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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

REPORT

writs of assistance and telewarrants

19

Canada

REPORT 19

WRITS OF ASSISTANCE

AND

TELEWARRANTS

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REPORT
ON
WRITS OF ASSISTANCE
AND
TELEWARRANTS

July, 1983

The Honourable Mark MacGuigan, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

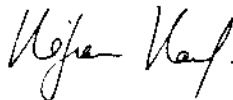
Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this report, with our recommendations on the studies undertaken by the Commission on writs of assistance and search warrants issued by telephone or other means of telecommunication.

Yours respectfully,



Francis C. Muldoon, Q.C.
President




Réjean F. Paul, Q.C.
Vice-President



Louise Lemelin, Q.C.
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Preface

The Commission has recently issued its Working Paper 30, entitled *Police Powers: Search and Seizure in Criminal Law Enforcement*. In that Working Paper the Commission proposed that the powers of search and seizure conferred for the investigation of offences against the *Criminal Code* and other federal statutes be subjected to a thorough-going consolidation, rationalization and reform.

This Report concerns only two of the approximately fifty recommendations which previously appeared in our Working Paper. The first is a recommendation that writs of assistance be forthwith abolished. The second is a related, but independent, recommendation which would permit search warrants to be obtained by telephone or other means of telecommunication in circumstances where a personal appearance before a justice would be impracticable.

The Commission will later be publishing the whole of its final recommendations on police powers of search and seizure in criminal-law enforcement. In the interim, however, the Commission believes that it can make a useful, and perhaps timely, contribution to law reform by commending to Parliament both of these recommendations for immediate implementation.

Their implementation would, in both cases, be relatively straightforward. To abolish writs of assistance, amendments would be required to the *Narcotic Control Act*, the *Food and Drugs Act*, the *Customs Act* and the *Excise Act*. To provide for applications to be made and search warrants to be issued by telephone or other means of telecommunication, amendments would be required to Part XIII of the *Criminal Code*.

Although our Report includes a legislative draft of the procedures proposed for obtaining a telewarrant, we do not, in this

Report tender a legislative draft of the amendments necessary to abolish writs of assistance. We have avoided that format, not because of its difficulties, but because it might obscure our larger purpose. Briefly, we intend to recommend, in a forthcoming Report to Parliament, that all police powers of search and seizure in criminal-law enforcement be organized within, and governed by, a comprehensive regime of standards and procedures. In the shorter term, however, we believe that few of our recommendations on police powers of search and seizure could be so easily implemented, and to such salutary effect, as the abolition of writs of assistance and the provision of procedures for the issuance of search warrants by telephone or other means of telecommunication.

PART ONE:
WRITS OF ASSISTANCE

1. Introduction

And it shall be lawful to or for any Person or Persons, authorized by a Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough or other Publick Officer inhabiting near unto the Place, and in the Day-time to enter, and go into any House, Shop, Cellar, Warehouse or Room, or other Place, and in Case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house, in the Port next to the Place where such Seizure shall be made.¹

The *Act of Frauds* of 1662 brought with it a most confusing and controversial instrument of search and seizure — the writ of assistance.

The writ of assistance was a confusing instrument because it conferred upon a mere ministerial commission the trappings of a judicial search warrant. In essence, however, the 1662 writ of assistance was not a species of search warrant; nor, moreover, was it a species of prerogative writ, in the nature of prohibition or habeas corpus; nor, finally, was it a species of any then-known writ of assistance, such as those pertaining to the duties of sheriffs to assist in the recovery of debts or the levying of execution.² Rather, it was an ingenious adaptation of an obscure common-law doctrine — Coke's "secret in law" — "that upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act."³

Briefly put, the 1662 customs writ was intended as a formal confirmation of a ministerial commission⁴ to exercise a statutory power of search and seizure, and for that purpose to commandeer whatever assistance was deemed necessary. But it was neither a judicial search warrant⁵ nor a judicial writ of either the prerogative or discretionary variety.⁶ Despite the fact that the customs writ carried the seal of the Court of Exchequer, its issuance was a matter of ministerial rather than judicial discretion.⁷ Indeed, the presence of the Exchequer Court's seal signified nothing more than the fact of its

issuance, in the same manner that court seals were affixed to documents of process for commencement of lawsuits.⁸

The writ was to prove, moreover, a most controversial legal instrument. Resistance to the writ, and to the customs regime that it supported, was a vital part of the sequence of events that culminated in the American Revolution.⁹ Such indeed was the intensity of American hostility to the writ of assistance that their constitution was ultimately to provide that “no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”

What the writ represented, then as now, was an executive rather than judicial instrument for the enforcement of customs legislation. Writs of assistance were issued to those who enforced the customs, signifying their commission to exercise statutory powers of entry, search and seizure in relation to prohibited and uncustomed goods. Such contraband could thus be sought out by writ-holding customs agents, unimpeded by prior judicial restraints upon their discretion.

Writs of assistance were required to carry the seal of the Court of Exchequer, but once issued, the Court of Exchequer had no jurisdiction to control the circumstances of their use. It was above all this feature which distinguished the statutory writ of assistance from its common-law counterpart, the search warrant. Where the search warrant itself constituted a specific grant of authority to conduct a specific search, the writ of assistance signified a general grant of authority, valid for the life of the monarch in whose name it had been issued, to conduct a generality of searches.

Assessed against contemporary Canadian search and seizure legislation, the *Act of Frauds* was perhaps less remarkable for the powers it conferred than for those it constrained. First, the only permissible objects of writ-assisted search and seizure pursuant to the *Act of Frauds* were prohibited *and* uncustomed goods.¹⁰ Second, the person who undertook a customs search was authorized to resort to force only if he was a designated customs officer, the proof of which was a writ of assistance issued by the Court of Exchequer. Third, resort to force was permitted only in the event of resistance being offered to the entry, search or seizure. Fourth, the customs agent was obliged to restrict his searches to daylight hours; and fifth, the agent was obliged to take with him a constable or other known officer in order to prevent any breach of the peace which might be entailed in the search.¹¹

Last, there was a further and singularly stringent constraint upon the mode of search and seizure authorized by the *Act of Frauds*, as indeed upon search and seizure in general. This constraint was not to be found in the *Act of Frauds* itself, but in the common-law doctrine of “justification by the event”.¹² It was not enough that there be “probable cause” to suspect the presence of prohibited and uncustomed goods.¹³ If the search failed to disclose contraband answering to this double-barrelled description, the informant was personally liable for damages in trespass to the person whose premises were searched. Since the customs officer conducting a writ-assisted search would be acting on his own information, he would be liable in his capacity as informant should his search prove unsuccessful.

Notwithstanding these constraints upon writ-assisted search of private premises, the customs search of 1662 was notably unfettered by the one constraint valued above all others by the common law — prior judicial authorization on particular information. As elaborated by Hale in his *History of the Pleas of the Crown*, the appropriate common-law procedure for securing access to private premises, then confined to seeking out stolen goods, was by means of a search warrant.¹⁴ However, the common-law courts were prepared to countenance this kind of interference with private property rights only upon warrants granted by a justice of the peace, and only upon sworn information as to the suspected whereabouts of the goods and the grounds for that suspicion.¹⁵ But these common-law requirements of judiciality and particularity were altogether absent from the statutory regime provided for customs search.¹⁶

There was in consequence no occasion for importing into writ-assisted search and seizure anything in the nature of prior *judicial* authorization upon particular information. Apparently, however, resort to the writ of assistance — from at least 1710, and possibly earlier — was governed by *administrative* regulations,¹⁷ analogous in almost all respects to the judicial constraints which governed the issuance and execution of search warrants.

The Customs Commissioners had a definite interest in overseeing the enforcement practices of their subordinates, if not to protect themselves from the possibly doubtful rigours of the doctrine of justification by the event, then simply because it was expedient that the Board not be embarrassed by overzealousness on the part of its officers, particularly in matters touching private property rights.

