhat by the American experience of fluctuating decisions on a scope of search, particularly with respect to vehicles.¹⁵⁹ Are all parts of the passenger compartment under the driver's control? What about the trunk? We recognize that these issues pose problems. Insofar as vehicle searches are concerned, however, this concern for clarity is met by the proposals for expanded powers outlined later in this Chapter. These proposals would give the police clear powers to search the entirety of vehicles occupied by arrested persons once requisite grounds exist,¹⁶⁰ and would leave as the main focus of dispute the situations in which the person is found inside private premises, such as a residence or place of work.

131. The question of the scope of search in such circumstances has been a matter of dispute in both the United States and Britain. In the definitive pronouncement of the United States Supreme Court in the *Chimel* case, it was stated:

A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.¹⁶¹

On the other hand, the Royal Commission on Criminal Procedure in England has proposed that statutory recognition be given to

warrantless searches of premises occupied by, or under the control of, a person, even if he is arrested elsewhere, with the limitation that such searches could only be performed "on the basis of suspicion on reasonable grounds" that the premises contained articles material to the offence charged or a similar offence.¹⁶²

132. The British approach may be criticized for its failure to respect the special privacy interest in the premises which an individual occupies. The circumstances that justify the deprivation of liberty entailed by an arrest do not require that the individual automatically lose his protection against violation of his private spatial domain. The relationship between arrest powers and the violation of private domains has arisen in recent Canadian cases, which have evinced a continuing judicial resistance to allow warrantless intrusions into the private domain of alleged offenders.¹⁶³ A sympathetic concern was expressed to Commission researchers by peace officers in a number of Canadian cities who indicated that even after performing an arrest they preferred to have a warrant in their possession before searching the accused's premises.

133. We believe that the *Chimel* rule is a sound one. Although at first glance it may seem rigid and unnecessarily limited, the reach test does provide a workable definition of the area within the accused's control; indeed, extending the scope of search and seizure beyond the reach of the arrested person may create problems of definition far greater than those it solves.¹⁶⁴ Moreover, the adoption of this rule in Canada would leave a number of viable options open to peace officers wishing to search the premises of a party they intend to arrest: a search warrant could be obtained either before entry or after the arrest. In either case, use of the telephonic warrant procedure we recommend later might well be appropriate.¹⁶⁵ We conclude that the inconvenience entailed in obtaining a warrant is generally outweighed by the interests served by the *Chimel* rule.

134. One situation in which requiring a warrant might seem unduly rigid, however, is that in which "objects of seizure" are within the plain view of the officer at the time of the arrest, yet beyond the reach of the arrested person. The "plain view" doctrine, which has long been recognized in the United States, would permit seizure of items in such a situation.¹⁶⁶ This doctrine is discussed later in this paper.¹⁶⁷ Also relevant to the issue of the scope of search incidental to arrest is the matter of intimate contacts with the person. Insofar as these fall within the definition of "medical examinations", the recommendations discussed later would require resort to special procedures.¹⁶⁸

C. What May Be Seized?

135. As indicated earlier, the justifications for search incidental to arrest have focused on a number of classifications of items — the fruits of a theft, evidence of the offence alleged to have been committed, and dangerous weapons.¹⁶⁹ At the same time, the case-law has denied the validity of seizing items unconnected to legitimate state interests attending an arrest, such as money lawfully possessed by the accused.¹⁷⁰ It was observed earlier that the objects of seizure associated with search incidental to arrest actually have fallen within similar categories to those objects associated with warrants to search places; the proposed definition of “objects of seizure” was intended to cover all intrusive searches, including those incidental to arrest.¹⁷¹ This approach conforms to that adopted in the *ALI Code*, under which the definition of “things subject to seizure” upon arrest incorporates classifications of things seizable under warrants.¹⁷²

136. The need to preserve safety in the context of an arrest, however, may justify expanding the scope of seizure. Although certain instruments may not fit strictly within the *Criminal Code* provisions covering illegal use or possession of a weapon, it may be a reasonable precaution to remove them from the accused at the time of his arrest. The intention in seizing such instruments is neither confiscatory nor evidentiary; rather it is solely to facilitate the exercise of the arrest power. Accordingly, we propose that, in addition to “objects of seizure”, a peace officer arresting an individual should be empowered to seize any weapon or other thing that could either assist the accused to escape, or endanger the life or safety of the accused, the peace officer or a member of the public.

137. Finally, the occurrence of an arrest justifies seizure of items that will enable the police to identify the accused. Subparagraphs 450(2)(d)(i), 452(1)(f)(i) and 453(1)(i)(i) of the *Criminal Code* all recognize that the need “to establish the identity of the person” may justify a decision by a peace officer or officer in charge to arrest and detain an accused person instead of releasing him with a form of written process. The power to actually search the person for identification once he has been arrested has been recognized at common law.¹⁷³ We propose that it be entrenched in the regime we are developing.

III. Where Delay Is Dangerous to the Life or Safety of Persons

RECOMMENDATION

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.

138. Outside of arrest, the need to preserve life and safety is recognized in a number of warrantless powers. The rationale is most evident in the context of the weapons searches authorized by sections 99 and 101 of the *Criminal Code*; it has also been a factor in the common law power of entry to stop, investigate and prevent breaches of the peace. We find that this rationale is persuasive. Whenever human life or safety is endangered by the delay necessary to obtain a warrant, the sacrifice of warrant protections is clearly justifiable in order to preserve what is an overriding value. Although detaching such searches from the prerequisite of arrest entails certain risks (which we address in the discussion of Recommendation 10 below), we believe these risks are also outweighed by the value of life and safety.

139. This position assumes that the justification for intrusion accepted in this paper is established — viz. that the peace officer has reasonable grounds to believe that an “object of seizure” is to be found. Any weapon possessed in circumstances constituting an offence would fall within the scope of this seizure power. But while the proposed provision would accordingly subsume the warrantless powers accorded by sections 99 and 100 of the *Criminal Code*, it is more limited in certain respects than both the common law power to preserve the peace and the recently enacted provisions of section 101. The need for the additional powers afforded by these two sources is discussed later.¹⁷⁴

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

RECOMMENDATION

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.

140. This proposal basically extends the power to search a motor vehicle beyond the limits which would otherwise be imposed by the rule for search incidental to arrest set out in Recommendation 7. Our position here is a cautious one. On the one hand, it signifies a recognition of the exigencies of situations in which a suspect is occupying, or in control of, a movable vehicle. In such situations, as the United States Supreme Court recently concluded in the *Ross* case,¹⁷⁵ there is a compelling need for the peace officer's authority to be clear-cut and free of unrealistic and confusing divisions of the vehicle into zones of permitted and forbidden investigation. Accordingly, we follow the principle enunciated in *Ross* that the scope of the warrantless search of the vehicle should be as wide as that which a judicial officer could authorize by warrant. On the other hand, the proposal is significant for the powers which it does *not* confer. Specifically, it expresses our reluctance to confer warrantless search and seizure powers outside the context of arrest, even where there is a danger that incriminating objects will elude police control if an immediate search or seizure is not made. This reluctance pertains not merely to the search of vehicles but also to searches of persons and places. In this sense we have differentiated between the paramount interests of preserving human life and safety, which justified the relatively broad provisions of Recommendation 9, and the significant but nonetheless subordinate interests of preserving the “objects of seizure” themselves. For the reasons outlined below, we are not prepared to recommend the same kind of provision to meet the latter interests as we are to meet the former.

A. The Present Law

141. At present, Canadian law admits no general exceptions to the warrant requirement based on the desirability of preventing the potential loss or destruction of objects of seizure. This factor has received some attention in case-law in other contexts. For example, it was recognized in *Eccles v. Bourque*,¹⁷⁶ that in order to prevent the destruction of evidence, a peace officer may be excepted from the requirement of making an announcement before entering premises to perform an arrest. If he wishes to perform a search without a warrant in order to prevent such destruction, however, the peace officer is somewhat limited in his options. If no consent to perform the search can be obtained, and if no danger to life or safety exists, there are basically two alternatives left: invoking a special statutory power, or making an arrest and then conducting a search incidental to it.

142. Many relevant statutory powers of warrantless search and seizure are found in federal regulatory and provincial statutes that are beyond the scope of this Working Paper. Insofar as crime-related legislation is concerned, the primary example is that of the narcotics and drugs powers.¹⁷⁷ Due to their portability and susceptibility to disposal, narcotics and drugs are often perceived to pose particular dangers of destruction or loss. These dangers are invoked by police officers to explain why, for example, when searching dwelling houses, they prefer to resort to a writ of assistance than a search warrant. In the Law Reform Commission's survey of a writ use in Canada, 40% of officers using writs explained that they had not used a warrant due to the need to prevent destruction or removal of evidence.¹⁷⁸ Another instance in which the rationale of preventing destruction of evidence appears to be applied is that of warrantless seizures of evidence of gaming offences under subsection 181(2) of the *Criminal Code*. Peace officers interviewed by Commission researchers referred to cases in which peace officers "stumbled" onto a game in progress and were accordingly required to make an immediate seizure.

143. The sole alternative in instances in which no statutory search power is applicable is that of arrest. This alternative is not always an unrealistic one. At least insofar as "takings of an offence" or "things ... possessed in circumstances constituting an offence" are concerned, any belief that an individual is in possession of the relevant object of seizure may amount to a belief that the individual is committing an offence: possession of property obtained by crime, for example, or possession of narcotics or drugs.¹⁷⁹ However, the restriction of

peace officers to this legal alternative raises certain difficulties. Insofar as the search power incidental to arrest is limited to the area within the arrested person's control (or, as we have recommended, his reach), it does not cover other areas, such as the space within a vehicle he is driving, in which objects of seizure may be located and susceptible to loss or destruction if an immediate search is not made. Perhaps more fundamentally, the logic of recognizing arrest as a prerequisite to searches for certain objects of seizure but not others demands examination.

144. In addressing these difficulties, we look to the positions regarding the prevention of loss or destruction of objects of seizure taken in the case-law of other jurisdictions and in recent proposals from both law reform commissions and scholars. Many of these sources have expanded powers to make searches and seizures for such purposes beyond arrest situations. The additional exceptions to the warrant requirement that have been recognized, however, are generally limited according to one or more variables. Although the exact nature and mix of variables in each case differs somewhat, it is possible to identify one factor as most critical: the identity of the subject of search.

B. Different Subjects of Search

145. There are three subjects of search at issue in this Working Paper: persons, vehicles and privately occupied places, residential and non-residential. In some jurisdictions, it is recognized that the danger of loss or destruction of objects sought may justify warrantless search intruding upon some individual interests but not upon others. This differentiation may be a product of either or both of two factors: the different values placed upon different interests, and the particular risk of loss or destruction associated with each of them.

(1) *Vehicles*

146. There appears to be a consensus among other common law jurisdictions that searches of vehicles should be relatively free of the constraints of warrant procedure. This is partly because, although vehicles are private domains, they are less valued as such than places

in which the individual lives or works.¹⁸⁰ Attention has also been paid to the fact that vehicles, due to their inherent mobility, are likely to escape an officer's control in the time required to obtain a warrant to search them. These factors have not led to a proliferation of express powers to search vehicles without warrant in Canadian criminal law. Indeed, only section 99 of the *Criminal Code* explicitly mentions vehicles as a subject of warrantless search. In large part, this is due to the ready access peace officers gain to vehicles under provincial liquor control and motor vehicle legislation.¹⁸¹

147. The jurisdiction that has given the greatest attention to warrantless searches of vehicles is the United States. In *Chambers v. Maroney*, the American Supreme Court observed:

[T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true ... if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.¹⁸²

The *ALI Code*, following in the tradition of American jurisprudence, contains this provision:

An officer who has reasonable cause to believe that a moving or readily movable vehicle, on a public way or waters or other area open to the public or in a private area unlawfully entered by the vehicle, is or contains things subject to seizure ... may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search.¹⁸³

A provision for warrantless searches of vehicles for objects of seizure has also been proposed by the Royal Commission on Criminal Procedure in England and Wales.¹⁸⁴

148. Our Recommendation 10 does not advance an "automobile exception" to the warrant requirement as such. Rather, it responds to concerns similar to those recognized in the United States and Great Britain by expanding the scope of search incidental to arrest in cases involving a movable vehicle. In large part, our position here reflects concerns related to searches of persons. As a matter of policy, these concerns — a desire for clarity of status, and an aversion to unnecessary increments in police discretion — prompt us to tie warrantless search powers as much as possible to the prerequisite of arrest.¹⁸⁵ But there are two additional points, specific to the context of vehicle searches, that deserve mention now.

149. First, except for instances in which the vehicle is both unattended and unoccupied, it seems fair to observe that the search of a vehicle must frequently involve an arrest in fact: the detention of the person concerned against his will during the period of the search. We recognize that the Supreme Court of Canada decided in the *Chromiak* case¹⁸⁶ that in complying with a police initiative to stop the motor vehicle he was driving, an individual could be considered to be acting voluntarily and hence be unconstrained by a condition of legal arrest. But *Chromiak*, a case involving a demand for a breath sample, must be viewed on its own facts. It did not purport to establish that stops of vehicles for an investigative purpose would never involve an arrest. Given the unlikelihood that a person whose vehicle is stopped and searched would be permitted, or indeed would consider himself to be permitted, to leave the scene either with or without the vehicle, it is arguable that the ratio of *Chromiak* would rarely be applicable in cases of vehicle searches. And while it is possible to conceive of the element of detention in such cases as incidental to the exercise of the power of search, peace officers themselves often account for vehicle stops in terms of investigation of a person — an inquiry into the commission of an offence by the driver or occupant. In such cases, it seems realistic to view the primary power at issue as one of arrest (controlling the suspect), and the ancillary power as one of search (looking through the suspect's vehicle).

150. Second, there is the danger that drafting a parallel power of vehicle search outside the context of arrest will lead to inconsistent and confusing interpretation and development of the two sources of authority. In this regard, it is relevant to consider the American experience, culminating in the simultaneously released 1981 decisions in *Robbins*¹⁸⁷ and *Belton*.¹⁸⁸ In the former case, the Supreme Court invalidated the seizure of marijuana from an opaque bag in the luggage compartment of a suspect's car; in the latter case, the same Court upheld the seizure of cocaine from a jacket pocket in the passenger compartment of a car occupied by the suspect. While the significance of the source of authority for the search was not made precisely clear in either case, it is noteworthy that the former instance was analysed as a warrantless search of vehicle within the "automobile exception" and the latter was viewed as a search incidental to arrest. Given the similarity of the facts in the two cases, it is hardly surprising that the Supreme Court felt compelled within a year to attempt to resolve the resulting uncertainty by its expansion of the automobile exception in the *Ross* case.¹⁸⁹ While departing from the specific solution advanced in *Ross*, we agree that the American experience points out the need to clarify the powers to search

vehicles without warrant. We suggest that this objective is well served by the single power set out in Recommendation 10.

(2) *Privately Occupied Places*

151. Searches of privately occupied places, both residential and non-residential, present the least compelling arguments for exceptions to the warrant requirement in the interests of preserving objects of seizure. Unlike persons and vehicles, such premises are stationary; while evidence believed to be on the premises can be removed or destroyed in the time required to obtain a warrant, there is a negligible danger of the premises themselves disappearing. And as discussed earlier, the individual's interest in maintaining the inviolability of his private domain has long been given strong recognition in the law.¹⁹⁰

152. As well as the considerations of principle applicable here, there is a pragmatic problem in establishing any generally defined power to search premises without warrant. That is the danger that such a power might be used so frequently as to render the warrant requirement meaningless in practice. Such a danger may be posed in fact by the Australian *Criminal Investigation Bill*, which permits warrantless searches of premises to prevent loss or destruction of relevant items in "circumstances of such seriousness and urgency as to require" departure from the warrant requirements.¹⁹¹ The scope of the exception defined by the quoted words is imprecise, and could be construed quite widely. In this regard, it is relevant to look at the Canadian experience with section 101 of the *Criminal Code*. Although the warrantless search power accorded by this provision is limited to instances in which it would be "impracticable" to apply for a warrant, searches without warrant under the section have in fact become the rule.¹⁹²

153. Some courts and scholars in the United States have attempted to circumvent such danger by framing warrantless powers to search premises in terms that limit their exercise to truly urgent circumstances. A list of relevant factors was set out in the Circuit Court level decision in *Rubin*, which dealt with narcotics:

- (1) [T]he degree of urgency involved and the amount of time necessary to obtain a warrant.
- (2) [T]he reasonable belief that the contraband is about to be removed.
- (3) [T]he possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought.