Predictably, the stringency of the Commissioners' directives varied between London and the outports, but their general object was to overlay writs of assistance with an administrative equivalent to the judiciality and particularity of search warrants. Thus, in 1710, London customs officers were instructed not to search residential premises without first obtaining the Board's permission.¹⁸ In 1719, certain protections were accorded by statute to writ-assisted customs seizures, provided the officer had acted "upon the Information of one or more credible Person or Persons".¹⁹ In order to assure themselves of this statutory protection, the Customs Commissioners established administrative procedures for ensuring that writ searches were reliably informed by particular information as to the character, description and whereabouts of the contraband. Hence, for example, Henry Crouch's *Complete Guide to the Officers of His Majesty's Customs in the Outports*, published in 1732, in which customs officers were enjoined not to enter private premises "without a particular Information from one or more credible Persons, in writing if possible, giving an Account of the Species or Package of the Goods, when and where run, or where concealed...."²⁰ By 1817, it was a requirement of general application, both in London and elsewhere, that each instance of writ use be conditioned upon prior, particular information sworn before a magistrate.²¹ Although these approximations to the search warrant's standards of judiciality and particularity formed no part of the statutory or common-law regime governing writs of assistance, they were no less a constraint for being administratively, rather than legally, prescribed.

That the 1662 writ of assistance has occasioned both confusion and controversy is evident. However, that it should have been perceived as a device "interposed by the Legislature through a tender regard to the liberty of the subject"²² was not entirely fair. Even the statutory conditions to which the writ was subject were far from being inconsequential: there were narrow limits upon the permissible objects of seizure (prohibited *and* uncustomed goods); upon the circumstances justifying resort to force (only in the event of resistance to a writ-holder); upon the time of search (daylight hours only); and upon the unaided powers of the customs officer (*viz.* the obligatory attendance of a constable or other local officer).

But in addition to these statutory conditions, the writ of assistance was hedged with constraints both administrative and judicial. By administrative directive, what began as a statutory licence for a generality of customs searches was converted into as

event-specific and particular an instrument of search and seizure as a search warrant. And, of course, over and above departmental insistence upon credible information before the event, there was a powerful stimulus to reliably informed customs search in the common-law doctrine of justification by the event. In aggregate, the English writ of assistance has been so constrained by statutory conditions, administrative regulations, and common-law doctrine as to be an improbable source of controversy.

Not so, of course, in the American colonies of the 1760s and 1770s, where vigorous exception was taken to the writ of assistance and the customs regime it was perceived to exemplify.²³ Nor has the writ been without controversy in its several Canadian adaptations. As in pre-revolutionary America, the controversy in Canada has had principally to do with the perception of the writ as a species of general warrant. However, unlike the American challenge in 1761, the challenge to Canadian writs of assistance has stemmed from concerns about their propriety rather than their legality. Indeed, until very recently,²⁴ their legality was presumably unassailable in the presence of the four Canadian statutes which provide for their issuance and use.²⁵

Rather, the issue in Canada has been as to the propriety of exempting the writ-assisted search from the requirements of judiciality and particularity upon which search warrants are issued. Briefly put, the writ's opponents object that its use is unfettered by the imperatives of prior judicial authorization upon particularly sworn information, and that, in consequence, its reach extends to an indeterminate generality of searches. The writ's proponents acknowledge its exceptional purview, but argue that such an instrument of search and seizure is required to cope with the exigencies of contemporary drug, customs and excise enforcement. Moreover, so its proponents argue, the exemption of writ-assisted searches from judicial controls is fully compensated by the stringency of the administrative procedures which govern the writs' issuance and use — procedures which, in aggregate, ensure that the writ of assistance is at least as closely regulated administratively as the search warrant is regulated judicially.

With the proclamation of the *Canadian Charter of Rights and Freedoms* on April 17, 1982, the Canadian controversy over writs of assistance has shifted to new ground. The issue is no longer merely one of proprieties: what is now also directly in issue is the very

legality of writs of assistance, in the face of the *Charter's* injunction against unreasonable search or seizure.

The Commission would resolve these issues concerning the legalities and proprieties of writs of assistance by urging their immediate abolition. Our recommendation proceeds from reasons both principled and pragmatic. As a matter of principle, the Commission asserts that there is no justification for the exemption of writ-assisted searches from the imperatives of judiciality and particularity. As a practical matter, the Commission also asserts that the writ of assistance is an unnecessary instrument of search and seizure.

In order to appreciate fully the Commission's reasons for these assertions, it is first necessary to appreciate something more of the writ's juridical character and its history in Canadian law enforcement.

2. The Writ as a Licence to Search without Warrant

The status of the writ of assistance has been much obscured over the three hundred years of its existence, with the writ tending, almost from its inception, to be seen as a species of search warrant. They were, however, distinct instruments and must be understood as such if the full significance of the writ is properly to be appreciated.

The distinction between writ and warrant has chiefly to do with their relative admixtures of judicial and ministerial jurisdiction. Where the issuance of a search warrant is principally an exercise of judicial jurisdiction, and only incidentally a ministerial act, the writ of assistance was and remains an exclusively ministerial instrument. In short, the writ was nothing so much as a certificate of identification, attesting to the capacity of its bearer to exercise the search powers conferred by the *Act of Frauds*. As such, it was exclusively a ministerial or executive instrument which "authorized", in the now

obsolete sense of “vouching for”, the holder’s identity as an agent of the Crown.

Although the seal of the Court of Exchequer, the judicial arm of the King’s revenue protection and collection apparatus, was required to be affixed to the writ, the document was in practice prepared and sealed by an administrative official within the Court of Exchequer. This official, known as the King’s remembrancer, was charged with responsibility for collecting debts due to the sovereign, and for that purpose was entitled to the use of the seal of the Exchequer Court. However, the responsibility of the Court of Exchequer, or more properly, of the King’s remembrancer within the Court of Exchequer, may be likened to that of a contemporary court registrar in the issue of writs for the commencement of civil suits: the function in both cases is purely administrative. Upon application to the appropriate administrative officer, and upon his being satisfied that the writ conformed to the requirements prescribed for it, the writ would be issued and authenticated with the seal of the issuing court — all without the interposition of a judicial officer acting in a judicial capacity. The issuance of the writ of assistance was thus in no sense an exercise of the judicial jurisdiction of the Court of Exchequer. It was rather a purely administrative act.

By contrast, the issuance of a search warrant, then as now, is an exercise of partly judicial and partly ministerial jurisdiction.²⁶ In substance, the search warrant represents a grant of authority to interfere with property rights in circumstances which would otherwise constitute a trespass. Although the seventeenth century justice of the peace, whose responsibility it was to issue search warrants, performed a *mélange* of police, prosecutorial and judicial functions, it was in his judicial capacity that jurisdiction to issue search warrants was conferred upon him. Thus, what was required of him was an independent judicial assessment of the form, the substance and the probative value of the information tendered to him. Unless the information before him were adequate in these respects, he was said to be without jurisdiction to perform his responsibility in a judicial manner. Once his jurisdiction had been thus established, the justice had then a judicial discretion as to whether and in what form the warrant should issue. Thereafter, his jurisdiction having been established and he having determined to exercise it, the justice performed the purely administrative or ministerial act of causing the warrant to issue, by affixing to the document his signature, together with a declaration of his office.

A variety of incidents attached to the writ of assistance by virtue of its status as an exclusively ministerial instrument. Each of these incidents established the writ as an instrument in its own right, distinct from, and independent of, the search warrant with which it has traditionally been confused.

First, notwithstanding that the writ was issued under the seal of the Court of Exchequer, it was not subject to prior judicial control with respect either to its issuance or the circumstances of its use: the search power and the authority to exercise it flowed directly from the statute. In the case of search warrants, by contrast, the search power might derive either from common law or statute, but authority to exercise the power was judicially regulated on a search-by-search basis. Where the writ attested to the legal competence of its bearer to exercise a statutory power of search and seizure, the warrant attested to the legality of the search itself. More briefly rendered, the warrant authorized the search, whereas the writ vouched for the identity of the searcher.

Second, because the writ was a ministerial instrument, its duration was initially co-extensive with the reign of the monarch in whose name it was issued. Subsequently, in 1702, the writ's duration was extended by statute for a further six months beyond the reign of the monarch, in order to allow for continuity in customs enforcement over the period of interregnum.²⁷ Again, this feature points up a further difference between writ and warrant: where the writ's validity extended throughout the life of the sovereign, authorizing a generality of searches, the warrant's authority was limited in space and time to the conduct of particular searches.

Third, the writ's status as a ministerial certificate of identification meant that it was not the route by which one challenged the validity of particular searches. One could of course challenge the identity of the writ-holder, but a challenge to the search he proposed to conduct had necessarily to be referable to the statute rather than to the writ. It was the statute that conferred the power and authority to search, the writ standing only as proof of the identity and competence of the bearer as an agent of the Crown. In effect, the customs search was virtually unchallengeable. If, by contrast, objection were taken to a search conducted pursuant to warrant, the challenge would properly lie to the warrant by which the search was purportedly authorized. The document itself, and the jurisdiction of the justice who issued it, would be the proper route and subject-matter of inquiry.

Essentially, then, the writ did not confer an authority to search, but rather attested to the identity of those who were so empowered by statute. In direct contrast, the search warrant did constitute an officer's authority to search. Thus, if challenged, the officer conducting a search pursuant to warrant would refer to the document as the source of his authority, whereas the customs officer would point to subsection 5(2) of the *Act of Frauds* of 1662 as his source of authority, and to his writ only to identify himself as a person entitled to exercise that authority.

The significance of this feature for present purposes is simply this. In strict legal terms, the proper focus for discussion of the powers associated with writs of assistance, then as now, is not the writ of assistance but rather the legislation that confers the power. If one objects to the notion of an executive discretion to enter, search and seize, then in that event the proper focus of objection is the legislation itself, which was so constructed as to exempt writ-assisted search and seizure from prior judicial authorization upon particular information.

For all of these reasons, then, the writ is not to be treated as a species of search warrant. However much writ and warrant may resemble one another in practical terms, both instruments being presented as documentary witness that the search was lawful, they share little of a common history and still less of a common juridical status. Strictly speaking, the writ of assistance should be recognized as a ministerial licence to exercise statutory powers of search *without* warrant.

3. The Writ of Assistance in Canada

So much, then, for the character of the writ of assistance of 1662. This most confusing and controversial instrument of search and seizure, originally designed to facilitate enforcement of the *Act of Frauds*, has survived, though not without considerable modification, for more than three hundred years. In the interval, the writ has lost

some of its intimidating magnificence — it is no longer the document described by Smith as “a large sheet of vellum, some two-and-a-half feet wide by two feet deep, bearing an ornate portrait of the monarch and, suspended from a stout plaited cord, a massive waxen seal”.²⁸ Nor is the writ the studious exercise in unintelligibility that it once was, with its indecipherable calligraphy and eccentric Latin text. Although the writ has suffered somewhat in appearance, it has lost nothing of its status as a licence to exercise statutory powers of entry, search and seizure without warrant. Indeed, in the form in which it has been adapted for use in Canadian legislation, the writ of assistance has gained more in discretionary power than it has lost in visual impact.

Four statutes presently provide for the issuance of writs of assistance: the *Customs Act*, the *Excise Act*, the *Narcotic Control Act* and the *Food and Drugs Act*.²⁹ In its Canadian adaptations, however, the writ of assistance has been subjected to a number of significant modifications in form, procedure and substance.

(a) *Formal Modifications*

The writ issued pursuant to the *Narcotic Control Act*³⁰ may be taken as typical for purposes of illustrating the formal appearance of the Canadian writs. While the seal of the Federal Court of Canada makes it a somewhat more impressive document than the common search warrant, the contemporary writ is remarkable for its brevity and intelligibility. Apart from a rather ornate preamble — “Elizabeth II, by the Grace of God of the United Kingdom, Canada and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith” — the writ proceeds with commendable dispatch to announce that its bearer is “authorized and empowered, pursuant to subsection (3) of Section 10 of the *NARCOTIC CONTROL ACT*, aided and assisted by such person as [he] may require, at any time, to enter any dwelling house and search for narcotics” (see Appendix). The document describes itself as having been “Issued under the authority of a Judge of our Federal Court of Canada” and prominently displays a seal of that court. Significantly, however, the document neither identifies nor carries the signature of the Federal Court judge who authorized it to be issued. It carries instead the signature of a registry officer of the Federal Court — or, in the French portion of the writ, a «fonctionnaire du greffe». In short, the writ is issued under the authority of a judge of the Federal Court,

but the formality of causing the writ to issue is performed by an administrative officer of the court. In its Canadian adaptation, the King's remembrancer within the Court of Exchequer has been replaced by a registry officer within the Federal Court as the official responsible for affixing the seal of the issuing court and formally causing the writ to issue — an administrative officer acting in an administrative capacity.

Perhaps the most significant formal modification to be worked upon the writ of assistance has been one of omission. Notable for its absence from the customs and excise writs is any recital of precisely what makes them writs of *assistance*. The writ-holder's authority to requisition assistance figures prominently in the drug writs, as indeed it did in one of the earliest decipherable writs of assistance, that of 1761.³¹ In the course of reducing the writ to a document of manageable and intelligible proportions, the "power to call in aid" has been altogether omitted from the customs and excise writs, and rendered in a single phrase in the drug writs: "[Y]ou are hereby authorized and empowered, ... aided and assisted by such person as you may require..." (see Appendix).

The effect of this omission is to make customs and excise writs something less than adequate expressions of the powers they represent. Persons presented with a customs writ could not ascertain from the face of the document that they were obliged by statute to render "such lawful aid and assistance in the Queen's name, as is necessary for securing and protecting such seized goods, vessels, vehicles or property".³² Nor, correspondingly, does the excise writ recite the holder's authority to requisition from all manner of persons, public and private alike, such aid and assistance as he deems necessary for *any* aspect of the excise search.³³ Nor, unless they were familiar with the intricacies of the legislation, would persons presented with a writ and a demand for assistance appreciate that a customs officer's "power to call in aid" was rather more modest than an excise officer's: unlike the *Excise Act*, the *Customs Act* makes no provision for assistance in conducting the search, but only in securing and protecting things seized or property liable to forfeiture.

For all of these reasons, it seems a fair observation that customs and excise writs do not meet the formal test prescribed for them by Sir Edward Coke, that they be devised "according to the force and effect of the act".³⁴ Granting writs other than in terms of the authorizing legislation poses the obvious and unnecessary danger that

the persons to whom they are presented will be unaware of their statutory obligation to assist, to say nothing of their liability to imprisonment in the event of refusal.³⁵

By contrast, the *Narcotic Control Act* and the *Food and Drugs Act* provide for assistance in terms both more explicit than the *Excise Act* and more expansive than the *Customs Act*. The “power to call in aid” is identical in both instances: the writ-holder is authorized to enter and search, “aided and assisted by such person as [he] may require”.³⁶ Further, his power to requisition assistance appears on the face of both drug writs, thus fulfilling their purpose as proof of the identity and competence of the bearer, whether presented to the occupier of premises to be searched or to the persons whose assistance is deemed necessary.