(4) [T]he information indicating the possessors of contraband are aware that the police are on their trail.

(5) [T]he ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic".¹⁹³

While this set of factors is undeniably comprehensive, and may be valuable for a reviewing court, it is so detailed and complex as to be virtually meaningless for a police officer faced with an immediate decision as to whether or not to perform a warrantless search.

154. The Royal Commission on Criminal Procedure¹⁹⁴ and the American Law Institute¹⁹⁵ have uniformly rejected the permissibility of non-consensual searches of premises without warrant outside of those associated with powers of arrest and, in the former case, danger to life or safety. For the reasons outlined above, we agree with their position.

(3) *Persons*

155. The greatest conflict in the present context arises with respect to searches of persons. Persons, like vehicles, are generally mobile, and similar risks of loss or destruction may flow from a failure to conduct a personal search immediately upon encountering an individual reasonably believed to be carrying "objects of seizure". On the other hand, the particular value our legal tradition has placed on the inviolability of the body serves to distinguish the two cases from each other. While a stop and examination of a vehicle, in the absence of legal authority, could amount in itself to a trespass to chattels, this wrong cannot be equated with the assaults, batteries, false arrests and other violations that could arise from an improper stop and search of a person.

156. The importance of the individual interests affected is recognized in American law, in which a warrantless search of person outside of arrest is authorized only on the basis of protection from concealed weapons and not potential destruction of other items. This approach has been supported by the argument that the benefits of warrantless search in other cases are outweighed by the potential for abuse.¹⁹⁶ On the other hand, the Royal Commission on Criminal Procedure in England has recommended a statutory power to stop and search persons in public places who are suspected on reasonable grounds of conveying stolen goods or being in possession of items otherwise illegal to possess:

We believe that people in the street who have committed property offences or have in their possession articles which it is a criminal offence to possess should not be entirely protected from the possibility of being searched.... But the grounds for stop and search must be firmly based upon reasonable suspicion and the exercise of the powers must be subject to strict safeguards.¹⁹⁷

157. The issue of permitting personal searches for objects of seizure in danger of loss or destruction focuses in large part on the prerequisite of arrest. The association of non-consensual personal searches with a pre-existing state of arrest is traceable to the early days of the common law.¹⁹⁸ This association has often been believed to afford protection to the individual; since the justification for legal arrest is limited by the requirement of “reasonable and probable grounds”, it is thought that the precondition of an arrest is an effective control device by which unjustified search may be prevented. The expansion of personal search powers under statute is seen as undermining this protection. This view, for example, was advanced by a minority on the British Advisory Committee on Drug Dependence:

In the view of the minority the abolition of the statutory power of search would undoubtedly mean that considerably fewer persons would be stopped and searched, the power to arrest being narrower than the statutory power of search. On their reckoning the proposal would involve a considerable diminution in the vexatiousness of police interference with people who are pursuing their ordinary affairs.¹⁹⁹

In a way, the precondition of arrest is viewed almost as a substitute for a warrant in curbing unjustified use of personal search powers. While our position reflects this view in large part, we acknowledge that the view is open to criticism.

158. The requirement that an officer make an arrest in order to gain the legal power to search may encourage the officer to arrest as much as it discourages him from searching. The empirical evidence available is ambiguous on this point. Participant observer studies have suggested that personal search incidental to arrest often follows a decision to take formal action against the suspect, but difficulties experienced by observers in discriminating between arrests and other police-citizen encounters make conclusions from such studies problematical.²⁰⁰ Some data also are provided by the self-reporting questionnaires returned in our own warrant survey. Of those personal searches performed in the course of executing warrants, a significantly higher percentage (17.4% to 11.2%) was reported as being incidental to arrest in the execution of *Criminal Code* warrants

as in the execution of *Narcotic Control Act* and *Food and Drugs Act* warrants.²⁰¹ Data from the survey would suggest that this cannot be attributed to the occurrence of more intervening justifications for arrest in the case of the *Criminal Code* warrants. The possibility exists, rather, that the police officers may have reported an arrest as the basis for search more frequently in the latter case because the statutory authority to search under the warrant did not exist, as it did in the narcotic and drug cases.

159. It may be argued that the “arrest” reported in any of these cases was merely an *ex post facto* attempt to legitimize the search. The problem is that it is difficult, on the basis of phenomenological factors to distinguish an arrest followed by a search from a simple search.²⁰² This may be seen to support the view that the arrest requirement imposes little restraint upon an officer who intends to search an individual; it is difficult to challenge an officer’s assertion that an arrest did indeed take place prior to a personal search. Under the test set out in the leading Canadian case of *Whitfield*, the officer would merely have to show that he touched the person with a view to his detention.²⁰³

160. Whether the search itself may be lawful if the arrest is not is less than clear under the present law. Leigh, discussing powers of search in England and Wales, cites the New Zealand rule that “[t]he right to personal search is clearly dependent not upon the *right* to arrest but upon the *fact* of arrest”.²⁰⁴ On the other hand, in the early English case of *Dillon v. O’Brien*, the power to search was clearly predicated upon a “lawful arrest”.²⁰⁵ This ambiguity could be resolved by statute in favour of the latter position, thus in effect making adherence to the rules governing the exercise of an arrest power the prerequisite to the performance of a search. One wonders, though, whether these rules really add very much to the individual’s protection against unjustified searches, particularly where the relevant offence is indictable. Since possession of many of the items for which an officer might wish to perform a personal search constitutes an offence prosecutable by indictment,²⁰⁶ it is evident that in many cases in which an officer had reasonable grounds to search a person for an object of seizure, he would also have reasonable and probable grounds to arrest him for a relevant offence and then search him as an incident of that arrest. The only circumstances in which this rough equivalence between grounds for arrest and grounds for search would not obtain would be those in which the relevant offence was merely punishable by summary conviction, in which case the person could only be arrested if “found committing” an offence.²⁰⁷

161. It is possible that the prerequisite of arrest makes little difference to the exercise of powers of search, at least in relation to indictable offences. In consulting police officers from various Canadian forces, our researchers were told that whether the object of the search was a narcotic or drug (for which a statutory power of personal search currently exists) or stolen property (for which personal search is authorized only in conjunction with arrest), the officer's rule of thumb is "reasonable and probable grounds", a test often satisfied in practice by gut feelings. On the other hand, the frequent reference of police officials to "reasonable and probable grounds", a standard specifically associated with arrest rather than search and seizure, would suggest the existence of an association between the two powers, an association that may have some limiting effect. Considering this possibility alongside the evidence from participant observer studies that searches generally follow decisions to take formal action against suspects,²⁰⁸ we are not prepared to concede that the prerequisite of arrest is meaningless as a device to help ensure that the exercised powers of personal search are confined to justifiable instances.

162. If our position appears to reflect an abundance of caution, this is because we believe that caution in this area is well founded. While a theoretical basis for a discrete power of personal search unquestionably exists, and while the recent trend in Great Britain and Australia has been towards the recognition of such powers, it is important to weigh very carefully the risks entailed in establishing them. In England itself, the Scarman Report has recently documented the activities of peace officers involved in search operations to recover stolen goods. Notwithstanding the limitation of the relevant powers to instances in which reasonable suspicion pertained to the persons searched, it was found that the exercise of powers during the operation was sweeping.²⁰⁹ While no such operations have been found to occur in Canada, incidents and programmes of random personal search for narcotics have been observed by both government Commissions²¹⁰ and legal commentators.²¹¹ While the objectives of the police in carrying out these programmes may be laudable, granting peace officers wide powers to conduct them conflicts with the specific, responsive character of criminal law enforcement intrinsic to Canadian traditions.

163. Moreover, quite aside from the question of impact on police activities, there is a useful purpose served in conferring the status of arrest upon a person who has been detained for the duration

of a search and seizure. Two consequences seem relevant. First, informing the person that he is arrested forewarns him of the illegality of any attempt to resist or elude the peace officer; this objective seems particularly significant in the light of recent Canadian case-law which leaves open the possibility of a suspect, free from any legally recognized form of compulsory restraint, being subject to criminal prosecution for such attempts.²¹² In addition, the existence of a state of arrest may bring into play certain provisions of the *Canadian Charter of Rights and Freedoms*, a contingency discussed later in this Working Paper.²¹³

C. Conclusion

164. Recommendation 10 is a tentative one for a number of reasons. Insofar as the need for an alternative to the powers of search and seizure incidental to arrest is dependent upon the scope and design of arrest powers themselves, we are mindful of the possible ramifications which could flow from our forthcoming Working Paper on Arrest. Perhaps more fundamentally, we are aware that any proposal dealing with this subject touches upon sensitive and significant areas of police practice and individual privacy. During discussions within the Commission, we have weighed a number of alternatives, including a discrete power to make searches and seizures without warrant, analogous to that set out in Recommendation 9 but covering the risk of loss or destruction of objects of seizure. Such a power could be fashioned so as to be more limited than Recommendation 9. It could be restricted, for example, to coverage of searches of persons and vehicles, but not places, or it could be applicable only when the object sought related to the commission of an indictable offence. While we have refrained from proposing such a power at this time, we welcome criticisms and comments as to the merits of our present position.

CHAPTER SEVEN

Procedures

165. This Chapter develops a scheme of rules covering search and seizure procedures in the following way. It begins by tackling the various problems arising in connection with the issuance and execution of warrants. It then moves on to consider problems relating to the execution of searches and seizures in general. Finally, it deals with two specific sets of issues: those relating to searches of persons, and those relating to questions of access to information about searches and seizures.

I. Issuance of Warrants

A. The Nature of the Procedure

RECOMMENDATIONS

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.

166. These recommendations express in general terms the procedure for issuing warrants. Many of the aspects of this procedure require special attention and are discussed in detail in subsequent recommendations. First, however, it is valuable to look briefly at the general nature of the search warrant procedure we propose.

167. At present, the issuance of a search warrant is almost exclusively a documentary procedure. If the application documents are complete and proper, there is no onus placed upon the issuer to perform such adjudicative tasks as asking questions of the deponent, or checking the credibility of his sources. Conversely, if the contents of the documents are not sufficient, the applicant cannot remedy this through an oral presentation. As Roach J.A. stated in *Re Worrall*,

mere conversations between an informant and a Justice of the Peace can form no part of the basis on which a search warrant may issue. If there is something lacking in the sworn information that deficiency cannot be supplied by some conversation between them.²¹⁴

168. The emphasis on documentary preparation serves several useful purposes. It encourages police officers to put their own case in order, rather than relying on sympathetic justices to extract the essential facts. Moreover, the documentary application, at least in those regimes that require reasonable grounds to be present on the face of a written information, provides a basic and easily accessible record of the proceedings before the issuer. An individual wishing to challenge the legality of issuance, rather than being forced to wait for a transcript of an application hearing to be prepared, need only obtain the already existing written information in order to ascertain the formal, substantive and probative sufficiency of the application.

169. On the other hand, the "rigidification" of documentary procedure can have a distinctly counter-productive effect if it encourages the issuer to assume a merely clerical role. In *Re Den Hoy Gin*, the Ontario Court of Appeal indicated its willingness to go behind the face of a false sworn information to quash a search warrant.²¹⁵ However, the present law in Canada has stopped short of urging the issuer himself to make inquiries as to the veracity of the claims made on the face of the information. This contrasts with the American position which, for example, precludes an issuer from relying solely on the applicant's assertion that his informant is trustworthy, truthful, prudent, reliable or credible. Indeed, American

Federal Rule 41(c) allows an issuer to “examine under oath the affiant and any witness he may produce”.²¹⁶

170. If a lack of inquisitiveness on the part of the issuer allows unsupported assertions to remain undetected, it may also result in subsequent problems for the police. By failing, for example, to demand an elaboration of terse or ill-defined “reasonable grounds” before issuing a search warrant, the issuer leaves open the possibility that a reviewing court may eventually quash the warrant for its insufficiency in this respect. It may well be that the officer has additional reasonable grounds but, out of reluctance to elaborate or because he believes that only a minimal disclosure is required, he has refrained from putting them in writing. For the issuer to make some inquiries here would be quite natural. In *Campbell v. Clough*, the applicant failed to detail his reasonable grounds for belief; however, the justice was able to ascertain the circumstances of the investigation through questioning, and noted these on the information. “In this respect”, held McQuaid J., “I am of the opinion that she [the justice] not only acted prudently, but also judicially as she is required to do”.²¹⁷ While some judges and justices indicated to Commission researchers that they follow this practice, the documents collected in our warrant survey show that this is the exception. For example, the existence of a 52.3% success rate in seizing an object sought would suggest that police in Montréal often do have a reasonable order of belief that the object sought is in fact in the premises named;²¹⁸ one would be hard pressed to ascertain this, however, by looking at the written informations captured in the Commission’s survey.

171. It may be argued that such participation by the issuer undermines his neutrality. If the police present a deficient application, runs the argument, they should bear the consequences. The argument, however, confuses judicial inquisitiveness with partiality. Although there is clearly a point at which an issuer’s questions become a crutch to a sluggish police officer, inquiries designed to test assertions and seek out latent details stop well short of that point. Such inquiries cut both ways: if the details are available, the issuance of the warrant may be supportable; if they are not, it may be precluded.

172. Inevitably, the discussion of appropriate authorization procedures must be linked to a discussion of enforcement or review mechanisms. Reviews of search and seizure have generally focused on the legality of the process, which has in turn been based on its documentation. The avenue of challenging the legality of a search or a

seizure is one this Working Paper accepts as essential. To facilitate the review of legality, the documentary emphasis of the warrant procedure must be retained.

173. This does not mean, however, that the issuer ought to be restrained from asking questions designed to elicit the true basis of the application. So long as any additional details elicited through interrogation and relied upon in issuing the warrant are included on the written application and properly attested to, an individual affected by the search is not truly prejudiced by the justice's inquiry. On the contrary, the warrant becomes a more judicial form of protection against unmerited intrusions against the individual.

B. Documentation

RECOMMENDATION

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.

174. Despite the present emphasis on documentary completeness, the statute books provide little in the way of valuable guidance as to the documents police officers ought to use. The only model forms provided are those in the *Criminal Code* pertaining to the section 443 information and warrant. The presentation of the model information in particular is problematical, in that it involves a certain degree of paradox. While section 443 makes resort to Form 1 mandatory, Form 1 itself falls short of fulfilling the substantive and probative standards of this same section. In *R. v. Colvin; Ex parte Merrick*, Osler J. observed:

It is to be observed that the use of Form 1 appears to be mandatory, although the actual form when examined leaves much to be desired... [T]he section ... requires that the Justice must be satisfied that there is in such place something "... that there is reasonable ground to believe will afford evidence with respect to the commission of an offence ..." and the Form provided does not give much assistance in this respect. In

consequence, the person filling out the Form is obliged to complete a sentence commencing "The informant says that", following which he should, presumably, state that there is reasonable ground to believe that certain articles will afford evidence of a certain crime.²¹⁹

175. As was noted earlier, various attempts have been made to modify Form 1 to comply with section 443.²²⁰ Moreover, due to the lack of statutory models for the other warrant procedures, local officials have had to improvise appropriate forms, often by making modifications to the section 443 forms. In both cases, the products of local initiative have varied considerably, leading to a number of consequences.

176. First, erratic documentary practice has had its impact on formal validity. In particular, there has been confusion of section 443 and *Narcotic Control Act* and *Food and Drugs Act* requirements. For example, in our warrant survey in 1978, Edmonton, Winnipeg and Montréal all yielded narcotics and drugs warrants that failed to name the executing officer; often a general direction to peace officers in the relevant district, permissible under section 443 but not under *Narcotic Control Act* and *Food and Drugs Act* provisions, was used instead. This error is not a grave one by any means, but, in that it violates recognized legal standards, it represents an apparent inattentiveness.²²¹

177. Second, the form of the document tends to influence the presentation of the substantive and probative details on the application. Even if the statutory requirements are followed to the letter, the spacing and structuring of the various elements may discourage meaningful disclosure. In the case of Montréal, for example, 33 out of 35 sets of documents relating to section 443 were found to be formally sufficient, yet the forms used by the Peace and Crown Office help to explain why only 4 out of the 35 were adequate in other respects; the space allotted to the description of "reasonable grounds" was minuscule. Subsequent to the completion of the survey, however, some attempt was made to rectify this problem through the incorporation of sworn appendices to the information. In Vancouver, on the other hand, the form was structured openly so as to encourage expansiveness where necessary; it is not surprising, then, that 28 out of 35 section 443 warrants issued in Vancouver provided satisfactory "reasonable grounds" in the eyes of the judicial panel.

178. Two rather simple prescriptions for action emerge from the above comments. First, standard forms ought to be provided and indeed made mandatory with respect to every warrant procedure, so

as to avoid the problems of local improvisation evident in the practices related to special procedures. If different regimes must be maintained for certain situations (a contention this paper questions), then the incoherence they produce should be minimized through the provision of special documents designed with the individual regimes in mind. Second, these forms ought truly to guide the officer in setting out the details the law requires. Exactly what details should be required will be discussed in the following sections; however, even if no alteration in the existing statutory provisions were to be made, it would be desirable to restructure Form 1 of the *Criminal Code* to meet this objective.

179. To make the documents used legally precise, however, is not enough. Even where information and warrants are structured properly, they often contain language that may make them intimidating and incomprehensible to the individual concerned. The value of warrants lies in part in the use of the document to inform the party searched of the legal status of the search.²²² Yet, that status is obscured by the arcane jargon used in the *Criminal Code* forms: “whereas”, “hereinafter”, the adjectival “said”. The use of “legalese” has been attributed to a perceived need to “handle exceedingly specific details and relations between them”.²²³ There is no question that search warrant documents must often portray specific and complex details; on the other hand, it is possible to draft forms that accommodate these details in a relatively comprehensible manner.

180. Finally, there is the question of the onerousness of documentary requirements. Do they impair police efficiency? Officers in a number of Canadian police forces expressed the opinion to Commission interviewers that their paperwork was becoming overwhelming. In Winnipeg, for example, officers estimated that one hour was needed to prepare each set of warrant documents under section 443. This estimate, of course, is subject to variation according to the circumstances of each application. An information for a complex commercial crime warrant might take literally days to prepare, while a terse set of documents relating to a stolen goods offence might take less than twenty minutes. Some of the police complaints related to the necessity of duplicating descriptions of offences, items and premises on the application form and the warrant. As the Montréal Crown and Peace Office practice shows, it is quite possible to eliminate this inefficiency through the use of carbons and appropriately designed forms. The design ought not to be such, however, as to render the probative basis of issuance less than “judicial”, or the definitions of items, offences or premises less than “particular”.

181. Montréal also serves as an illustration of how police administrative procedures, rather than legal requirements, can add to an officer's paperwork. In addition to the warrant documents, municipal peace officers have been required to fill out separate forms for administrative use in which the circumstances of proposed searches are repeated. Not only does such duplication seem unnecessary; it may also de-emphasize the importance of the warrant documents themselves. It is recommended that documentary procedures used by the police should stress the need for thoroughness on the warrant documents rather than on documents for internal use.

C. Judicial Discretion and Refusal to Issue a Warrant

RECOMMENDATION

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).

182. Under subsection 443(1) of the *Criminal Code*, the issuer "may" issue a warrant if the information affords the requisite "reasonable ground to believe". As Fontana observes, this implies a discretion to refuse to issue the warrant notwithstanding the sufficiency of the information:

Implicit in the wording of the section through the use of the word "may" is the discretionary element of the definition. A justice presented with the information properly sworn as required, and even though being "satisfied" within the terms of the section, may still refuse to issue the search warrant. It then rests with the applicant to pursue his application by other means.²²⁴

This discretion is also given to the issuers of warrants under sections 101, 181, 182, 353, and the narcotic and drugs provisions. On the other hand, judges performing functions under sections 160 and 281.3 of the *Criminal Code* are given no apparent discretion. The sections provide that they "shall" issue a warrant when satisfied as to the existence of the relevant grounds for believing.

183. We propose that as a general rule the issuance of the warrant should continue to be discretionary. The existence of discretion conforms with the “judicial” role this paper deems appropriate for the issuer and provides a context within which a number of factors relevant to issuance may be considered. Some of these factors relate to the status of the party to be searched. The fact that a party to be searched is a newspaper not believed to be implicated in the relevant offence does not alter the existence of reasonable grounds to believe that objects of seizure may be found inside. As suggested in the *Pacific Press* case, however, it may be relevant to deciding whether a warrant ought to be issued to search the premises.²²⁵ Discretion may also be relevant in cases of doubt as to the accuracy of sworn assertions. Such doubt does not affect the apparent “reasonableness” of the grounds on the face of the information. However, it should entitle an issuer to refuse to issue the requested warrant.

184. Retaining judicial discretion marks a certain faith in the capacity of issuers to conduct meaningful hearings into warrant applications. This faith is not entirely justified by the results of our search warrant survey and it might be wondered whether it is not naïve to rely on it. Participant observer studies of detective work not only indicate that justices who fail to co-operate with the police are subject to considerable pressures to do so, but advance the possibility that truly “judicial” issuers are the exception rather than the rule.²²⁶ The fact is, though, that the judiciality of the proceedings is not an option that can be revoked at will. Rather, it is a basic objective of a warrant procedure, and if the attainment of that objective is regarded as hopeless, not merely the existence of judicial discretion, but the basic structure of the proceeding, is of dubious worth.

185. One aspect of warrant issuance that may be perceived to undercut the “judicial” nature of the proceedings is the practice of forum-shopping. At present, if a peace officer’s application for a warrant is refused, he may reapply for the same warrant on a subsequent occasion before the same or another adjudicator.²²⁷ It may be argued that the exercise of judicial discretion against an applicant is rendered sterile by legal tolerance of this situation. On the other hand, we do not accept that the same “double jeopardy” considerations underlying the application of *res judicata* doctrines at subsequent proceedings truly obtain at the investigative stage of search and seizure. Circumstances may change after an initial application for a warrant; evidence supporting the application may become firmer. Moreover, we recognize that if an initial refusal to

issue a warrant were to be binding in relation to an investigation as a whole, this could inhibit adjudicators from ruling against applications perceived to be insufficient.

186. Accordingly, we propose a balanced solution, one that gives appropriate recognition to a refusal to issue a warrant, yet does not make the consequences of such refusal inimical to judicial discretion. Such a balance is found in paragraph 178.12(1)(e.1) of the *Criminal Code*, which requires the following information to be included in an affidavit supporting an application for an authorization to intercept electronic communications:

[T]he number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit ... and on which the application was withdrawn or no authorization was given, the date on which each such application was made and the name of the judge to whom each such application was made; ...

We recommend that a similar requirement be included in applications for search warrants.

D. The Test to Be Met

RECOMMENDATIONS

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.

(1) *Reasonable Grounds to Believe*

187. The traditional test for the issuance of a search warrant is the demonstration under oath of reasonable grounds to believe that a specific item, related in a designated way to a specific offence, may be found in a specific location. The test incorporates both the

“judiciality” and “particularity” features associated with the warrant, features that empirical evidence suggests are often absent from the procedure in daily practice. Although some degree of vagueness characterizes the articulation of the test, it seems that the real problem lies not in the test itself, but in its application.

188. The test is quite readily broken down into its particular and judicial components. The specifications of the items, offence and location comprise the former; the reasonable grounds, the latter. Although there has been some inconsistency in the application of the particularity tests, and indeed some disagreement over the exact standards of particularity required, the basic issues are fairly settled.²²⁸ The descriptions must be sufficiently detailed to assist the issuer in making a judicial decision and, when carried over into the warrant, to both guide the executing officer, and inform the individual concerned as to the scope of intrusion permitted.²²⁹ While it is possible to quarrel with certain inconsistencies in the case-law, the existing standards are relatively uncontroversial.²³⁰ It is, rather, in connection with the “reasonable grounds” themselves that the major problems have arisen.

189. What are “reasonable grounds to believe”? A number of courts have taken stabs at the question, often comparing the test to other legal standards. It is clear, for example, after *Re Newfoundland & Labrador Corp. Ltd.*, that the standard imposes a lower burden than “proof beyond a reasonable doubt”.²³¹ But such semantic ordering does not really answer the question. Perhaps the best way to regard the test is as a guide. To the degree that “reasonableness” incorporates the standards of objectivity and thoughtfulness inherent in judiciality, it conveys sufficiently the duties the issuer should have in mind.

190. There is no doubt that the “reasonable grounds” test has been inconsistently applied, not only by issuers of warrants, but also by reviewing courts. For example, in the recent Québec Superior Court decision in *Abou-Assale*, the words “investigation conducted by the Royal Canadian Mounted Police” were held to satisfy the standard.²³² Yet the same Court fifteen years earlier in *Regency Realities Inc. v. Loranger* had rejected “information from a trustworthy person” as insufficient in this respect, commenting that this provided “no serious enlightenment”.²³³ In light of such conflicts, it is perhaps not surprising that issuers of warrants in Montréal followed a relaxed standard.²³⁴ It is difficult to distinguish such decisions on the basis of the “circumstances of the case”; the circumstances are often virtually identical. To some extent, such

conflicts are inevitable, reflecting different priorities of various judges and various courts. However, common identifiable problems do crop up in the course of establishing reasonable grounds, and it is useful to outline basic principles for dealing with them. Two of these problems are the reliance of warrant applicants upon facts provided by confidential informants and by intercepted communications.

(2) *Confidential Informants*

191. The current Canadian position on confidential informants was set out in the *Lubell* case, in which Zuber J. upheld a warrant issued on “information from a reliable source”:

It is trite law that the Crown enjoys a privilege with respect to the disclosure of the name of informants and obviously this is the reason for taking refuge in this type of language.²³⁵

It may be argued that this position sacrifices too much of the fact-finding duty inherent in judiciality to police interests in concealing the facts. On the other hand, the identity of the informant is a matter that even at trial is generally protected from disclosure on the grounds of public policy. This policy is founded on the basis that anonymity encourages informers to communicate information about criminal offences to the government.²³⁶ And while the identity of the informant may reflect upon the credibility of the assertions by the applicant for the warrant, protection of that identity does not entail complete frustration of the issuer’s judicial duty.

192. There is a distinction between protecting the name of the source from disclosure, and protecting the grounds of belief yielded by the source from scrutiny. This distinction was recognized in the Newfoundland Court of Appeal’s decision in *Re Newfoundland & Labrador Corp. Ltd.* “Surely”, held the Court, “information in Form 1 in which the informant deposes to specific facts, knowledge of which he obtained [from a confidential source] is information upon which the justice could be satisfied that reasonable grounds to so believe existed”.²³⁷ This position is sound. To fall short of it is to compromise the issuer’s control of the search in favour of police discretion. We recommend, therefore, that while informant privilege should continue to be recognized at warrant hearings, it should be limited to its proper scope. While the identity of the confidential source should continue to be protected from disclosure (through the use of aliases and code names if necessary), the applicant must still provide the factual assertions necessary to satisfy the “reasonable grounds to believe” test.

(3) *Grounds Based on Intercepted Communications*

193. A somewhat related problem arises when police wish to perform a search on the basis of factual information received from a wire-tap. As a matter of principle, there is no reason why the "reasonable grounds" standard should not be applied to such information. However, the police are often reluctant to disclose both the information itself, and the fact that it was obtained by wire-tap, not only because of the possibility that the future success of the tap will be jeopardized, but also because of the statutory prohibition against disclosure of the existence of an intercepted private communication.

194. Subsection 178.2(1) of the *Criminal Code* reads:

Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for two years.

Results of the Commission's warrant survey and subsequent consultations suggest that the interpretation of the prohibition under this provision varies somewhat from city to city, and even within some forces. Some officers prepared informations referring to an "interception of private communications of persons whose names cannot be presently revealed". A number of police officials took the view, however, that a police officer could not even tell a justice of the peace of the existence of the tap without contravening subsection 178.2(1). While subsection 178.2(2) makes the prohibition inapplicable to "criminal proceedings" and "other proceedings" in which "evidence on oath" is required, local officials were not confident that this exemption covered search warrant applications.

195. The interrelationship between section 178.2 and search warrant requirements deserves clarification. For one thing, the section is expressly an effort to protect the privacy of the originator of the intercepted communication against disclosure to third parties. It is *not* directed to withholding information about police activity

from the parties to the communication themselves. This latter purpose is recognized in section 178.23, which permits delays in written notification to affected persons. Given that there is some ambiguity, however, it may be advisable to amend subsection 178.2(2) to specify that subsection 178.2(1) does not apply to search warrant proceedings. A provision designed to protect the privacy of the individual ought not to stand in the way of another provision with like intent.

196. This begs the larger question: To what extent should the existence of a wire-tap affect the application of the “reasonable grounds” test? It is suggested that this circumstance, like reliance upon a confidential informant, does not justify departing from the requirement that the peace officer provide the justice with facts supporting the application for the warrant. Indeed, the present reluctance of police officers to divulge the existence of a tap has meant that reviewing courts treat informations prepared in the wake of electronic surveillance the same as other informations.²³⁸ This consistency in application should be continued, not only by reviewing courts, but by issuers of search warrants as well. While it is true that Parliament has placed a premium upon guarding the clandestine nature of wire-tapping, most notably through the delayed notification provision of section 178.23, there is a danger in pyramiding secrecy requirements on top of each other. Taken to its extreme, the need to maintain the secrecy of a wire-tap could argue for secret inquiries and trials.

197. As in the case of confidential informants, the distinction should be made between disclosing facts pertaining to the identification of the wire-tap, and facts received from the wire-tap about the existence of criminal activity. It is the latter category of facts, not the former, that establishes the requisite “reasonable grounds to believe”. Any prejudice to an ongoing tap caused by disclosure of the latter category in the written information is likely to occur in any event as a result of executing the warrant. It is difficult to believe that an individual whose premises have been searched by police officers would not be so alerted to the possibility of electronic surveillance.

E. The Issuer

RECOMMENDATION

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.

198. The issuers of search warrants, at least those under sections 443 and 181 of the *Criminal Code* and the *Narcotic Control Act* and *Food and Drugs Act* provisions, are failing to maintain the legal standards governing the performance of their duties. The question is thus raised as to whether the responsibilities for issuance ought to be shifted to officials other than those designated under present legislation.

199. Most crime-related warrant regimes name a justice as issuer of the warrants.²³⁹ Under section 2 of the *Criminal Code*, “justice” includes a magistrate as well as a justice of the peace, and under some provincial enactments, superior court judges have been granted *ex officio* status as justices.²⁴⁰ In practice, according to the Commission’s warrant survey, issuance duties appear to be shared by justices, magistrates and judges of the various provincial courts. One province covered by the survey, New Brunswick, has abolished the office of justice, and the search warrants we captured in that province were issued exclusively by Provincial Court judges.²⁴¹

200. A frequently voiced opinion is that justices of the peace do not have the impartiality or competence to issue search warrants. The Kirby Report on the *Administration of Justice in the Provincial Courts of Alberta* put the point bluntly:

It is possible to lay an information for a search warrant before clerks or police officers who have been appointed justices of the peace. Since the granting of a search warrant is a judicial act requiring judicial competence, impartiality and independence, justices of the peace should not have the power to grant such warrants.²⁴²

The Report suggested that search warrants should only be issued by Provincial Court judges. While this suggestion has much apparent force behind it, there are two points that should be considered.