Finally, the Canadian writ of assistance has undergone one further modification of form which should not be overlooked. Again, this change relates to the “power to call in aid”, the feature which constitutes writs as writs of *assistance*. And it is perhaps this change which has contributed most to the belief that the writ is a species of search warrant. Where the writ of 1662 was directed to a generality of persons, commanding them to aid and assist the bearer of the writ in the execution of his duties, contemporary writs are directed instead to the bearer himself. Given the writ’s purpose as proof of the identity and competence of its bearer to exercise a statutory power of search and seizure, and for that purpose to requisition assistance from all and sundry, it should properly have been directed to the persons to whom it was to be presented.

The original writs of assistance contemplated three occasions where proof of identity might be required. First, the person whose premises were to be searched might demand proof of the officer’s identity in order to satisfy himself that the search was not a trespass or a breach of the peace. Second, there was a further precaution taken against possible breaches of the peace: officers conducting customs searches were obliged to take with them a “Constable, Headborough or other Publick Officer inhabiting near unto the Place”. It was expected that, by virtue of his “inhabiting near unto the Place”, the local constable or other public officer would be known to the person whose premises were to be searched and that knowledge was to provide a further assurance of the lawfulness of the search. The writ of assistance thus served to identify the customs officer to the person whose premises were to be searched and to the local

public officer whom he was obliged to take with him. But what was expected of the local constable was not so much his assistance as his presence during the search, in order to vouch for the identity and competence of the customs agent and as well, presumably, to protect him from any violence which might ensue.³⁷ Third, the writ would have to be presented to any of the generality of persons whose assistance might be requisitioned to facilitate the search.

All of these occasions still obtain as instances requiring proof of the identity and competence of the writ-holder. Granted, only the excise writ is presently limited by the requirement that a peace officer be in attendance when searches are conducted at night, and granted on that account that the number of occasions when proof might be required of the officer's identity and competence have effectively been reduced to two. Notwithstanding the elimination of what might be termed the restrictive provision for assistance from three of the four statutes, proof of the writ-holder's identity and competence is still required for the occupier of the premises to be searched and for those liable to be commandeered to render assistance. And of course it is to these persons that the writs ought to be directed if their purpose is to be served and their character respected.

(b) *Writ Issuance Procedures*

The procedure for obtaining a writ of assistance entails an application to a judge of the Federal Court by the Attorney General of Canada.³⁸ As a matter of practice, the application consists of nothing more than a letter from an agent of the Attorney General, addressed to the Administrator of the Federal Court and enclosing a formal application, supporting affidavit and forms of the writs to be issued, together with the appropriate fees. Although styled "IN THE MATTER OF AN APPLICATION ... FOR THE ISSUE OF WRITS OF ASSISTANCE", the application is in fact more in the nature of a notice: "TAKE NOTICE THAT ... the Attorney General of Canada hereby makes application to a Judge of this Honourable Court for the grant of Writs of Assistance to the following member of the Royal Canadian Mounted Police who is engaged in the enforcement of the *Narcotic Control Act*."

The application is supported by the barest of documentation, consisting solely of an affidavit sworn, for example, by an officer in

charge of the particular enforcement branch for which the writ is being sought, and attesting to the identity and status of the person proposed as recipient of the writ. Alternatively, in the case of R.C.M.P. nominees, the affidavit filed in support of the application may be sworn by the officer in charge of the force's records branch; in such cases, the affidavit will include a true copy of the nominee's "Warrant of Appointment" as a peace officer and as a member of the Royal Canadian Mounted Police.³⁹ In either event, however, the affidavit constitutes no more than a bare statement that the person being proposed for the writ is engaged in enforcement of the relevant legislation.

The application is then submitted through the court registry to one or another of the judges of the Trial Division of the Federal Court. Notwithstanding that the application must be presented to a judge of the Federal Court, there is nothing judicial about the nature of his duties in relation to the issuance of writs of assistance. Indeed, their issuance is in effect a mandatory and purely administrative act, which consists only of the judge satisfying himself that the application meets the formal requirements prescribed for it, that the nominee is legally competent to be designated as a bearer of the writ, and that the writ which issues corresponds to the terms of the legislation. In effect, a judge to whom such an application is presented is obliged by statute to authorize the issuance of writs of assistance in accordance with the terms of the application, or more properly, the instructions of the Attorney General.

The proposition that judges should be obliged by statute to lend the authority of their office to what is essentially an executive decision has not been accepted without resistance. Indeed, the proposition has recently encountered outright hostility.

The first expression of resistance came in 1965 from the Honourable Wilbur Jackett, President of the Exchequer Court of Canada (since succeeded by the Federal Court).⁴⁰ In the course of an application for the grant of writs of assistance under the *Customs Act*, the *Excise Act*, the *Narcotic Control Act* and the *Food and Drugs Act*, Jackett P. gave anxious consideration to the nature of the functions required of judges of the Exchequer Court in relation to writs of assistance. After canvassing all four items of legislation providing for the issuance of writs, he concluded that it was "very difficult, if not impossible, to conceive of any basis upon which a judicial discretion might be exercised".⁴¹ In short, the issuance of

writs of assistance was not an exercise of judicial jurisdiction. It was rather a mandatory administrative duty imposed by Parliament upon judges of the Exchequer Court.

Jackett P. noted that the legislation providing for the issuance of customs writs appeared to differ significantly from the other statutes in terms of the responsibilities expected of the issuing justice. Where the *Customs Act* provided that a judge of the Exchequer Court “may” grant a writ of assistance, the remaining statutes provided that a judge of the Exchequer Court “shall” grant a writ of assistance upon application by the appropriate minister of the Crown. He concluded, however, that no significance could be attached to this difference, since none of the Acts provided for the writ application to be supported by materials which would permit a judicial determination of the propriety of the writ’s issuance. Nor, he noted, did any of the Acts provide scope for an exercise of judicial discretion with respect to the circumstances in which, once issued, the writs were to be used. There being neither basis nor occasion upon which a judge of the Exchequer Court could act judicially, the writ’s issuance could not in any sense be said to be an exercise of judicial jurisdiction.

Having determined that the court was without a judicial discretion with respect to the issuance of “search warrants in the guise of Writs of Assistance”,⁴² Jackett P. concluded his assessment in the following terms:

Having regard to the extraordinary difficulty, if not impossibility, of exercising any judicial discretion as to whether or not a Writ of Assistance should or should not be issued under the *Customs Act* upon any particular application, and having regard to the fact that the issuance of such writs under the other three statutes referred to above is mandatory upon the specified application, and having regard to my inability to distinguish any difference between the desirability of such writs being issued under the *Customs Act* and the desirability of their issuance under the other Acts, I have come to the conclusion that there is a duty upon a judge of the Exchequer Court, upon receipt of an application from the Attorney General of Canada under section 143 of the *Customs Act* for the issuance of a Writ of Assistance, to issue the Writ of Assistance in accordance with the application conditioned only upon his satisfying himself that the person named in the application is an “officer”.

...

[I]f I am right in my construction of the legislation, when a person holding a Writ of Assistance is exercising the powers conferred upon

him thereby, he is exercising powers conferred upon him by statute pursuant to designation by the Attorney General of Canada or the Minister of National Health and Welfare, as the case may be, and is not executing an order or judgment of the Exchequer Court of Canada, or a judge thereof. Parliament, in its wisdom, has ordained that the authority conferred upon such officer shall be evidenced in the form of a writ issuing out of the Exchequer Court of Canada and the Court must bow to such statutory direction.⁴³

The interpretation by Jackett P. of the Exchequer Court's statutory duty in relation to writs of assistance was of course the only interpretation which the terms of the legislation would permit.⁴⁴ Where, however, in 1965 the court was prepared, albeit reluctantly, to "bow to such statutory direction", in 1975 this reluctance became a vigorous protest.