201. First, the empirical evidence available from the Commission’s survey suggests that giving Provincial Court judges exclusive jurisdiction would not in itself have a decisive positive impact. In New Brunswick, the validity rating of the twelve warrants, which were issued exclusively by provincial judges, was *lower* than in the other provinces (27% to 39%).²⁴³ Vancouver, the city with the best

validity record, utilized only justices of the peace in warrant applications. In Edmonton, the one city in which it was possible to compare the validity rates of warrants issued by justices and those issued by Provincial Court judges, the justices fared only slightly worse than judges (33% to 35%). Due to the small size of the samples, these statistics are of limited value, but they do suggest that it is misleading to put much faith in the label or status attached to the official. What must be considered, rather, is the qualification of the official for his assigned function, and the appropriateness of the administrative structure surrounding him.

202. Second, it is arbitrary and narrow to view adjudicative functions of justices in terms of search warrants alone. Although the consequences of the issuance of a warrant are undeniably severe, the justice has other functions that can result in even more drastic consequences for individuals affected. Under existing *Criminal Code* provisions, he may issue arrest warrants, order accused persons to be detained in custody, conduct preliminary inquiries, make committal orders, and try summary conviction offences.²⁴⁴ To strip the justice of his search warrant powers while leaving the rest intact is to miss the real issue: Is the office as currently constituted a proper repository of significant judicial responsibilities?

203. It is notorious that many justices are closely associated with the police officials who make applications to them. Many indeed are former police officials with minimal legal training. The air of casualness that can develop in such circumstances was illustrated in an incident described in the Pringle Report, in which two police officers obtained two warrants from a justice who had formerly been a police officer. When requested to present the informations that had been sworn to obtain the warrants, the justice could not do so, explaining that there were no guidelines that required him to retain the documents after the warrants had been issued.²⁴⁵ This lack of perception as to basic judicial standards has led many observers to question the fitness of many justices for their office.²⁴⁶ On the other hand, at least one province has developed a system of justices of the peace that treats adjudicative responsibilities seriously. British Columbia demonstrated to Commission researchers an organization in which justices were brought up through the court administration system, selected by a judicial council, and given the benefit of continuing education programmes concerning their duties.

204. The problems that arise are not simply ones of individual competence. One must also question the validity of doing what the warrant process has purported to do since the days of Hale — give a

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

most cases the peace officer proceeds to obtain one without a lawyer's assistance. The notable exception occurs in instances of searches connected with allegations of commercial crime. Crown counsel or privately retained lawyers may in fact be aiding the police in their investigation before the search is undertaken, and their legal expertise is often considered valuable in the preparation of warrant documents. The documents prepared in such cases are comprehensive and detailed, a circumstance which suggests that the quality of the applications, and hence the warrant issuance system in general, would be improved if legal counsel played an increased role in the procedure. Recognizing this likelihood, the Kirby Report suggested that all applications for search warrants in Alberta be made by Crown prosecutors.²⁵¹

207. Aside from the pragmatic reasons for participation by the Crown, there is a principled argument that can be made — namely, that since the day-to-day administration of the criminal law is under the control of the Attorney General's department, a representative of that department ought to be present when a decision is made to enforce the criminal law by invoking warrant procedures. Indeed, such a monitoring role is envisaged by section 281.3 of the *Criminal Code*, which requires the Attorney General's consent before proceedings are instituted to obtain a warrant to seize hate propaganda. Should such a requirement become a general rule?

208. In our Working Paper, *Control of the Process*, we placed an onus upon the Crown to participate in all "prosecutorial" functions. The Commission extended this responsibility to the stage of compelling an accused's appearance in court. It was irrational, it was argued, "to permit a case to proceed to the stage of court appearance before the prosecution has been approved by the party who will bear ultimate responsibility for prosecutorial decisions".²⁵² It may be argued that, by analogy, before any case reaches the court appearance stage, Crown counsel should also be required to make a positive assertion that items seized are being detained for legitimate purposes. Indeed, some assertion as to the state of the investigation is required by the present subsection 446(1) of the *Criminal Code* within three months of seizure.

209. This does not mean, however, that the Crown ought to monitor all applications for a warrant to search. For one thing, such a requirement would complicate the process, and could be expected to make applications for warrants impracticable in certain cases, thus encouraging the police to perform warrantless searches. It is worth noting that, following the Kirby Report recommendations, a

monitoring system involving the Crown was set up; in practice, the system was described by a Crown official as “closer to a dream than reality”. But beyond the administrative and pragmatic difficulties involved, there is the circumstance that search with warrant is basically an investigative rather than a “prosecutorial” function: while the search may uncover information that makes a charge appropriate, it is in itself neither a prerequisite or a concomitant to a charge. The participation of the Crown in initiating the process, therefore, should not be regarded as mandatory in principle, under the Commission’s articulated standards.

210. This is not to say that more administrative arrangements, under which Crown counsel would monitor difficult applications, might not be useful in practice. Moreover, it would be consistent with the Attorney General’s broad role as administrator of criminal justice for his representative to appear at search warrant hearings, either to support or oppose an application for a warrant. The existing practice by which issuers of warrants in some jurisdictions alert Crown counsel to cases involving significant problems, such as constitutional conflicts, deserves to be formalized. To affirm the judiciality of the issuer, however, it must be made clear that any role Crown counsel plays in the application process is as a submitter, rather than an adviser, to the issuer. While more participation by the Crown or other legal counsel undoubtedly would improve the quality of applications, it must be emphasized again that the maintenance of a judicial standard can only be assured by the independence and diligence of the issuers themselves.

G. The Telephonic Warrant

RECOMMENDATION

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.

211. The telephonic or oral search warrant has been adopted in a number of American procedural codes, including the Federal Rules. In addition, it was endorsed by the Australian Law Reform Commission, which called it the “natural application of a modern convenience” to situations of urgency or inaccessibility of a magistrate.²⁵³ Such problems may arise in Canada, in urban as well as rural settings. An officer may be at a location where he discovers things or information relevant to an offence. To leave the location in order to present a warrant application to an issuer would involve the risk of losing these objects of seizure. Yet, as a general rule, the officer has no other legal way of seizing them, short of arresting an occupant and making the seizure incidental to arrest. In cases where grounds do not exist for the arrest, the sole legal alternative left to the officer is to obtain the assistance of other officers in guarding the premises while the warrant is obtained.

212. Such predicaments would often be avoided if a telephonic warrant system were instituted. As outlined in Federal Rule 41(c)(2), such a system works as follows:

(A) General Rule — if the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application — the person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance — if the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

213. The telephone warrant procedure offers two advantages. First, because it eliminates such factors as travel time and the preparation of a written application before execution, it abbreviates

the application procedure. American cases indicate that an oral warrant may be obtained in as little as ten minutes.²⁵⁴ Second, because it may be obtained from any location, it allows the officer to stay near the place where he has discovered relevant objects. Both of these factors contribute to the practicability of the warrant in cases in which the use of conventional techniques would risk the loss of the objects, and accordingly they encourage resort to warrant procedures. To what extent, though, do the innovations inherent in the new procedure sacrifice the protective character of the warrant?

214. As far as the “particularity” of the warrant is concerned, there is no real difference in standards at all. Rule 41(c)(2)(E) requires that the contents of a warrant upon oral testimony be the same as a conventional warrant. Although the issuer is not presented with a written application containing specifics as to offence, items and location, this does not mean that specifics need not be given. On the contrary, the officer must recite them to the issuer for the purpose of their inclusion on the issuer’s copy of the warrant. Since Canadian law has interchanged the standards of particularity applicable to informations and warrants, the dictation of one set of specifics rather than the written presentation of two does not effect a lowering of standards. The provision that ensures the uniformity of the recited description with that appearing on the actual warrant is the issuer’s retention of the original warrant document.

215. Some problems are posed, however, with respect to “judiciality”. Although the “reasonable grounds” test remains the same, the circumstances of its application change somewhat. First, there is the fact that no written application is presented to the issuer to assist him in making his decision. There are, no doubt, cases of such complexity that the absence of organized, written grounds of belief would hinder the evaluation process. However, the applicant would be likely to experience confusion in his oral presentation of such cases, and since it is the applicant who must demonstrate the grounds of his belief to the issuer, the basic rules of issuance would dictate that the application be refused. Moreover, since complex cases of this type would likely have been pieced together after a long and careful investigation, it seems doubtful that the “urgency” factor necessary to justify dispensing with the written application would obtain in such instances.

216. In the majority of cases, on the other hand, the main advantage of the written application lies not in the assistance the issuer gains from the document, but rather in its availability as a record of the proceedings. Thus, if an alternative record is available,

the prejudice stemming from the lack of a written application is diminished. The most obvious alternative is a transcript of the proceedings. Given that a telephonic warrant application is both exceptional and generally brief, it would not seem unreasonable to require the issuer's office to prepare a transcript without delay. Once it was prepared, it would be filed, like a written application, with the warrant. The availability of a stenographer and recording device can be ensured through organization and centralization of procedures, such as the establishment of an on-duty issuer with the necessary equipment and personnel.²⁵⁵

217. Second, the point may be made that the long-distance presentation of the application precludes the observation of the applicant's demeanour by the issuer. This point is undoubtedly true, but one wonders whether it is very significant. So long as the procedure is primarily documentary, demeanour is only relevant when the applicant is swearing the oath, and in the course of answering any questions the issuer may put to him. And, as an American commentator has pointed out,²⁵⁶ the police officer's familiarity with legal proceedings makes demeanour a less-than-reliable indicator of credibility in any warrant application. Any cases in which demeanour might arouse suspicion might well be discernible through either the quality of vocal presentation or the consistency of the applicant's allegations. Ultimately, the significance of this factor appears to be minimal.

218. A properly safeguarded telephonic warrant procedure can be virtually as judicial as the normal documentary one. Indeed, models for conducting oral applications, such as that used in San Diego, California²⁵⁷ not only compensate for the procedure's lack of documentation, but stand as examples of informative, meaningful inquiries into the basis for warrant issuance. Various Canadian jurisdictions, particularly in northern areas, have begun to use the telephone for proceedings such as bail applications and *ex parte* civil motions. We therefore recommend that the telephonic search warrant be incorporated into Canadian law. Since it is the impracticability of resort to conventional warrants that justifies its use, however, the telephonic warrant should be available only where the applicant can demonstrate this impracticability to the issuer.

219. Finally, it is important to recognize that just as the invention of the telephone expanded the possible ways of communicating authority, so too, the emergence of new technology may make the proposed telephonic procedure obsolete. For example, the widespread development of facilities for transmission of a copy of

a warrant signed by an issuer to a terminal in an officer's patrol car could eliminate the necessity of the officer hand-copying the issuer's instructions. As new technology becomes widely available, the law must be flexible enough to address it.

II. Execution of Warrants

A. Peace Officers and Private Individuals

RECOMMENDATION

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.

220. Except for warrants issued under the precious metals provision and section 443, all current search warrants must be executed by peace officers. In fact, the existing powers to execute a warrant privately are largely theoretical. The former provision appears to be rarely used, and the cross-country survey revealed no instances of private execution in the case of the latter. The question arises, then, as to whether or not the possibility of private execution ought to be left open by legislation.

221. The provision for private execution, at least in section 443, appears to be a product of historical distortion of Hale's common law warrant. Hale himself recognized the desirability of reducing the aggrieved party to the status of an adviser to the executing constable.²⁵⁸ Later commentators, however, observed that warrants were in fact issued to private persons as well as constables.²⁵⁹ Today, when the interest justifying the search is less the vindication of private rights than the enforcement of the criminal law, the provision for private execution is simply anachronistic. While certain intrusive powers are still accorded to individuals in the case of arrest, these

essentially arise in situations of urgency or sudden discovery of an offence, and are qualified by the stipulation that the individual deliver the accused to a peace officer.²⁶⁰ There is no power under the *Criminal Code* to issue an arrest warrant to a private person, and it is difficult to maintain that such a power ought to exist in the case of search and seizure.

222. This is not to say, however, that a private individual ought to be precluded from swearing an information to initiate a search with warrant. The private individual's right to initiate proceedings is built into the spectrum of criminal procedures. In the early case of *Hetu v. Dixville Butter and Cheese Association*, Fitzpatrick C.J., speaking for the Supreme Court of Canada, affirmed the right of an individual to commence a prosecution: "To lay an information when in possession of facts sufficient to establish a *bona fide* belief of guilt, is not a fault, but the exercise of an undoubted right".²⁶¹ Recognizing the importance of this right, this Commission in its Working Paper on *Control of the Process* recommended that private individuals retain the right to lay charges.²⁶²

223. However, once the justification for the exercise of a coercive power has been ascertained, the responsibility for its exercise must belong, as much as possible, to the agents of the State. In a sense, this position derives from the basic exchange at the heart of the ideology of the liberal democratic State — the individual's concession to the Sovereign of his coercive powers in exchange for the security the Sovereign can offer.²⁶³ The position is also supported by the common law concern that the party executing the warrant be free from any material interest in the outcome of the search.²⁶⁴

224. That a private individual should not be given the responsibility for executing a search warrant does not mean that he also be excluded from assisting in the search if the peace officer deems it necessary. It is evident that in some cases the presence of a private complainant or other individual might both facilitate the search and minimize the intrusion suffered as a result. For example, in searches and seizures involving business documents, the presence of an accountant may assist in isolating documents relevant to alleged transactions. Some police forces purport to authorize his participation by obtaining warrants directed to the accountant as well as to the peace officers. However, the alternative nature of the wording in subsection 443(1), which allows for a warrant to be given to a "person named therein *or* a peace officer", may not strictly permit this. Since an insufficient authorization could result in an individual being lawfully excluded from private premises or even found liable as a

trespasser, it is apparent that this situation should be clarified. Our recommendation would both provide for express authorization of a private individual accompanying the police and make that authorization clear to the individual affected by including it on the warrant.

B. Which Peace Officer May Execute the Warrant?

RECOMMENDATION

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

225. Assuming that peace officers are authorized to execute a search warrant, the issue remains: Which peace officers? This question reflects a discrepancy among the various warrant provisions. Section 443, which allows the justice to authorize “a peace officer” to conduct the search, has been interpreted as allowing a warrant to be issued to all peace officers in any given province.²⁶⁵ The case-law has also suggested that a section 181 warrant could validly include such a wide direction.²⁶⁶ On the other hand, warrants under the *Narcotic Control Act* and *Food and Drugs Act* provisions must be executed by “a peace officer named therein”; accordingly, in the *Goodbaum* case, it was held that the general direction permitted under section 443 invalidated a narcotics warrant.²⁶⁷

226. This problem was at the root of the finding of defects in narcotics and drugs warrants among the 98 evaluated by the judicial panel. Although the naming of a peace officer as executor of the warrant might seem a relatively minor inconvenience, it is worth asking what legitimate interest is served by restricting execution in this way. Certainly the naming of the executor does not lessen the intrusion as far as the individual is concerned. It does not purport to represent any evaluation of the fitness of the named party to execute the warrant. Rather, the warrant is issued on at least the tacit understanding that the recipient, whoever he is, will obey the rules attending execution.

227. On the other hand, there are strong arguments for abolishing legal restrictions as to which peace officers may execute a warrant. The authorization of particular officers is basically a throwback to an archaic notion of a one-to-one communication of

authority which derived from the subordinate relationship of the constable to the justice. Today, with a sophisticated police organization in place, this relationship no longer exists in any meaningful sense. Rather, lines of command and delegation are established within the police forces themselves. The issuer should direct his attention to the applicant, ensuring that he is in sufficient command of the basis of the investigation to present the requisite grounds to justify issuing the warrant. In the absence of a lingering police administrative role for the issuer, however, he has no business participating in decisions as to who should execute the warrant he has issued.

228. The one practical limitation upon the designation of executors of the warrant is the jurisdiction of the issuer. This is recognized in virtually all of the crime-related warrant provisions. Subsection 443(1), for example, speaks of premises within the justice's "territorial division", while subsections 101(9), 181(1) and 182(1) refer to the issuer's "jurisdiction". The question of jurisdiction is beyond the scope of this paper, and the existing structure of territorial divisions is therefore accepted for the present purposes. The scope of the paper also entails acceptance of the "backing" procedure currently available under subsection 443(2) of the *Criminal Code* for the execution of the warrant in another territorial division.

C. Daytime or Night-time Execution

RECOMMENDATION

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

229. In the common law of the seventeenth century, searches of premises with warrant could only be performed in the daytime; nocturnal intrusions were prohibited both for their "great disturbance" and the fear of robberies being committed under the 'guise of authority'.²⁶⁸ Modern techniques of lighting have obviously diminished the latter concern, but the former is still vital. Most individuals sleep at night, and intrusions during sleeping hours, practically speaking, represent particularly acute disruptions of normal life. Still, the only crime-related warrant to retain even vestiges of the

common law position is that under section 443, which is governed by section 444:

A warrant issued under section 443 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night.

Sections 181 and 182 of the *Criminal Code* allow execution “by day or night”, whereas entry under the *Narcotic Control Act* and *Food and Drugs Act* warrants may be effected “at any time”. Sections 100, 160, 281.3 and 353 do not mention the time factor at all.

230. Our empirical evidence indicates that most warrants issued permit execution at the officer’s discretion. However, in some cities covered by our survey — Edmonton and Winnipeg in particular — a practice of imposing time constraints had developed among local justices and Provincial Court judges. Indeed the actual imposition of time constraints appears to be a function more of local practice than of the particular statutory regime invoked. Our results also indicate that time constraints, when imposed, are almost invariably obeyed. Out of the cases reported in which time constraints were imposed and compliance could be ascertained, the vast majority were executed during the prescribed hours.²⁶⁹

231. What ought to be the general rule? None of the common law jurisdictions surveyed retains the hard and fast prohibition against nocturnal search. Indeed, the nearest approximation to Hale’s position is that of the *French Code of Criminal Procedure*, which generally prohibits searches between nine o’clock at night and six in the morning unless a demand is made from within the premises.²⁷⁰ On the other extreme, the Australian position has been quite permissive. Under the existing *Crimes Act*, the warrant may authorize a constable to enter premises at any time.²⁷¹ Recently proposed reforms give the magistrate discretion to restrict the time of execution without establishing any onus or presumption as to the appropriate hours.²⁷² In between these two positions is that of American Federal Rule 41(c)(1):

The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall delegate a federal magistrate to whom it shall be returned.

232. We find that the American position is the soundest of the three approaches. It recognizes that an unyielding restriction of searches to the daytime hours might render the search ineffectual in particular cases; at the same time it requires the applicant to

demonstrate the need for nocturnal execution before it permits him to exercise this more intrusive power. In essence “probable cause” amounts to proof that “the warrant cannot be executed in the daytime or that the property sought to be seized will be removed or destroyed”.²⁷³ A test similar to the American position should be articulated in Canadian legislation.

D. Deadline for Execution

RECOMMENDATION

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.

233. There is at present no statutory requirement that searches with warrant be performed within a specified period of time. In the *Execu-Clean Ltd.* case, the Ontario High Court of Justice was sympathetic to the view that if an issuer includes a specified date on the face of a warrant, the officer is bound by it,²⁷⁴ although the actual authority under which an issuer is empowered to impose such a limitation remains unclear. Despite this lack of direction, however, there is a tendency among some issuers of search warrants to specify deadlines; altogether, 18.2% of the warrants executed were limited by an expiry date.²⁷⁵ Once again, local practice seems primarily relevant. Issuers in Edmonton and Toronto imposed expiry dates relatively frequently compared to their counterparts in Winnipeg, Vancouver and Montréal. Moreover, the data indicated that those warrants with expiry dates were executed more quickly than those without such deadlines.

234. The existence of an expiry date is a healthy element in a search warrant regime, for reasons that relate to both the “judiciality” and “particularity” of the warrant. In the *Adams* case, the English Court of Appeal held that a search warrant for obscene publications authorized only one search, entry and seizure: a conclusion necessary to a truly “particular” warrant procedure.²⁷⁶ If police maintain the discretion to make the single intrusion after a lengthy period of time, however, the possibility remains that the police will undertake their intrusion in circumstances different from those that prompted the issuer to grant the warrant. Yet it is the intrusion itself

that must be justified by the circumstances, not simply the conferment of authority to intrude. This entails a proximity in time between the issuance and execution of the warrant. It is thus unsatisfactory to allow execution of the warrant 103 days after its issuance, as occurred in one case surveyed by the Commission.²⁷⁷

235. Deadlines upon search have been imposed in a number of different jurisdictions. While no deadlines exist in Canadian federal search warrant provisions, a number of provincial statutes, notably those dealing with liquor control, do specify time limits on execution.²⁷⁸ The specific length of time picked, however, has varied considerably. Both the British Royal Commission on Criminal Procedure and the Australian Law Reform Commission's proposed legislation allow seven days,²⁷⁹ and we accept that this period is a sensible one.²⁸⁰ In order to accommodate the increasing number of police forces using a "four on — three off" shift system, however, we would fix the time limit at eight days. In consultations with Commission researchers, police authorities indicated that they could operate within such a deadline. If, after the expiry of the period, the police believe that circumstances still justify the authorization of a search, it is not unreasonable to ask them to submit those circumstances to an adjudicator for a new determination and obtain a new warrant.

E. Scope of Search and Seizure with Warrant

RECOMMENDATION

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.

236. We have specified that the following are legitimate "objects of seizure": takings of an offence; evidence of an offence; and things,

funds and information possessed in circumstances constituting an offence. The warrant issued in a particular case should thus contain descriptions of items within one or more of these categories. The officer, however, in the course of making the authorized search, may discover other things, funds or information falling within the definition of seizable objects, yet not mentioned on the warrant. Should he be allowed to seize them?

237. The answer with respect to the section 443 warrant in present legislation is a qualified yes. Section 445 of the *Criminal Code* clearly allows for seizure of things, not included in the warrant, believed on reasonable grounds to have been “obtained by or used in the commission of an offence”. Although this provision may not actually authorize the seizure of items of a purely evidentiary nature, it does give the peace officer considerable scope. Accordingly, officers are instructed in police training materials not to confine their attention to articles specified on the warrant. “Be alert”, reads the Metropolitan Toronto Training Précis, “for anything unlawful”.²⁸¹

238. According to the Commission’s survey results, the power to seize unspecified objects is used often but not in the majority of cases. If one breaks down the figures according to things seized, 66.3% of the seizures reported were of the things or types of things described on the warrant.²⁸² The remaining 33.7% of seizures represented objects that the issuer of the warrant did not, on the evidence before him, order seized. What policy, then, justifies such departures from the authority of the warrant?

239. It is plain that if the officer’s grounds for seizing the additional goods are indeed reasonable, he could obtain a warrant for them. What he is being allowed to do in skipping this procedure is essentially to perform a warrantless seizure. In fact, case-law on point has supported such seizures on a ground recognized in this Working Paper as justifying an exception to the warrant requirement: that obtaining a warrant would be impracticable. As put somewhat bluntly by Lord Denning in *Chic Fashions (West Wales) Ltd. v. Jones*:

Suppose the constable does not find the goods mentioned in the warrant but finds other goods which he reasonably believes to be stolen. Is he to quit the premises and go back to the magistrate and ask for another search warrant to cover these other goods? If he went away, I should imagine that in nine cases out of ten, by the time he came back with a warrant, these other goods would have disappeared. The true owner would not recover them. The evidence of the crime would have been lost. That would be to favour thieves and to discourage honest men.²⁸³

240. This puts the case somewhat extremely. Even under a conventional warrant system, the peace officer could, for example, have a fellow policeman remain on the premises while he obtained authorization from a justice. Under a telephonic warrant system, the peace officer often could obtain the warrant while remaining on the premises. On the other hand, there are undoubtedly cases in which obtaining a telephonic warrant is not a real alternative — there might not be a telephone on the premises, there might be a risk of injury to the officer or destruction of the objects sought even with the officer's continuing presence on the premises. Ultimately, the question becomes one of whether the costs entailed by compelling a second application for a warrant are outweighed by the dangers created by permitting the seizure of unspecified items.

241. The prospect of allowing seizure of unspecified items creates two significant dangers. The first is the possibility that objects will be seized on the basis of mere speculation or arbitrary exercises of discretion, rather than on reasonable grounds for believing that they are legally seizable. Arbitrariness is, of course, the spectre that the notion of prior control inherent in the warrant is supposed to curtail. The existence of a warrant to search the premises, however, means that insofar as the entry and search are concerned, that control has been exercised. We believe that control of the unspecified seizure would be adequately served by requiring the officer to file a report after the seizure, setting out its particulars and the reasons why it was made. Such a procedure is set out in Recommendation 37 and detailed later in this Chapter.²⁸⁴ Although it cannot prevent unjustified seizures, the report can both discourage them by letting the peace officer know that he will be accountable for his actions, and give an individual an informed basis, analogous to the written warrant application, upon which he may challenge them. The inconvenience of such a report is hardly prohibitive; it merely adds one element to the return which the officer makes to the issuer.

242. The second danger is that the permission to seize unspecified objects will, in the words of Stewart J. of the United States Supreme Court, "invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home", and, once inside, to make "unconfined searches" for seizable objects.²⁸⁵ Accordingly, American jurisprudence has developed the "plain view" doctrine which prevents an officer from fishing through the entirety of an individual's premises, looking for something to seize. We conclude that the "plain view" rule should limit seizures of objects not specified on a warrant. Since this rule is applicable to situations outside the

execution of warrants, it is also detailed later in this Chapter.²⁸⁶ For the present, in Recommendation 24, we advance a modest proposal which aims to keep the execution of the search limited by its justification.

III. Execution of All Searches

243. The following rules cover problems arising in both warranted and warrantless searches. Although the specific instances of these problems may differ from typical cases of search with warrant to typical cases of search without warrant, we believe that the principles governing the resolution of these cases should be uniform.

A. The Use of Force

RECOMMENDATION

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.

244. The use of force is one of the considerations the warrant itself cannot address. It is both too circumstantial — what the officer should be authorized to do depends on factors that may vary from moment to moment, and too general — it is significant in the whole context of law enforcement, not just that of search and seizure. It may also be an area in which the application of legal rules, rather than the rules themselves, is primarily in issue.²⁸⁷

245. The present general rule regarding the use of force is set out in subsection 25(1) of the *Criminal Code*:

Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer or public officer,

...

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

This subsection applies to searches of persons as well as to searches of places and vehicles; the former topic is discussed later in this Chapter.²⁸⁸ The application of force to persons may also arise in the context of a search of a place, however; for example, an occupant may attempt to prevent a peace officer from performing a search of his residence. Since the standard for resolving problems of force to persons is consistent whether the relevant search is directed against a person or a place, the whole area will be canvassed now.

246. In one particular type of search the use of force is not always resolved by reference to section 25. Special powers to break possessions are provided in subsection 10(4) of the *Narcotic Control Act* and subsection 37(4) of the *Food and Drugs Act*, which read:

For the purpose of exercising his authority under this section, a peace officer may, with such assistance as he deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

No compelling case can be made for such sweeping discretion as a general rule. Whether special treatment under *Narcotic Control Act* and *Food and Drugs Act* provisions is justifiable will be discussed in Chapter Nine.²⁸⁹

247. The leading Canadian case on the use of force during a search is *Levitz v. Ryan*, which dealt specifically with search under a writ of assistance. However, Arnup J.A.'s discussion on this point was expansive, embracing American jurisprudence on search warrants. In conclusion he held that a "reasonable surveillance" of persons on the premises could be a necessary part of a search, depending on the circumstances of the case.²⁹⁰ In *Levitz* itself, it was found that the officer grabbed the plaintiff as he was attempting to run from the premises, and swung him backwards, causing him to fall. The use of force was held to be reasonable by the Court.

248. The test in subsection 25(1) governs not only the degree of force used but the resort to force in the first place. In the Ontario Police College training materials, it is recognized that "police should only resort to physical force when persuasion, advice and warning fail to achieve the objectives".²⁹¹ Arguably, some degree of force is always present in searches of an individual's body, and perhaps particularly so in the case of narcotics and drugs searches. Among the

locations on the person mentioned in instructional materials dealing with such searches are artificial limbs, buttocks, foreskin of penis, nose, rectum, vagina, and under false teeth, band-aids and bandages.²⁹² The probing of such locations is likely to be somewhat painful as well as particularly intrusive. Accordingly, we propose that these activities be governed by special rules,²⁹³ as set out in Recommendations 32 and 33.

249. For the most part, however, the best standards would appear to be those currently enunciated in section 25 of the *Criminal Code*. Even the *ALI Code*, as detailed as it is, provides only for application of the “reasonable” and “necessary” standards to searches, along with provisions similar to those currently set out in subsection 25(3) on deadly force. While it might be argued that more specific applications of these tests should be set out in legislation, any attempt to be exhaustive would be futile. The variations in circumstances that confront a police officer in his decision to use force defy codification. The better approach would appear to be to continue to set out the general standard in the legislation, and leave the guidelines to police instruction, administrative mechanisms and judicial resolution of specific, litigated cases.

B. Unannounced Entry

RECOMMENDATION

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.

250. A special set of rules has developed with respect to unannounced and forcible entries into premises. This body of law dates back to the seventeenth century decision in *Semayne's Case*:

In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make requests to open the doors.²⁹⁴

Notably, the rule focuses upon the home as opposed to other premises. This distinction was carried into Canadian case-law in *Wah Kie v. Cuddy (No. 2)*.²⁹⁵ While maintaining the general rule that there must be a demand to open in searches of dwelling houses, the case denied that the rule applied when the premises were not residential. In the latter event, the officer was bound only by the “reasonable and necessary” test. This test is essentially incorporated into the special entry provision in subsection 182(2) which is applicable to warrants for evidence of gaming- and bawdy-house offences, and women in bawdy-houses.

251. This is one area in which the distinction between dwelling houses and other premises might be usefully de-emphasized in favour of circumstantial factors. Some such factors were described by Dickson J. in *Eccles v. Bourque, Simmonds and Wise*, a case which dealt with entry to effect arrest. The list included the need to save a person from death or injury, the need to preserve evidence from destruction, and hot pursuit of an offender.²⁹⁶ Other enumerations are provided in American jurisprudence dealing with the “no knock” rule, and include the expectation of violence, escape or destruction of evidence, the existence of an open door, and the obviousness of illegal activities.²⁹⁷ We conclude that, whatever the use of private premises, in the absence of circumstances justifying either unannounced or forceful entry, an officer ought to be required to make a demand to enter. If an occupant does not comply with the demand, the officer ought to be empowered to enter the premises, resorting to reasonable force if necessary. American case-law has established that after notice is given, an officer must wait a “reasonable time” before breaking in; a wait of thirty seconds has been held to satisfy this standard.²⁹⁸ This reasonableness test should be recognized in Canadian law.

C. Duties toward Individuals
Affected by the Search or Seizure

RECOMMENDATIONS

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.

(1) *Production of the Warrant*

252. At present, the peace officer executing a warrant is under a minimal duty to provide information to an occupant about the intrusion upon his premises. All he must do is show the person concerned the warrant when required by subsection 29(1) of the *Criminal Code*:

It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

While subsection 29(1) goes some distance toward assuring persons against whom a warrant is executed that the search is authorized, it stops rather short in two respects. First, the requirement that the warrant be produced is conditional upon the feasibility of the executor having the process with him, and even then only upon request. Second, subsection 29(1) does not require that the warrant be produced at the commencement of the search, which is presumably when an assurance of legality would be most worthwhile. Nor, incidentally, has Canadian case-law developed any requirement that the warrant be produced at the outset of a search or as soon as practicable thereafter.²⁹⁹

253. In discussion with Commission researchers, a number of forces mentioned different practices of showing a search warrant to an occupant in the course of a search. Some peace officers stated that they would tell a person that they had a warrant as a matter of course, but would not show the warrant unless requested to do so. Some

commented that the decision to show the warrant might depend on the identity or characteristics of the occupant of the premises. Others claimed that as a matter of policy a person would always get a copy of a search warrant to examine, but not necessarily to keep.