An application having been made by the Attorney General of Canada for a customs writ, Collier J. expressed himself as "shocked and incredulous that the Court should be asked or required, on such fragile and unenlightening material, to lend its authority to the clothing of an unknown Government officer with such extensive unlimited powers".⁴⁵ Before "reluctantly bowing to the dictates of the statute" in a matter in which the court "has no say or discretion in the matter of issuing these writs which are then placed in the hands of persons who, in individual cases, may seriously abuse the unrestrained invasionary powers given", Collier J. recited portions from the earlier judgment of Jackett P. The passages cited were fairly interpreted by Collier J. as a protest against "... the wide powers given by these writs and the inability of the Court to exercise any discretion in respect of the number of writs issued, the qualifications of those to be clothed with the powers, and the duration of the writs".

Mr. Justice Collier's objections would appear to have had a double focus, the one procedural and the other substantive. The force of his substantive objection was somewhat muted by his unreported footnote,⁴⁶ but it seems clear nevertheless that Collier J. took issue with the propriety of the legislation itself. More specifically, it would seem that he objected to legislation conferring upon writ-holders such extensive powers of search and seizure without providing for some measure of judicial control over the writ's issue, the qualifications of those to whom it was issued and the circumstances of its use.

Mr. Justice Collier's principal objection, however, was not that the legislation provided for such wide powers of search and seizure

without judicial regulation. It was rather that the procedures for obtaining writs of assistance gave the appearance that writs were somehow judicial instruments. That writs were to issue out of the Federal Courts on the instructions of the Attorney General obscured the fact that they were ministerial rather than judicial instruments. The Federal Court was in effect obliged to lend an aura of judiciality to an instrument of search and seizure which was exclusively ministerial in character. Absent the pretence to judiciality, and the writ of assistance would be seen for what it was — an executive licence to search and seize, untrammelled by judicial control.⁴⁷

Notwithstanding the objections of Jackett P. and Collier J. that they should be obliged by statute to lend the authority of their office to what is essentially an executive decision, the procedures for obtaining writs have not been substantially altered since they were first introduced into Canada. In sharp contrast to the issuance of search warrants, the court responsible for the issuance of writs of assistance is without discretion as to (1) whether or not a writ of assistance should be granted; (2) the number of writs extant; (3) the qualifications of those to be clothed with such powers; (4) the duration of the writs; and (5) whether the particular circumstances in which the writ is to be used are appropriate for the exercise of such wide powers. The only significant procedural modification to have been worked into the writ of assistance has been a reduction in the number of ministers of the Crown who can apply for their issue. As of March 22, 1978, applications for writs of assistance under all four items of federal legislation can be made only by the Attorney General of Canada.⁴⁸

(c) *Substantive Modifications*

The most significant changes to the writ of assistance have been substantive, rather than formal or procedural. There has of course been no change in the character of the writ: it remains a certificate of the legal competence of its bearer to exercise a statutory power of search and seizure.⁴⁹ But while the character and function of the writs remain unchanged, the powers conferred upon the writ-holder have been substantially enlarged. Thus, for example, when the writ of the 1980s is contrasted with that of 1662, one finds that resort to force is no longer conditional upon resistance first being offered to the entry, search or seizure. Instead, an officer conducting a customs or excise search under the authority of a writ of assistance may employ force “in case of necessity” — a contingency manifestly more open-ended

than was implied by the phrase (“in case of resistance”) that preceded it.⁵⁰ More open-ended still are the provisions of the *Narcotic Control Act* and the *Food and Drugs Act*, both of which provide in identical terms that a peace officer may “[f]or the purpose of exercising his authority under this section ... break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing”.⁵¹ Resort to force is conditional neither upon resistance, nor, for that matter, upon necessity.

This question of precisely at what point in the conduct of a search resort may be had to force is obviously a matter of considerable significance. Generally speaking, in the case of residential premises, a statutory power of forcible entry for the purpose of executing a criminal process is constrained by common-law requirements that there first be a demand to open.⁵² Thus, in the absence of an explicit statutory provision to the contrary, an officer would be acting in excess of his authority if he were to effect a forcible entry upon residential premises without first having demanded entry.

It would seem an arguable proposition that the shift from “resistance” to “necessity” to an unqualified power of forcible entry represents an attempt to override the common-law requirements that searches of residential premises be preceded by at least the formality of a demand for entry.⁵³ The phrase employed in the *Act of Frauds* of 1662 — “in case of resistance” — certainly implied the condition precedent of a demand for entry, for how otherwise would an occupier’s resistance be distinguished from his absence. “Resistance” implies, in other words, some action on the part of the occupier which impedes the execution of the process. The phrase employed in the present customs and excise legislation — “in case of necessity” — would seem to provide for resort to force within a larger range of contingencies than mere resistance, possibly including, for example, the occupier’s absence. But to the extent that it would include the contingency of resistance, it may be taken to imply the requirement of a demand for entry. And in any event, neither phrase would seem to exempt customs and excise searches from the common-law requirement of a demand for entry. By providing for an unqualified power of forcible entry, the *Narcotic Control Act* and the *Food and Drugs Act* would seem to have stopped just short of explicitly eliminating the demand for entry requirement. What these changes represent, therefore, would appear to be a gradual deregulation of the common-law limitations upon forcible entry, or,

correspondingly, an extension of the circumstances in which forcible entry can be effected without notice.

Second, an officer armed with a writ of assistance is no longer restricted to conducting his searches during the day time. All four statutes provide, in varying terms, for searches by night as well as by day. The *Customs Act* provides simply that an officer “may enter, at any time in the day or night”, while the *Excise Act* provides that an officer “may enter in the night time, if accompanied by a peace officer, and in the day time without being so accompanied”.⁵⁴ Correspondingly, the drug statutes provide for search powers which may be exercised “at any time”.⁵⁵ This virtual *carte blanche* for night searches evinces a stark contrast with the search warrant contemplated by section 444 of the *Criminal Code*, which is to be “executed by day, unless the justice, by the warrant, authorizes execution of it by night”.

In the result, the powers invested in the bearer of a writ of assistance have been enlarged both with respect to the contingencies in which resort may be had to force and with respect to the hours within which searches may be undertaken. There have as well been modifications which have materially curtailed the powers to which the writ attests.

First, with the notable exception of excise writs, contemporary writs of assistance are no longer the transferable instruments they once were. Writs were originally issued to one or a series of named persons appointed to collect customs revenues. The powers these persons were authorized to exercise in the performance of their duties could as well be exercised by their “Deptys Ministers Servts. & other Officers”.⁵⁶ Those nominated to hold the writ of assistance were, in other words, authorized to delegate their powers, including the powers represented by the writ of assistance. This was of course a perfectly permissible practice in the absence of a statutory requirement that the writ specify by name the person entitled to its use. In effect, the writ was available to any person legally competent to make a customs seizure.

As matters presently stand, however, only the excise writ is expressly available for delegation.⁵⁷ Arguably, the customs writ carries an implicit, though similar, power of delegation, but it is clear in the case of the drug writs that they may be used only by the persons to whom they were issued. Both the *Narcotic Control Act*

and the *Food and Drugs Act* provide that the court shall “issue a writ of assistance authorizing and empowering the person named therein ... to enter ... and search ...”.⁵⁸ Both drug statutes state explicitly, in other words, that writs are to be issued to specifically named persons and that only those persons are entitled to use them. The *Customs Act*, by contrast, is explicit only with respect to the writ being issued to a named person,⁵⁹ but not with respect to who might be entitled to its use once issued. There being no statutory requirement to the contrary, it is an arguable proposition that persons other than those to whom customs writs are issued would be competent to carry and use them. The proposition that the customs writ is a transferable instrument is further reinforced by the language of section 139, which is open to the interpretation that *any* officer may exercise the powers of the writ of assistance.⁶⁰ However that may be, it would seem that only the excise writ truly qualifies, in the words of Simpson C.C.J., “as a mere piece of general office equipment”.⁶¹

Clearly the most significant legislative restriction upon the Canadian version of the writ of assistance has been the introduction of a requirement of reasonable belief as a condition precedent to lawful entry and search. It should be noted, however, that this requirement varies substantially from statute to statute, and, within statutes, applies differently to the various stages of entry, search and seizure.