254. In contrast, the *ALI Code* recognizes the principle that the warrant should be shown as soon as possible, regardless of whether a request has been made or not:

In the course of any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or the person in apparent control of the premises to be searched, as the case may be. The copy shall be read and furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case it shall be read and furnished as soon as is practicable. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.³⁰⁰

Although inconveniencing the peace officer in a minor way, this rule ultimately benefits both the officer and the individual concerned, by making the officer's authority visible as soon as possible.

(2) *Giving Reasons for the Search*

255. The requirement that peace officers conducting searches with warrant be required to show the warrant document provides considerable information to the individual concerned. While most warrants will not disclose the grounds of belief presented in the application before the issuer,³⁰¹ they are required to specify the premises to be searched, objects to be seized and an offence to which the search relates. Since these protections are supplemented by certain rights of access to the information after execution of the search,³⁰² we find little need to augment them.

256. We were concerned, however, that no such information was available to persons subjected to a search without warrant. This concern was reinforced by reference to two sections of the *Canadian Charter of Rights and Freedoms*. The first of these is section 8 which affords security against "unreasonable search or seizure". To require that reasons be given when persons are searched without warrant would give some force and visibility to this constitutional rule. In a similar vein, the Royal Commission on Criminal Procedure

concluded that a notification of reasons for the exercise of stop and search powers would assist in enforcing the threshold criterion of “reasonable suspicion”.³⁰³ As well, the provision of reasons could assist in ensuring that peace officers could be held accountable if the search or seizure were subsequently challenged. Along with this enforcing effect, the requirement that reasons be provided could contribute to better relations between the police and the persons they search without warrant in the course of their duties. To paraphrase a somewhat worn expression, it could help to ensure that reasonable searches are not only done but seen to be done.

257. Second, requiring that reasons be provided to persons searched without warrant would be consistent with the spirit of subsection 10(1) of the *Charter*, which reads:

Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Although this is a constitutional rule pertaining to arrest, it may be relevant to search and seizure insofar as the exercise of these powers may involve incidental detention of individuals. Such detentions could arise in the context of non-consensual stops of vehicles and persons authorized in Recommendation 9, and even the kind of “freezing” of the premises accepted in *Levitz v. Ryan*.³⁰⁴ In other words, it is possible that an arrest or detention may be found to have occurred notwithstanding the fact that the peace officer involved in the incident was executing a power other than arrest (or even no recognized power at all). On the other hand, a differentiation between powers of search and seizure and those of arrest may be relevant for Canadian constitutional purposes, the former being assigned section 8 protections, the latter the coverage of section 10.³⁰⁵

258. Even if section 10 of the *Charter* is found to be inapplicable to situations occurring in the exercise of search powers, the requirement of providing reasons at the time of search would serve the useful purpose of eliminating a source of potential hairsplitting. It has been argued that from a phenomenological point of view, the similarities between personal search and arrest activities are strong. To split the protection accorded to the individual on the basis of the identity of the power employed is to risk subsequent wrangling over the question of that identity. In the *Scott* case, a

Canadian appellate court found itself unable to agree with the trial court as to whether a brief encounter between peace officers and a patron of a bar had involved an arrest or merely a search.³⁰⁶ Such conflicts could be minimized if procedural protections between the two exercises were parallel.

259. Notwithstanding the force of these arguments, however, we have declined to follow the example of the Royal Commission on Criminal Procedure, which recommended that reasons be provided to persons who are searched without warrant and that those reasons be recorded in the officer's notebook.³⁰⁷

260. Our reasons for declining to make such a recommendation are several. First, though perhaps the least compelling, is the "paper burden" consideration. If we were to make such a recommendation, any given consent search could entail the police officer being obliged to complete three separate forms: a statement of his reasons for the search or seizure, which reasons would presumably be recorded in his notebook; a consent form, signed by the person searched; and an inventory of things seized. Of these three items, the written statement of reasons would seem to be the most expendable. This is perhaps more obviously so when it is appreciated that, even in the case of a search with warrant, the warrant document will not generally disclose the reasons for the search. Second, the British Royal Commission's recommendation was specifically referable to the exercise of "stop and frisk" powers. By contrast, our recommendations, as a whole, are designed to express a preference for search with warrant and to limit resort to powers of search without warrant to circumstances of recognized exigency and informed consent. The exigencies we recognize number only two: danger to human life or safety and arrest. In the case of a consent search, the officer will likely find himself obliged to provide reasons before consent is forthcoming. In the case of search incidental to arrest, section 10 of the *Charter* requires that persons be informed promptly of the reasons for their arrest or detention. Requiring additional reasons — in writing — for the search that follows the arrest seems manifestly superfluous. As, for the "danger to human life or safety" exception to the warrant requirement, it does not seem unreasonable to expect that in those cases where the reasons are not already self-evident, they will, in the nature of things, likely be forthcoming at, or immediately after, the event.

(3) *Witnesses and Inventories*

261. Beyond the production of the warrant upon request, there is nothing the law currently requires the officer to do in the course of his search. He is bound only by the standard of reasonableness. While this may serve as an adequate restraining principle, it does not take account of positive steps that the interests of the individual affected arguably demand. Specifically, the individual himself should be entitled in most cases to observe the search and upon request to receive an inventory of items seized.

262. The thrust of these demands is to make the execution of the search as much of a visible, civil and respectful exercise as possible, and to bolster the professionalism of the police. While the roles of the searcher and occupant are naturally adverse, this does not mean that the search need always be conducted in an overtly hostile manner. Rather, the peace officer should recognize the intrusiveness of his actions and attempt to be as considerate of the occupant as is realistic. While requirements of police courtesy are evident in both police instructional materials in Canada and the *ALI Code* in the United States, a quite remarkable exposition of such policies may be found in the *French Code of Criminal Procedure*. This Code includes different sets of rules for searches of domiciles belonging to accused and unaccused parties. Both sets of rules require the search to be made in the presence of the occupant, or a surrogate; if the occupant is not an accused party, he "shall be invited to assist" in the search. At the conclusion of the search, an official report is prepared and the witnesses to the search requested to sign it.³⁰⁸ While the differences between civil and common law jurisdictions must be taken into account, the tone of the French legislation commends itself.

263. The general rule that an occupant of a place or a vehicle searched be entitled to witness the police activity is not only an instance of civility but of common sense: the presence of a witness verifies the officer's account of the conduct of the search. This policy has already been implemented to some degree, by police guidelines which require the officer in charge to have the landlord or occupant of the premises accompany him while the search is in progress.³⁰⁹ We are mindful of the privacy problems entailed in allowing persons such as neighbours or bystanders to witness searches in the individual's absence. However, with respect to the occupants themselves, the law ought to sanction existing guidelines by incorporating them into legislation, making provision for exigencies in which the individual's

presence would be counter-productive (e.g., where he is so hostile as to make his presence a danger to the successful conduct of the search). We attempt to compensate somewhat for the absence of a witness in searches of unoccupied places or vehicles by the requirement that the police executing the search leave a copy of the warrant suitably affixed within the premises.

264. The inventory requirement was recognized at common law as applicable to seizures of stolen goods,³¹⁰ but it is not present in any modern provision. Inventory procedures, however, have been adopted by a number of Canadian forces. Members of one force told Commission researchers that they send exhibit forms to the individual from whom items have been seized as well as to their own records departments. On the other hand, another force looked unfavourably on inventory procedures as an unnecessary source of paperwork, backing up their argument by reference to an absence of complaints from persons affected. In between these views stood a number of forces which maintained that they would provide an inventory upon request.

265. A statutory requirement that a person whose possessions are seized be provided with an inventory is part of the American Federal Rules³¹¹ and has been recommended by the Royal Commission on Criminal Procedure.³¹² We believe that the principle should be adopted in Canada as well, but with a proviso. There may be cases in which the individual does not require and perhaps does not want an inventory. Examples of the latter possibility would be cases in which the objects seized were illegal to possess. Accordingly, we propose that the requirement stem from the individual's request. Since the officer will usually make an inventory for administrative purposes anyway, and indeed should do so for the purpose of making a return upon a warrant before the justice, the requirement imposes little extra burden upon the police. The objective of informing the occupant as to the exact possessions being taken from him enhances the visibility of the search and seizure procedure, and is well worth any inconvenience involved. In cases in which the volume of material seized makes a meticulous list impracticable, the inventory should be as detailed as is reasonable under the circumstances.

266. One possible complication involved in an inventory requirement concerns the potential use of an individual's receipt of an inventory as evidence against him in court. Where possession of the objects seized becomes a fact in issue at trial, any express or implied acknowledgment by an individual that an inventory was accurate

could be considered relevant evidence. In order to protect himself against this contingency, the individual from whom things are seized may wish to decline to request or to receive any such inventory.

D. The “Plain View” Doctrine

RECOMMENDATION

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.

267. There are a number of ways in which a peace officer executing a lawful search may discover objects of seizure not covered by the justification underlying his initial intrusion. For example, a peace officer searching premises with a warrant for stolen goods may find a supply of illegal drugs; a peace officer arresting an individual in his house may see an illegal weapon beyond the reach of the accused and hence outside the ambit of the “reach” test proposed in Recommendation 7.³¹³ This situation poses a certain dilemma. Notwithstanding the obvious criminal law enforcement interest in taking the opportunity to acquire such objects, there is a risk that permitting their seizure invites peace officers to expand specifically authorized searches into “fishing expeditions”. Some special provisions, such as subsection 10(1) of the *Narcotic Control Act*, permit seizure of objects not mentioned on the warrant but still connected to the same or a related offence. But what if the incriminating items pertain to another kind of offence altogether? Aside from the provisions of section 445 of the *Criminal Code*, which deals exclusively with searches with warrants issued under section 443,³¹⁴ Canadian law has not addressed this problem. However, the dilemma has been resolved in American case-law by the “plain view” doctrine.

268. This doctrine basically holds that taking advantage of the observation of incriminating objects in “plain view” does not involve the peace officer in any distinct “search” activity outside of that covered by his initial justification; hence, by allowing seizure of such objects, the law does not sanction any “general or exploratory” intrusion into the privacy of the individual concerned.³¹⁵ Rather, the

only recognizable deprivation resulting from the discovery is the individual's loss of the incriminating objects found. Warrantless seizure of these objects is permitted because the deprivation suffered does not outweigh the inconvenience or possible danger entailed in requiring the police to obtain a warrant specifically covering these objects.³¹⁶

269. The American position is informed by Supreme Court case-law, which has confined the doctrine according to its rationale:

It has been emphasized that any evidence seized by a law enforcement officer will ordinarily be in "plain view" at least at the moment of seizure, and that the mere fact that evidence is in "plain view" at the moment of seizure thus does not indicate that the "plain view" doctrine applies. The Supreme Court has held that the "plain view" doctrine is subject to such qualifications and exceptions as the following: (1) the observer of objects in "plain view" must have the right to be in the position to have that view; (2) in order for the seizure of objects observed in "plain view" to be constitutional, the seizure must be based either on a valid warrant or on "exigent circumstances" justifying the failure to obtain a valid warrant.³¹⁷

We believe that the doctrine is a valuable one and accordingly recommend its incorporation into Canadian law.

270. It has been suggested in American jurisprudence that the "plain view" doctrine will not justify seizure of the object where its incriminating nature is not apparent from the "plain view" itself.³¹⁸ In some cases, distinctions have been drawn between seizure of contraband, stolen goods and dangerous articles, and objects of simply evidentiary value, although seizure of the latter category still appears to be constitutional if the discovery is inadvertent.³¹⁹ It would be possible to simplify the American approach somewhat by excluding from seizure objects which were neither "takings of an offence" nor "possessed in circumstances constituting an offence" but serve merely evidentiary purposes. Indeed such a policy may already be implicit in Canadian law. At present, the additional items seizable under section 445 of the *Criminal Code* are restricted to things believed to be "obtained by" or "used in the commission of an offence", a provision which may not cover mere evidence. However, there are unquestionably some kinds of evidence, such as bloodstained clothing or lawfully possessed weapons, which are incriminating at first glance, and we are not persuaded that excluding such objects from our Recommendation would serve any truly beneficial purpose. For this reason, and in the interests of simplicity, we propose that the "plain view" doctrine be applicable to all objects of seizure.

IV. Searches of Persons

RECOMMENDATIONS

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.**

A. Reasonable Grounds to Believe

271. It seems trite to say that the law protects each individual. It is not, for example, a collective protection against assault that extends to the residents of a building, but rather a protection of each resident individually. Consequently, it might be expected that protection against search would be accorded on such a basis, viz. that a person could not be searched unless a particular ground for searching *him* was present. The present law, however, is not always so individualized. Perhaps the most significant departure is evident in *Narcotic Control Act* and *Food and Drugs Act* provisions, which permit search of "any person" found in places searched for narcotics or drugs.³²⁰ In the wake of the *Jaagusta* case, it appears clear that even in warrantless searches, reasonable ground for belief must exist as to the presence of drugs, either on the individual or in the place in which he is found, before a personal search can be made.³²¹ However, the alternative nature of this rule leaves it open for the officer to search anybody found inside a place, once he has the warrant or other authority under the statute to enter it.

272. This state of affairs was criticized in the Pringle Report,³²² which dealt with an incident of indiscriminate internal searches of the occupants of a tavern. The report referred to a June 1974 policy directive of the R.C.M.P. advocating the "utmost discretion" in the exercise of powers of personal search, and prohibiting strip searches "unless the investigator possesses reasonable and probable grounds to believe that the person is in physical possession of prohibited goods or evidence" of an offence. It went on to recommend that persons found in non-residential premises not be subject to search unless reasonable cause existed to believe that they were in possession of incriminating things.³²³ We affirm this position. To entrust any measure of personal search to officers using "utmost discretion" is simply not good enough. Aside from principle, empirical evidence would suggest that this discretion is used quite liberally. In 487 searches of premises under *Narcotic Control Act* and *Food and Drugs Act* warrants reported in our warrant survey, 959 personal searches were conducted.³²⁴

273. Our recommendations recognize that the justification for intrusion should be related to the individual whom the peace officer wishes to search; the things, funds or information sought must be associated with him in a way sufficient to make the intrusion defensible. We apply this rule not only to searches of persons found

in the course of searching a place but to all instances in which a personal search is authorized, save for arrest. This position is based in part on constitutional considerations. In the *Ybarra* case, the United States Supreme Court found that each individual in a tavern was clothed with an individualized constitutional protection against unreasonable search and seizure, including frisks.³²⁵ This rule was based on wording in the American Fourth Amendment similar to that found in section 8 of the *Canadian Charter of Rights and Freedoms*. Even aside from constitutional issues, however, the policy articulated in *Ybarra* is a sound one, and one which ought to be recognized in Canadian statute law.

274. We are aware of the possibility that powers to conduct searches of persons upon “reasonable ground to believe” could be distorted in practice into programmes of random or sweep searches. An account of such a programme with the alarming consequences that followed from it is found in the recent Scarman Report on the Brixton riots in England.³²⁶ The danger of such programmes may be particularly acute in the instance of warrantless search powers such as those set out in Recommendations 7 to 10. We do not accept, however, that such programmes are deterred by ignoring the legitimate criminal law enforcement interest in conducting personal searches in certain circumstances, when reasonable grounds truly exist. As we indicated earlier, the effect of ignoring these interests may simply be to influence police to account for such searches by reference to relatively discretionary powers such as those found under provincial liquor legislation, to inappropriate constructions of consent or to problematical situations of arrest. Our approach, rather, has been to accord the police a proper range of powers of personal search, attended by procedural safeguards designed to limit the possibilities of their unjustified use.

275. It might also be wondered whether “reasonable grounds to believe” is a sufficiently strict probative test for personal search. Some American case-law on searches for narcotics has used “probable cause” as the applicable standard of proof,³²⁷ although a lesser “reasonableness” test seems the guiding standard in frisks for weapons.³²⁸ On the other hand the Royal Commission on Criminal Procedure has sanctioned a somewhat vague criterion of “reasonable suspicion”.³²⁹ Like the drafters of the Australian *Criminal Investigation Bill*, we conclude that the “reasonable ground” standard is appropriate for our purposes.³³⁰ This decision reflects in part the traditional association of this test with Canadian search and seizure law as well as its fidelity to the “reasonableness” test in

section 8 of the *Canadian Charter of Rights and Freedoms*. It also accords with our observation that fine semantic differences may be of limited impact to peace officers faced with an immediate decision as to whether to search a suspect. Finally, it evinces our belief that true protection against unjustified personal searches can only come from the attitudes of the peace officers, the warrant issuers and the judges who are called upon to apply the law. Properly and fairly applied, the “reasonable ground to believe” test strikes a sound balance between the interests at stake in the situations of personal search covered in our recommendations.

B. Warrants to Search Persons

276. The idea of specific warrant to search persons may seem foreign to the mainstream of Canadian criminal procedure, despite the possible availability of such a warrant under sections 101 and 353 of the *Criminal Code*. However, the association of warranted searches with places and warrantless searches with persons is a result of the long historical growth of these search powers in separate strands rather than any legitimate distinction in principle.³³¹ Indeed, if one accepts the premise that warrants should be available to authorize all justifiable searches and seizures, it is the omission of personal searches from the warrant provisions that appears contrary to principle. This premise has now been incorporated into a sufficient number of codes and provisions³³² in other jurisdictions that the exclusive association of personal search with warrantless powers may be on its way to becoming an anachronism.

277. While it might be observed that many personal searches, including those incidental to arrest, are undertaken in urgent circumstances, this does not argue against the availability of a warrant to perform personal searches. Rather, it argues for the availability of the additional option to perform warrantless searches where circumstances require. It seems trite to observe that the fact that many arrests are carried out in similarly exigent circumstances has not made the peace officer’s arrest powers exclusively warrantless. Although the considerations justifying warrantless search cannot be equated with those justifying warrantless arrest, it is

fair to observe that with both search and arrest powers, the choice is between different modes of authorizing an intrusion upon the person. If the warrant, with its inherent features of judiciality and particularity, is an appropriate mode of authorizing an individual's arrest, it is not evident why it is not an appropriate mode of authorizing a search of his person.

278. It might be argued that establishing a warrant to search persons is something of an academic exercise, in that police will invariably perceive that obtaining a warrant is impracticable, and proceed to perform a warrantless search.³³³ But while the extent to which warrantless searches are indeed confined to "impracticable" cases is an important problem,³³⁴ it is not resolved by the exclusion of personal searches from warrant provisions. What such exclusion means is that the peace officer cannot go to a judicial official for authorization even when he appreciates that it is practicable, and indeed desirable, for him to do so.

279. Moreover, there is one type of personal search in which a warrant is not only practicable but essential: the performance of "medical examinations". This topic is discussed in detail later; for the time being it is sufficient to state that the number of strip and internal searches currently performed indicates that a warrant requirement in this respect could be expected to produce a significant number of warrant applications.³³⁵

280. What tests, then, ought to be applied in authorizing personal searches under warrant? There are actually two specific issues relevant here. As to the probative test that ought to be applied by the issuer in authorizing the search of a person, there would appear to be no basis for departing from the "reasonable grounds" test. The critical requirement is that each individual to be searched be someone in relation to whom the requisite reasonable grounds for belief exist.³³⁶ As to the particularity with which the person must be described, this would vary with the circumstances of each case, but there is obviously a need for a name, or at least a physical description accompanied by a precise location at which the person might be found.³³⁷ Although American decisions are not entirely consistent on this point, it would seem that the elaboration of particularity tests is best left to the flexible context of case-law, rather than attempting to establish them in the legislation itself. Canadian cases, such as *Gibson*³³⁸ and *Royal American Shows Inc.*,³³⁹ have developed intelligent particularity rules with respect to the search of premises, and there is no reason to believe that similar tests could not be developed with respect to individuals to be searched.

C. Searches of Persons Incidental to Searches of Places and Vehicles

281. Personal searches currently carried out in the course of executing search warrants are rarely carried out in pursuit of warrants expressly authorizing personal search. Rather, they are usually undertaken in the course of executing searches of premises. As such, they are based on various sources of legal authority and, in some cases, no apparent source of legal authority at all.³⁴⁰ In deciding upon how to deal with such searches in warrant provisions, one is presented with three basic alternatives: (1) to provide, as no Canadian provision currently does, that personal search may be authorized in a warrant to search places or vehicles; (2) to follow the basic approach of the narcotics and drugs provisions (although with possible modifications) by providing an independent statutory power to search persons as an incident of a warranted search of places or vehicles; or (3) to leave the executor of the warrant to rely upon independent sources of authority to search persons, as is currently the case with searches under section 443 of the *Criminal Code*. We have concluded that the first alternative is the best one.

282. The third course gives full expression to the view that each personal search represents a distinct intrusion. By according no significance to the fact that the individual is found in the place or vehicle searched, it puts the peace officer in the same position he would be in if he encountered the individual on the street. Its weakness lies in the artificiality of separating all personal searches from their context: the warranted search of places or vehicles. This is not simply a physical context but, more importantly, a context of purpose. It may happen that an officer wishes to search a person for reasons that are unrelated to the purpose of the warranted search, such as the apprehension that the person is carrying a dangerous weapon. But this need not always be the case; on the contrary, the officer may be searching the persons found on the premises for the same objects of seizure as those mentioned in the warrant. In such cases, it seems only sensible to view the personal search in the context of the search as a whole.

283. What is different about the undertaking of personal search, of course, is that personal security and not merely a spatial domain is being violated. And it remains critical that each individual in the place or vehicle be protected from a search of his person unless reasonable grounds exist to believe that he himself is in possession of

an object of seizure. The critical question is whether the decision as to the existence of these grounds should be confided to the original warrant issuer or to a peace officer.

284. To leave the matter solely to the determination of the peace officer raises certain objections. It gives the officer what is essentially a power to make warrantless searches, without offering a convincing reason for abdicating all warrant protections. There are a number of arguments to be made against requiring a *second* warrant application to be made from the scene of the search: the possibility of urgent circumstances, the inefficiency of requiring two separate applications, the marginality of benefits received from such an application compared to its inconvenience. But what factors argue against giving the issuer of the warrant responsibility in this respect on the *original* application?

285. The basic problem is that the issuer is in an inferior position to ascertain the likelihood of whether an individual encountered in a place or vehicle is carrying or concealing an object of seizure. Whereas the officer has the advantage of being aware of the circumstances encountered during the search of the place or vehicle, the original issuer can only be cognizant of factors known before the search is undertaken. There may be no basis upon which it may be predicted, at the stage of the application for the warrant, who may be in the place or vehicle, or which occupant might be in personal possession of the objects. And any hypothesis that might be developed before the search might easily be refuted once the search has begun.

286. To offer the issuer the power to authorize personal search entails some concession to the hypothetical and vague basis upon which his decision must rest. The problem of whether such a basis is a proper one upon which to issue a search warrant has plagued American case-law. The cases have focused upon the validity of authorizing searches of "occupants" of certain premises. It would appear that if there is reasonable ground to believe that all persons present at the anticipated scene are implicated in the offence, the warrant will be valid.³⁴¹ While the decisions evince a laudable concern that individuals on the premises not be searched without justification, they have viewed the issue of grounds to search at a collective level: if all occupants are sufficiently implicated to be searched, a search of each one of them may be authorized. Although it may well be that only a few individuals on the premises are so implicated, the issuer is faced with an all-or-nothing proposition.

287. We propose that the best solution to the problem is to divide the responsibility for determining the question of personal search between the issuer and the peace officer. To the issuer should go a kind of clearance function. If, when the issuer grants the initial warrant, it appears that the "objects of seizure" named in the warrant may be concealed upon persons in the place or vehicle to be searched, he should be empowered to include a clause on the warrant authorizing the officer to search persons. However, the officer should be permitted to search only those persons whom he reasonably believes to be in possession of these "objects of seizure". Not only does such a compromise balance the "judicial" protections of the issuer's decision with the informed basis of the officer's judgment, but by using the warrant to confer authority upon the officer, it communicates that authority to the occupants of the place or vehicle searched.

D. Medical Examinations and Searches of the Mouth

288. Probings of body orifices, intimate sexual searches, and strip searches are clearly very intrusive procedures. As well as being an aspect of search and seizure, these same procedures may also be performed for other investigative purposes, e.g., in order to obtain samples of bodily substances from a suspect in custody. Whether as an aspect of search and seizure, or as an aspect of what we refer to as "investigative tests", we believe that these procedures should be carefully prescribed by law. For present purposes, we make recommendations only as these procedures relate to powers of search and seizure; in a subsequent Working Paper, we will be considering the procedures appropriate to investigative tests. It should be understood, however, that it may subsequently prove necessary to reconcile certain of the present recommendations with those that we will shortly be making in our Working Paper on Investigative Tests. This task we expect to reserve for our respective Reports to Parliament on Search and Seizure and Investigative Tests.

289. The need for special rules governing visual examination and searches of body orifices and sexual organs was recognized by the Australian Law Reform Commission. The Australian Commission's position was summarized as follows:

The intention of the Commission is to confine the power of search incident to arrest to light body search of the so-called "frisk" type. The more intrusive searches of the surface of the body, or various cavities

thereof, should be carried out only in accordance with provisions governing medical examinations. Obviously it will be difficult in many cases to draw the line between what is a personal search, which can be carried out by a police officer, and what is a medical examination, which in our recommendation can be carried out in the absence of consent only by a medical practitioner pursuant to a court order. The Commission is of the view that search of the body surface, even if only superficial scratches or bruises, should be construed as a medical examination to the extent that it involves any invasion of the modesty or dignity of the person concerned, as by the shedding of clothes and so on. It is difficult to draw this kind of distinction clearly in statutory terms. Much will clearly depend on the willingness of the courts to draw the appropriate distinctions when practical situations come before them, upon the discipline enforced by senior police officers and upon the response of all officers to the principle advanced here.³⁴²

290. The Australian proposal is basically oriented towards three objectives. First, it affirms personal dignity by expanding the definition of medical examination beyond intrusions into the body and encompassing strip searches generally. This position recognizes what was evident in the findings of the Pringle Report:³⁴³ that it is the exposure, rather than the probing of the orifices of the body, that is the primary intrusion made in the course of an intimate search. The point was also made by the minority of the British Advisory Committee on Drug Dependence, which called for special protection against what it termed “embarrassing” inspections of underclothes and the naked body.³⁴⁴ We give further recognition to this concern by requiring that the examination be conducted in circumstances respectful of the privacy of the person to be examined.

291. The argument may be put, of course, that no matter how serious the offence, the violation of human dignity implicit in a vaginal or rectal examination is intolerable in a free society. Proponents of this argument, however, often concede that there is a legitimate interest in obtaining some secreted items (*viz.* condoms containing heroin), and suggest alternatives open to the police, such as incarceration and supervision of the individual, and constant inspection of his or her body wastes. These alternatives themselves are hardly more respectful of human dignity than a rectal or vaginal probe conducted in appropriate surroundings by a medical professional; they may be even seen as less so. In the result, we suggest that the proposals contained in our Recommendation are the best available set of rules for an inevitably distasteful task.

292. Second, the Australian proposal requires that rectal and vaginal searches, when they are conducted, be performed by

qualified medical practitioners, and therefore involve a minimum of pain and risk of injury to the individual searched. In Canada, this concern has been manifested in the Pringle Report³⁴⁵ and incorporated into a number of police instructional materials.³⁴⁶ By restricting the permitted practices to medical “examinations”, the proposed law clearly would exclude the more dangerous kind of operation attempted in the *Laporte* case,³⁴⁷ as well as such brutal tactics as force-feeding of emetics which so incensed the United States Supreme Court in the *Rochin* case.³⁴⁸

293. Third, the proposals would preclude conducting a medical examination without the specific authority of a judicial order. We believe that these intrusions are sufficiently serious that they should not be permissible without prior judicial authorization. Moreover, it might be noted that the various orifices of the body generally do not lend themselves to the destruction of evidence so much as to its secretion. While it is physically possible to use internal surfaces to absorb, and hence prevent seizure of, various narcotics,³⁴⁹ the internal search of an individual is usually predicated on the belief that the substance has been carefully concealed in the body for transportation purposes, a belief that assumes that the carrier is preserving the substance. Therefore, as a general rule, the “urgency” factor necessary to justify resort to warrantless search in the absence of consent is not present.

294. The major exception to the policies outlined above involves the mouth, searches of which are particularly relevant in narcotics cases. In the *Scott* case, Urie J. discussed a search of the plaintiff’s mouth as follows:

According to the evidence, it is well known to police officers engaged in drug law enforcement that suspects hide narcotics contained in a balloon or a condom in their mouths. The uncontradicted evidence was that the purpose of the application of the throathold by Sergeant Siddle was to ascertain whether or not the respondent had narcotics in his mouth. That is, he was conducting a search of the person as authorized by the statutes. Since the evidence also indicates that the only satisfactory methods for recovering narcotics hidden in a suspect’s mouth and to prevent him from swallowing them to avoid their recovery is to apply such a hold, it would appear to be a lawful act, at least in the absence of evidence of undue force in its application. To find otherwise would, in my opinion, make a realistic search for narcotics a mockery and to a large extent negate the practical use of ss. 10(1) and 37(1).³⁵⁰

295. The existence of the practice of swallowing narcotics to prevent their seizure may be well known, but the *Scott* decision

raises some concern in its evident condonation of mouth searches as a general police exercise. It was in fact found that there were no reasonable grounds to believe that narcotics were concealed in the plaintiff's mouth; the search was conducted rather to "ascertain whether or not" narcotics might be found there. This exploratory rationale contradicts the positions taken in this paper that an individual should not be subjected to a search unless grounds pertaining to himself exist.³⁵¹ Assuming these preconditions to be satisfied, however, the question remains as to whether, given the painfulness and danger inherent in a search of the mouth, it ought to fall within the medical examinations provisions, or whether the demands of law enforcement justify making it, so to speak, an exception to the exception.

296. It would appear that, while undeniably a drastic measure, a mouth search by a peace officer may well be at times a necessary one to prevent the destruction of evidence. And while possessing the invasiveness of any assault upon the person, it does not involve the embarrassment and threats to dignity which strip searches and other internal searches entail. Accordingly, we propose that the requirements for a warrant and qualified medical practitioner applicable to special medical examination provisions should not obtain in searches of the mouth. We attempt to compensate for the removal of these protections with the requirements that an *ex post facto* report be prepared and that the search be performed in a manner not dangerous to human life or safety.

297. The one major weakness of the Australian proposal for medical examinations is that it allows the investigation of any offence to justify the intrusion. We recommend, however, that these searches be confined to cases in which the seriousness of the social interest demanding intrusion truly balances with the seriousness of the intrusion. Given that rectal, vaginal, and mouth searches are often undertaken in narcotics and drugs investigations, there is still a wide disparity between the search of an alleged possessor of marijuana and that of an alleged trafficker in heroin. Indeed, this distinction has been made in an R.C.M.P. operational manual:

When conducting investigations involving small amounts of cannabis, members of the Force should not resort to the investigational techniques utilized in the investigation of offences involving heroin or other similar narcotics. Seizing a person by the throat or subjecting suspects to complete strip or internal searches will normally be considered excessive. If members do resort to these investigational techniques, they must be prepared to justify their actions.³⁵²

298. The classification of offences under the *Criminal Code* is itself currently under scrutiny by the Law Reform Commission of Canada, and it is difficult to discern in current criminal legislation any consistent standard by which an offence could be classified as deserving or not deserving of resort to medical examinations. Perhaps the best approach would be therefore the one taken in drafting existing wire-tap legislation: to limit the application of the regime to specific offences listed by Parliament in a special definition section.³⁵³ This approach to medical examinations was taken by the Victoria Chief Justice's Law Reform Committee, and we recommend its adoption.