Thus, for example, the *Narcotic Control Act* limits the powers of entry and search to premises, whether residential or otherwise, in which there is a reasonable belief that there are narcotics present.⁶² The power to seize, however, provides for four categories of seizure, only one of which is constrained by a requirement of reasonable belief. Thus, the officer may seize (1) *any* narcotic; (2) anything in which narcotics are *reasonably suspected* to be contained or concealed; (3) anything *reasonably believed* material to a narcotics offence; or (4) anything that *may* be evidence of a narcotics offence. Each of these four categories of seizure would seem to carry its own standard of certainty. The phrase “any narcotic” implies a standard equivalent to personal knowledge or, in any event, something marginally more certain than is implied by the phrases “reasonable belief”, “reasonable suspicion”, or anything that “may be” a narcotic. Next in order of certainty is the standard of reasonable belief, with reference to things by means of, or in respect of which, a narcotics offence is reasonably believed to have been committed. Below that is the standard of reasonable suspicion, with reference to things in which narcotics may be contained or concealed. Lower still is the

mere possibility implied by the provision for seizure of anything that “may be evidence” of a narcotics offence.

There is doubtless a rather large measure of redundancy in these provisions for seizure, and it seems likely on that account that all possible seizures could be justified against the lowest standard of certainty, that implied by the phrase, anything that “may be evidence of the commission of such an offence”. It is doubtful, therefore, that the inclusion in paragraph 10(1)(c) of a requirement of reasonable belief with respect to *Narcotic Control Act* seizures represents any significant constraint upon that Act’s powers of seizure.

Even more curiously, once an officer has satisfied himself that there are reasonable grounds to enter premises, he then has an unqualified power to search any person found on the premises. It seems something of an anomaly that a standard of reasonable belief should obtain with respect to a search of premises, but that searches of persons found on those premises should be without even the restraint of reasonable suspicion.

To confuse matters still further, the *Food and Drugs Act* is expressed in terms identical to the *Narcotic Control Act* with respect to the entry and search of premises, and equally with respect to the search of persons found on those premises. But it reduces the redundancies of the *Narcotic Control Act*, both as to what may be seized and as to the standard of certainty which is to inform such seizures. Thus, paragraph 37(1)(c) of the *Food and Drugs Act* provides simply that an officer may “seize ... any controlled drug ... and any other thing that may be evidence” of a drug offence. Again, to the extent that controlled drugs are themselves evidence of an offence, it would seem that all possible seizures could be justified against a standard pitched materially lower than one of reasonable belief.

The requirement that intrusions be constrained by a standard of reasonable belief has been introduced into customs legislation with even less rigour than is found in the drug legislation. Indeed, the *Customs Act* confers upon writ-holders an unqualified power of entry, reserving the constraint of reasonable belief to the later steps of search and seizure. Thus, under the authority of a writ of assistance, mere suspicion or, indeed, nothing more substantial than the customs officer’s curiosity would suffice as grounds for entering, with force “in case of necessity”, any building within the jurisdiction

of the court, at any time of the day or night.⁶³ Once entry has been effected, however, the customs officer's writ permits him only to search for and seize those things "that he has reasonable grounds to believe are liable to forfeiture".⁶⁴

Quite inexplicably, the excise writ has been altogether exempted from any standard of reasonable belief. Thus, under the authority of a writ of assistance, an excise officer — or his delegate — has what would appear to be an unlimited power of entry, an unlimited power of search, and an unlimited power of seizure.⁶⁵ There are, to be sure, two constraints upon the excise agent's powers: a peace officer must be in attendance if the entry is by night, and resort to force is contingent upon necessity. But for these rather modest restrictions, however, the excise writ carries powers of entry, search and seizure of virtually unlimited scope. Writ-holding excise officers have been empowered by statute to determine where and when they might enter, search and seize, unimpeded by any restraints upon their discretion. Or, to echo Mellish J. in his colourful assertion of judicial disdain, "in the place of the Judge, there is put, as interpreter of the statute, an officer who, armed with a battering ram and writ of assistance, may ... force his way at any time by night or day into peaceful homes and search them so that he may perchance discover evidence of an unsuspected offence".⁶⁶

To this point, then, we have discussed the respects in which the writ of assistance of 1662 differs from that of 1783, in terms of modifications which have either enlarged or restricted the powers conferred upon writ-holders. There has as well been one further modification requiring comment. Although it neither extends nor constrains the powers which the writ signifies, it stamps the writ clearly as a licence to exercise statutory powers of entry, search and seizure without warrant.

Briefly, that modification has to do with the duration of the writ. When the writ of assistance was first introduced, its duration was co-extensive with the reign of the monarch in whose name it was issued. It was of course principally this feature which served to distinguish writ from warrant: where the writ's validity extended throughout the life of the sovereign, authorizing a generality of searches, the warrant's authority was limited in space and time to the conduct of a particular search.

In its Canadian adaptations or, at any rate, in its customs and excise variations, the writ is expressed as being "in force for as (so)

long as the (any) person named therein remains an officer, whether in the same capacity or not”.⁶⁷ Since the writ was designed primarily to identify its holder as a person competent to exercise a repertoire of statutory powers of search and seizure, it is entirely appropriate that it should be issued to a named person, and, as provided by the *Customs Act* and the *Excise Act*, that its duration should be tied to the career of its holder. Indeed, given the writ’s purpose, it is not a matter of any great significance whether the writ is valid for the life of the sovereign, the career of the officer or, for that matter, any lesser period.

What is important, if the writ is to serve its purpose, is that its duration be of sufficient length to exempt its bearer from any requirement of obtaining authorization on a search-by-search basis. The technique employed to ensure that exemption, in the case of the customs and excise legislation at least, was to provide that such writs as were issued were to remain in force “for as long as the person named therein remains an officer”. This feature clearly stamps it as an instrument exempt from any requirement of particular applications for particular searches. And of course, that exemption carries with it collateral exemptions from any requirement of specifying the particular things to be searched for, the grounds for belief that those things are present on the premises to be searched and material to an offence reasonably believed to have been committed, and as well from any requirement that the writ be returnable in particular instances to the issuing authority.

4. The Writ as an Instrument of Unconstitutional Search and Seizure

Writs of assistance are presently available for the enforcement of the *Narcotic Control Act*, the *Food and Drugs Act*, the *Customs Act* and the *Excise Act*.⁶⁸ Although each of these writs has its own idiosyncracies of form and substance, the essential point is that they signify search and seizure powers which are untrammelled by judicial constraints, untrammelled by time constraints, and untrammelled by

constraints upon the use of force. What the writ legislation provides, then, is a regime of search without warrant: and the writ constitutes a licence which identifies those entitled to exercise these unique powers of search without warrant.

As a licence to engage in search without warrant, writs of assistance are manifestly deficient as to form, and hypocritical and confusing as to procedure. As well, we believe that the powers they represent are an affront to the *Canadian Charter of Rights and Freedoms* both as to substance and spirit.

The writs' manifest deficiencies of form could of course be rectified: (1) the ornate preamble could be rendered in less extravagant terms; (2) the obsolescence and redundancy of the phrase "authorized and empowered" could be rendered in more contemporary form to indicate that the bearer's powers flow not from the writ but from the statute; (3) the customs and excise writs could as well be redrafted to include a recital of precisely what makes them writs of assistance, namely, the bearer's "power to call in aid" a generality of persons, private and public alike, to assist in the search; and (4) the writs could be redrafted to ensure that their purpose is served as proof of the identity and competence of the bearer to exercise statutory powers of search and seizure, by directing them to the persons whose aid and assistance might be requisitioned, rather than to the bearer himself.