V. Release of Information about the Search and Seizure

299. By the time a search has been executed or a seizure has been made, the police are likely to be in possession of significant information about an individual whose interests have been infringed by the intrusion. At the least, they will know why and how the search was conducted, and whether or not a seizure was made. If a warrant has been issued, the office of the issuer should also be in possession of information which has been provided in the application for the warrant. The factual datum in the possession of the police and issuer is naturally of concern to any individual to whom it relates. It may also interest an institution, such as the press, which is not directly involved in the investigation. The institution's interest in turn affects the individual. The dissemination of police information may result in the exposure of previously private facts about his life and activities. The police, on the other hand, may wish to restrict the flow of information in their hands, in order to safeguard their sources and preserve their investigation.

300. The primary concern underlying rules governing the flow of information about a search or seizure is accountability. In this respect the differences between warranted and warrantless searches and seizures are acute. In the former case, accountability should begin with the application to the warrant issuer and his evaluation of the applicant's request. But even if the procedure for obtaining warrants in certain jurisdictions has been perfunctory and subject to

manipulation by the police, there is still some benefit in terms of accountability derived from the record which the information and warrant provide for subsequent examination, review and challenge. Where “returns” to the execution of the warrant are filed as required by section 443, these too provide a measure of accountability. Why should such benefits not accrue as well to an individual affected by a warrantless intrusion?

301. To some extent, this is attributable to certain distinctions between the source of the peace officer’s authority in the two instances. Historically, the constable’s warrant identified him as the delegatee of the justice of the peace for the purpose of carrying out the justice’s law enforcement functions. This relationship is still notionally preserved in some aspects of warrant procedure such as the provision for “return” of the warrant and items seized to the justice under section 443 of the *Criminal Code*. By contrast, in the case of a warrantless provision, the peace officer is the direct holder of a statutory power. In the absence of specific legal or administrative provisions to the contrary by law, he is not accountable to any superior official for having exercised it. But primarily, the difference in accountability would seem to be based on the exclusive association of a “judicial” element with the warrant procedure. Many of the existing accountability mechanisms are traceable to this association, and its corresponding absence in the case of warrantless search powers has meant that parallel or similar mechanisms have not been conceived as appropriate in the latter case.

302. Do these factors still justify the existing discrepancies? In terms of present-day realities, the peace officer is no longer the subordinate constable being sent out to perform the functions delegated to him by the justice. Rather, it is the peace officer who almost invariably initiates the warrant procedure, ascertaining the basis of the underlying complaint and preparing the application and warrant for the justice’s signature. More importantly, while the maintenance of a “judicial” character should continue to be an objective of warrant procedures, it may be misleading to isolate this objective as the major rationale for supervising powers of search and seizure with warrant. Rather, the “judicial” protections may themselves be instrumental; they themselves have been built into warrant procedures because of the perceived importance of protecting individuals from the unjustified exercise of intrusive powers.

303. In making recommendations concerning the maintenance and release of information about a search or seizure, we attempt to

balance the different considerations raised in instances of warranted and warrantless search. While not rejecting entirely the factors mentioned above, we have attempted to close the gap between the accountability mechanisms available in the two instances.

A. Search with Warrant

RECOMMENDATIONS

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.

304. These recommendations respond in part to the recent decision of the Supreme Court of Canada in the *MacIntyre* case,

which primarily involved the issue of whether the public ought to be entitled to access to records of search warrant proceedings. By a five to four majority, the Court adopted a modest position in favour of public access. Dickson J., writing for the majority,³⁵⁴ held that after a search warrant had been executed and any objects seized as a result brought before a justice, a member of the public is generally entitled to inspect the warrant and supporting information. Martland J., dissenting,³⁵⁵ took the view that access to these documents should be restricted to persons showing a direct and tangible interest in them, a class that in his view did not include the respondent MacIntyre, a reporter who claimed no interest above that of the general public. The Court's decision did not purport to lay down anything more than certain common law propositions; if Parliament deemed it appropriate, these propositions could be modified by statutory provision. We believe that the interests of clarity call for legislative treatment of three issues raised in the case. These issues are: Should access to the hearing of the application be curtailed? Under what circumstances, if at all, should an individual affected by a search be entitled to examine the warrant supporting information on oath? Under what circumstances, if at all, should members of the public and the press or media be so entitled?

305. The Nova Scotia Court of Appeal decision in *MacIntyre* held that the issuance of a search warrant is a judicial act performed in open court: "The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant".³⁵⁶ Both the majority and minority in the Supreme Court of Canada rejected this view, however. As Dickson J. observed,

{t}he effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless.³⁵⁷

We agree with this position and accordingly give the warrant-issuer the power to exclude persons from a warrant hearing.

306. The need to control information about the search warrant hearing is diminished after the warrant is executed, both because the individual affected knows about the police investigation by virtue of the search itself and because the police have had their opportunity to make the authorized seizures. The case for giving the affected

individual access to the warrant and information at this point was recognized by both the majority and minority in *MacIntyre*. It was perhaps most succinctly put in *Realty Renovations Ltd.*, a case that preceded *MacIntyre*:

It is abundantly clear that an interested party has the right to apply to set aside or quash a search warrant based on a defective information. In order to make such an application the applicant must be able to inspect the information and also the warrant and must be able to do so immediately the warrant is executed.³⁵⁸

We incorporate this position into Recommendation 35.

307. The benefits of giving access both to the public at large and to institutions such as the press which serve it may harmonize with the individual's concern, but this is not necessarily so. As was the case in *MacIntyre*, a journalist may be interested in exposing the activities of the persons named in the warrant as much as checking on the propriety of the police activities against them. The interest that conflicts with public access in this instance is that of the individual's own privacy. Given the wide reach of the media, information about a search may cause the individual serious embarrassment. Privacy legislation at the federal level specifically protects "information relating to the ... criminal history ... of the individual" from disclosure to others,³⁵⁹ and American law explicitly recognizes that release of information about criminal investigations may constitute an undue invasion of privacy.³⁶⁰ On the other hand, damage to privacy is a danger acknowledged by law-makers in exempting courts from protection of privacy legislation. The public scrutiny necessary to ensure the fairness and quality of judicial proceedings entails exposure of embarrassing facts about individuals.³⁶¹

308. In *MacIntyre* itself, the majority resolved this issue by reference to the policy of "protection of the innocent". It held that "where a search is made and nothing is found", arguments of public access gave way to concerns for the individual's privacy, but where objects were seized the interests in favour of access prevailed.³⁶² We hesitate, however, to make such a direct association between the results of a search and the question of an individual's 'guilt or innocence. A guilty individual may have removed wanted items from his premises; an innocent party may be in possession of relevant evidence seizable under a warrant. Our preference, rather, is to distinguish between access to the warrant and information and publication of their contents.

309. It is important to recognize that the public interest in publicizing procedures at the pre-trial stage is not as strong as at the trial stage. Indeed, the exposure of pre-trial proceedings may threaten the integrity of the trial system as well as enhancing it — by disclosing evidence that may not be introduced subsequently in court, or by tainting the person searched with culpability before he has been charged. The former concern has been enhanced by the introduction of a limited exclusionary rule against illegally obtained evidence in subsection 24(2) of the *Canadian Charter of Rights and Freedoms*.³⁶³ It is also relevant to note that search warrant hearings, while ancillary to criminal procedure, do not involve the kind of final determination of culpability or liability that characterizes the trial and makes publicity “the hallmark of justice” in that context.

310. Perhaps the stronger case for unrestricted rights of publication resides in the violence that restrictions do to freedom of the press. The constitutional protection of freedom of the press as recognized in the *Canadian Bill of Rights*³⁶⁴ was recently invoked by the Manitoba Court of Appeal in the *F.P. Publications* case. In quashing an order excluding a reporter from a trial, the Court recognized the reporter’s freedom to report the names of witnesses at the trial, despite the embarrassment this might cause to the witnesses.³⁶⁵ But, although the judgments of the majority in the case are spirited in their defence of the press, it would be misleading to take the ratio of the judgment outside the context of the trial proceeding itself. Indeed, two specific provisions in the *Criminal Code* make it clear that at the pre-trial stage, freedom of the press must bend to some extent to accommodate the individual’s own wish to control information about the investigation against him.

311. Both at preliminary inquiries and show-cause hearings, a justice is required, upon application by the accused, to impose a non-publication order covering the evidence and representations made before the court.³⁶⁶ The order lasts until either the accused is discharged at a preliminary inquiry or the trial of the accused is ended. Search with warrant generally precedes both the inquiry and the show-cause hearing, and unlike the accused in either case, the individual mentioned in a search warrant has not necessarily been charged with an offence. Neither the public interest nor the stake of the press in disclosing investigative facts against the individual’s will would appear to be more compelling in the case of search warrant hearings than in the cases in which the benefit of a non-publication order is already recognized.

312. The major difference between the contexts is that the absence of the individual from the warrant hearings precludes him from making the application for protection available to an accused before a court. We recommend, therefore, that an order similar to that obtainable at preliminary inquiries and bail hearings be imposed automatically upon the issuance of a search warrant, but that this order be revocable upon the application of the person concerned. We do not accept, however, that this right of the individual concerned to obtain revocation of the order should be absolute. For one thing, the examination of a warrant or information upon oath may involve the disclosure of facts about a number of different individuals. While some of these persons may wish to publicize their case, others may wish to avoid exposure. The complex issues that could arise in such situations could be determined sensitively if presented to an adjudicator of a high-level court.

313. It is recognized that, allowing for what is in effect conditional public access to search warrant documents entails certain risks. The suggestion is made by police and Crown officials that such a step could lead to a reduction in the details disclosed in their applications. It is important to put this argument in perspective, however. It is true that some documents, notably those relating to commercial crime, are prepared with an almost artistic devotion to detail, and that officials preparing these documents might well be concerned about the exposure of names and sources included on these documents. However, the likelihood is that many of these details are superfluous in terms of the legal standards that actually govern applications and warrants. The more common warrant document, by contrast, is one that falls short of even the basic legal criteria — 58.9% of the warrants evaluated by the judicial panel were invalid, and of those found to be valid, many included terse but minimally sufficient descriptions of items, premises, offences and grounds to believe. It seems possible that the effect of public exposure could be to modify practices at both extremes: reducing detail on the meticulous warrants while bolstering standards on the manifestly inferior ones. If this is the case, it is suggested that the sacrifice incurred at the higher stratum is justified by the improvement at the lower end.

314. One area of particular concern is the possibility that public access to search warrants could frustrate electronic surveillance activities. As was suggested earlier, the relevant concern in the evaluation of a warrant application founded on a wire-tap is not the identification of the wire-tap itself but rather the facts it discloses.

However, there is one kind of search in which the tap is inevitably identified in both the information and the warrant: a search for records relating to the telephone number itself. Such searches are often conducted upon telephone company premises.³⁶⁷ If the fact of the search for the records became publicly available, the individual concerned might well be alerted. In order to avert this situation, court officials, at the request of the police or Crown, could be empowered to delete the actual telephone number from the documents accessible to the public, and replace it with a cypher. So long as it was attested by the issuer of the warrant that the cypher represented a specific telephone number, no significant sacrifice would be made in terms of the capacity of the public to evaluate or monitor the standards of warrant procedures. Analogous policies are proposed with respect to the identities of confidential informants.

315. In advancing Recommendations 34, 35 and 36 we are aware of both the controversy surrounding the *MacIntyre* decision and the acute conflicts that emerge when police are required to disclose intricate and sensitive investigations in an open judicial forum. While the present set of proposals represents a defensible balance of the competing interests, we realize that they may seem too secretive to some and insufficiently confidential to others. In preparing the parts of our final reports on police powers and procedures concerning release of information about searches and seizures with warrant, we would be greatly assisted by comments on, or criticisms of, our present proposals.

B. Search without Warrant

RECOMMENDATION

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.

316. That a particular search or seizure activity is attended by such conditions as to justify an exception to the requirement of obtaining a warrant does not remove the need for accountability mechanisms. It might even be argued that the more defensible inclination would be to augment accountability mechanisms so as to make them effective as sources of *primary* rather than *secondary* protection against unjustified search. We do not accept, however, that it would be beneficial to require full-scale reporting of all warrantless searches and seizures, so as to provide a record as extensive as that available in cases of search and seizure with warrant. In part, this position is based on the recognition that the judicial character of warrant procedures is a matter of some weight. In part, it is based on the observation that some of the concern for accountability and access to information may be met by Recommendation 27, concerning the giving of reasons for the search. However, there are three other considerations that deserve attention: (1) the costs of requiring the scale of reporting characteristic of warrant procedures in all cases of warrantless searches and seizures, (2) the significance of the encroachment upon individual interests represented by different variations of search and seizure activity, and (3) corollary dangers arising from increasing reporting requirements.

317. It is a truism of police work that the reporting of occurrences involves a drain on resources. Traditionally, this drain has been viewed in terms of the "paperwork" that a peace officer is required to complete. Some of this expenditure has been transferred in recent times into computer systems in which information acquired by the police has been processed and stored. The exact nature of the expenditure entailed in requiring full-scale reporting for warrantless searches and seizures would be somewhat dependent on the division of functions between paperwork and computers. However, it seems inevitable that putting such requirements into practice would place an increased strain on the reporting capacities of police forces. This assertion is based on the likelihood that, despite the preference in principle for utilization of a warrant and the improvements in warrant procedure suggested earlier, warrantless searches, particularly of persons and vehicles, will continue to heavily outnumber warranted ones.

318. Can such an expenditure of resources be justified by the benefits received from it? It is accurate to say that any deprivation of

human liberty or violation of bodily integrity represents an interference with interests accorded significant importance in Canadian legal tradition and under the new *Canadian Charter of Rights and Freedoms*. However, it would seem that in many cases, the violation of individual interests is a limited one. Particularly in cases of non-resultant searches of vehicles and persons, the effect of the police action may have been a relatively fleeting deprivation of the individual's rights: a stop and a check or frisk for stolen property or weapons, following which the individual is allowed to go his way. While it remains essential to reduce even such fleeting episodes to truly justifiable cases, it is open to doubt whether striving for this objective justifies imposing draconian record-keeping burdens on the police for all search and seizure practices.

319. This position is fortified when one considers the implications for individual privacy that flow from detailed record-keeping. These implications would arise from the anticipated use of computers to process and store information about warrantless searches and seizures. Problems involving privacy and computers are, of course, larger than the context of criminal law enforcement, and the struggle to resolve them can hardly be said to be over.³⁶⁸ In the specific case of search and seizure, the prospect of recording in a computer every incident in which an individual is stopped and searched by a peace officer is a dangerous one: it possesses dimensions of an Orwellian world that can hardly be reassuring to an individual whom search and seizure procedures strive to protect. These dangers would be compounded if the prospect of access to police information by outside parties were given serious attention.

320. Our recommendations attempt to strike an acceptable balance between the conflicting interests and arguments noted above. Generally, the performance of a search without warrant should not in itself lead to mandatory reporting procedures. However, such procedures could be triggered by one or more of a number of circumstances. First, making an arrest may invoke its own set of reporting requirements; the law of arrest is the subject of a separate Commission Working Paper. Second, as an administrative matter, in a case of search performed pursuant to consent, the written authorization to search proposed in Recommendation 6 should be kept by the police and filed. Third, when a search involves a particularly intrusive activity such as a probing of the mouth, an *ex post facto* report of the search should be mandatory.³⁶⁹ Fourth, a similar report should be required in cases in which an actual seizure of things is made without a warrant.

321. Detailed *ex post facto* reporting requirements are currently set out in R.C.M.P. guidelines concerning writs of assistance. Another model for an *ex post facto* report is provided by the *ALI Code*:

Report of Seizure. In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things seized [to a judge of a court having jurisdiction of the offence disclosed by the seizure].³⁷⁰

We recommend that a post-search report, containing the time, date and place of the search and/or seizure, the reasons why it was made and an inventory of items seized, be made a part of Canadian law as well.