Equally, the hypocrisy and confusion entailed in the writs' issuance procedures could be rectified at a stroke — by having the Attorney General of Canada issue writs of assistance on his own authority, without implicating judges of the Federal Court in a parody of judicial decision-making.

Alternatively, judges of the Federal Court could be given the discretion promised by the then Minister of Justice in his announcement of April 6, 1978: the issuance of writs would be contingent upon whatever criteria are implied by the phrase, "the best interests of justice"; and the use of writs of assistance would be subject to *ex post facto* reporting requirements, on a search-by-search basis, in a return to the issuing court.⁶⁹ Manifestly, however, the writ would remain intact as an executive rather than a judicial instrument, since it would not be subject to prior judicial control over the circumstances of its use; and, in the absence of any remedial powers being attached to the *ex post facto* review, it is difficult to conceive of such reviews as an exercise of judicial jurisdiction.

As well, some at least of the writs' substantive idiosyncracies are amenable to rectification: (1) the contingencies authorizing forcible entry could be standardized and made conditional upon admission first having been demanded and refused; (2) similarly, resort to force at the stages of search and seizure could be standardized and pitched at criteria entailing a reasonable belief as to its necessity; (3) the times during which writ searches may be undertaken could similarly be qualified by a requirement that searches by night be reasonably believed to be necessary during those hours; (4) the anomalous restraint upon excise officers searching by night, unless accompanied by a peace officer, could simply be eliminated in the interests of uniformity; (5) equally, the excise writ's anomalous power of delegation could be removed, again in the interests of uniformity; (6) most important, perhaps, the standard of certainty which justifies the respective stages of entry, search and seizure, whether of premises or persons, could be set at one of reasonable belief and imposed systematically upon all four varieties of writ; (7) the narcotic and drug writs could be subjected to express limitations as to their duration, in terms compatible with the customs and excise writs; (8) finally, the writ's "power to call in aid" could be standardized across all four varieties of writ, the recital to include an indication of the consequences of refusal.

However, none of these rectifications, whether formal, procedural or substantive, would do more than render the writs more coherent and intelligible instruments for the exercise of highly intrusive powers of search and seizure. They would not resolve the issue of their constitutional validity. This turns on whether the powers signified by the writs of assistance respect the prospective guarantee against unreasonable search or seizure which the Commission believes inheres in section 8 of the *Canadian Charter of Rights and Freedoms*.⁷⁰

In relation to the customs and excise writs, as they stand, this issue is perhaps most easily resolved simply by referring to the relevant statutes. In the case of the *Excise Act*,⁷¹ the powers of entry, search and seizure conferred upon writ-holders by subsection 76(1) are entirely unconstrained by any statutory requirement of reasonableness. In the *Customs Act*,⁷² only the powers of seizure, but not the powers of entry and search, are subject to a requirement of reasonable belief. The disjunctive "or" in section 8 of the *Charter* ("Everyone has the right to be secure against unreasonable search or seizure.") suggests the conclusion that the *Customs Act*'s search

powers, though not necessarily its seizure powers, are manifestly unconstitutional.

In the remaining statutes which make provision for writs of assistance, the *Narcotic Control Act* and the *Food and Drugs Act*,⁷³ the powers of search and seizure conferred upon writ-holders are conditioned upon a statutory requirement of reasonable belief. Arguably, therefore, the fact that resort to narcotic and drug writs is subject to a statutory prescription of reasonable belief might seem to dispose of the contention that these varieties of writ-assisted search and seizure were unconstitutional. And, arguably, making similar modifications to the other writ regimes might seem to rectify their constitutional objectionability.

However, the Commission would reject those arguments. The Commission firmly believes that the grounds for the exercise of investigative powers of entry, search and seizure should not, apart from exceptional circumstances, be in the sole discretion of the person exercising those powers. If such powers are meaningfully to comply with the *Charter's* injunction against unreasonable search or seizure, the grounds for their exercise must, as a rule, be determined to be reasonable by a judicial officer, adjudicating before the event and upon particularly sworn information. To be sure, *ex post facto* judicial review remains a necessary, but complementary, means of realizing the significance of the *Charter*. But the most effective means of giving proper recognition to the prospective character of the constitutional right to be secure against unreasonable search or seizure is that of an independent judicial determination before the event. Hence the Commission's explicit preference for search with warrant as the rule and search without warrant as the exception, an exception to be confined to circumstances of recognized exigency and informed consent.⁷⁴

The Commission contends that the powers exercised under writs of assistance are patently unconstitutional. The offensiveness of such powers inheres in the fact that the grounds for their exercise are determined to be reasonable by an interested peace officer rather than by a disinterested judicial officer. They are neither subject to independent judicial scrutiny before the event, nor constrained by statute within circumstances which would justify an exception to the rule requiring search with warrant.

Without the imperatives of judiciality and particularity, and absent a principled exemption from those imperatives, the powers of

search and seizure conferred upon writ-holders are, the Commission believes, inconsistent with the terms of the *Canadian Charter of Rights and Freedoms*, and on that account the writ is an instrument of unconstitutional search and seizure.

In making this assertion, the Commission is not unmindful that it was the evil of indiscriminate search and seizure conducted under the authority of “general warrants”, the most prominent of which was the customs writ of assistance, which prompted the Fourth Amendment to the U.S. Constitution:

AMENDMENT 4

Unreasonable searches and seizures.

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

The *Canadian Charter of Rights and Freedoms*, unlike the American Fourth Amendment, does not make explicit a preference for search with warrant. The American jurisprudence on this issue is, however, both instructive and persuasive. The weight of American authority stands for the proposition that the preference for search by warrant is a necessary corollary to the injunction against unreasonable search and seizure. Thus, it is a basic principle of Fourth Amendment interpretation that searches of private premises without a warrant are presumed to be unreasonable, unless the search can be shown to fall within a narrow class of exceptions based, in the main, upon exigent circumstances.⁷⁵

What makes a power to enter and search private premises without a warrant presumptively unreasonable is that its exercise should be conditioned upon a peace officer's, rather than a judicial officer's, determination of reasonable grounds. “When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent”.⁷⁶ In the result, the Commission would urge a like interpretation for section 8 of the *Canadian Charter of Rights and Freedoms*: the enjoinder against unreasonable search or seizure carries by necessary implication a preference for search by warrant, issued by a judicial officer before the event and upon particularly sworn information.

As for the writ of assistance, it is merely the instrument of powers of search and seizure which themselves stand in fundamental conflict with section 8 of the *Canadian Charter of Rights and Freedoms*. To countenance its continued existence would be to perpetuate an instrument of unconstitutional search and seizure.

5. The Writ as an Affront to Common-Law Tradition

Whether the search powers signified by writs of assistance are unconstitutional is of course an issue upon which the Commission can only tender its considered opinion. Ultimately, the matter is one which will be resolved elsewhere, either by the Supreme Court of Canada or by Parliament itself. But whether or not the writs' powers of search and seizure should ultimately be pronounced unconstitutional, the Commission nevertheless urges their abolition on the grounds that they offend the common-law tradition of reserving powers of search without warrant to circumstances of recognized exigency or informed consent.

The common-law courts have traditionally constituted themselves as the forum in which agents of the State must make good their claims to power. In the context of powers of search of private premises and seizure of objects found thereon, the common law has taken a particularly strong position in defence of the privacy interests of individuals, seeking to ensure that coercive interventions are accomplished consistently with the rule of law. One manifestation of this protective tradition has been the imposition of judicial responsibilities upon the issuers of search warrants, responsibilities which help to limit the exercise of search powers to justified cases. In addition to the prior restraints embodied in warrant procedures, the common law has developed in its courts a set of *ex post facto* remedies. Whether before or after the event, however, the common-law tradition has been the same: to guarantee respect for the constraints upon sovereign power comprehended by the concept of the rule of law.

As a means of control, the common law has viewed prior restraint as clearly preferable to *ex post facto* review. In the vernacular, an ounce of prevention is worth a pound of cure. Accordingly, ours has long been a system in which prior judicial authorization is a general precondition of lawful search of private premises, a tradition in which search with warrant is the rule and search without warrant the exception.

To be sure, the exceptions are today perhaps more significant than the rule itself. But these exceptions are no less exceptions for all their greater numerical significance. As a matter of principle, the warrant with its protective features remains the preferable means of authorizing intrusions, to be used unless a persuasive reason for an exception obtains. At common law, exceptional powers of search without warrant have been available only in circumstances of recognized exigency or informed consent.

The exception of consent hardly warrants elaboration except perhaps to say that judicial authorization to suspend an individual's personal or property rights is superfluous where the individual consents to such a suspension. Precisely which exigencies qualify for recognition at common law is worth some elaboration, however. At a minimum, the common-law power of search without warrant is available for a search conducted as an incident of lawful arrest, where reasonably prudent to do so (a) for the purpose of discovering a concealed weapon or any article which the suspect might use to injure himself or others or to assist him to escape; or (b) to secure or preserve evidence with respect to the offence for which the suspect has been arrested;⁷⁷ where a person is arrested on private premises, this power also permits the immediate search of that part of the premises within his control. As well, there has been some recognition of a common-law power of entry to prevent the commission of offences reasonably believed likely to cause immediate and serious personal injury;⁷⁸ and some recognition of even broader powers to enter private premises in order to prevent a breach of the peace, or perhaps even to prevent the commission of any offence believed imminent or likely to be committed.⁷⁹ More certain, however, is the common-law power, after proper demand, to enter private premises, forcibly and without a warrant, to search for and arrest a person named in an outstanding warrant who is reasonably and probably believed to be on the premises.⁸⁰

As well as these common-law powers of warrantless search, there is a further category of exceptions to the general rule that

search shall be by warrant. Parliament has, not infrequently, availed itself of its power of supreme legislative competence and created statutory extensions to the power to search and seize without warrant. In some cases, such as the provisions of section 101 of the *Criminal Code* covering searches for weapons, the legislation has merely made explicit or modified pre-existing common-law powers. In other cases, the result has been the creation of new or vastly expanded powers of search and seizure.

Among the most conspicuous such powers in Canadian law are those conferred by the items of legislation presently under consideration, the *Customs Act*, the *Excise Act*, the *Narcotic Control Act* and the *Food and Drugs Act*.⁸¹ Statutory exceptions to the prohibition against search without warrant have also been invoked to cover a mass of statutory provisions authorizing various inspectors to enter and search, without warrant, various areas or premises for various purposes. Thus, a regime of search without warrant has been made available by statute for the enforcement of such diverse items of legislation as the *Migratory Birds Convention Act*,⁸² the *Aeronautics Act*,⁸³ the *Fisheries Act*,⁸⁴ and the *Animal Contagious Diseases Act*.⁸⁵

Indeed, the principles which make search with warrant the rule, and search without warrant the exception, have been so qualified by considerations of expediency that the rule is perhaps better rendered in the following terms: all searches and seizures are unlawful unless conducted under the authority of a warrant or, in the absence of a warrant, unless conducted in accordance with one of the following criteria:

- (a) in response to legally-recognized circumstances of such seriousness and urgency as to require and justify immediate action without the authority of a warrant;
- (b) at the invitation or with the consent of the person to be searched; and in the case of premises or vehicles, at the invitation or with the consent of the person occupying the premises or in charge of the vehicle; or
- (c) pursuant to specifically-designated statutory authority.

More briefly rendered, the exceptional power of search without warrant is available only in circumstances of recognized exigency or informed consent, or where otherwise specifically authorized by statute.

The Commission believes that this third exception — where otherwise authorized by statute — may have sharply to be curtailed if powers of search and seizure are meaningfully to comply with the *Charter's* enjoinder against unreasonable search or seizure. In addition, the Commission would urge respect for the common-law tradition that search and seizure be accomplished within the rule of search with warrant or within the principled exceptions to that rule, recognized exigency and informed consent. That is not to say that the power of search without warrant should never be conferred by statute on grounds of expediency. It is rather to say that such powers are an affront to common-law conventions, that there should on that account be as few such exceptions as possible, and that they should not in any event be allowed to proliferate indiscriminately.

Clearly, the issue of whether customs, excise, narcotics and drug enforcement are or are not appropriate instances for suspending the imperatives of judiciality and particularity is one upon which reasonable persons can be expected to differ. Different persons will accord different significance to the values of revenue protection and suppression of illicit drugs. The values assigned to these objects will, without more, determine the balance to be struck between police powers and individual liberties. Clearly, some would urge that nothing short of real or apprehended insurrection can justify the suspension of the traditional restraints upon police powers. Others, with equal claims to rationality, would urge that either or both of the objects of this legislation — revenue protection and suppression of illicit drugs — approach the “clear and present danger” criterion which justifies the suspension of fundamental rights and liberties. How one resolves this issue will therefore depend upon the value one assigns to these legislative objects, on the one hand, and, on the other, the significance one assigns to common-law tradition and to the *Canadian Charter of Rights and Freedoms*.

For our part, we do not accept that revenue protection and the suppression of illicit drugs compel a regime of licensed search without warrant. Indeed we would assert that a statutory regime which exempts the State from justifying its use of intrusive search powers before the event, and which confers powers of search and seizure unbounded by limitations as to the use of force, unbounded by time, unbounded by place, and unbounded by requirements of reasonable belief is necessarily antithetical to our common-law traditions and our constitutional aspirations. To echo the advice of the Australian Law Reform Commission on writs of assistance, we

believe that these instruments of search and seizure should long since have been abolished and we recommend that their demise be delayed no longer.⁸⁶

6. The Writ as an Unnecessary Instrument of Search and Seizure

For the Commission, it is enough that the writ of assistance is an instrument of unconstitutional search and seizure and an affront to common-law tradition. Either or both of those grounds represents ample justification for urging that writs of assistance be forthwith abolished.

The Commission is of course aware that, in some quarters at least, its recommendation could be criticized for having taken insufficient account of the pragmatics of contemporary drug, customs and excise enforcement. To that observation, the Commission would respond that the writ is an unnecessary instrument of search and seizure.

As it happens, customs and excise writs were acknowledged as being unnecessary by the federal government in 1978.⁸⁷ It was on that basis that the then Minister of Justice, the Honourable Ron Basford announced that customs and excise writs were to be abolished, while narcotic and drug writs were to be retained, subject to substantial modifications upon their issuance and use.⁸⁸

We accept the conclusion that customs and excise writs are unnecessary and should therefore be abolished. However, we respectfully take issue with the Minister's criteria of necessity and, consequently, with the decision to retain writs of assistance for narcotic and drug enforcement.

What is it, then, which would make the drug writs necessary instruments of search and seizure? For the then Minister of Justice and Attorney General of Canada, there were three principal

considerations: the pervasive influence of organized crime in drug trafficking; the covert nature and ease of transportation and disposal of illicit drugs; and the difficulty of obtaining search warrants on very short notice.⁸⁹ Acknowledging the verity of all three of these considerations, however, one is not compelled on that account to concede the necessity for writs of assistance in narcotic and drug enforcement. Indeed, the Commission respectfully suggests that these considerations attest, at most, to the writ as a useful and convenient instrument of search and seizure, but not to its necessity.

For the R.C.M.P., the claim for the writ's necessity is typically made out by reference to the difficulties of obtaining search warrants in the exigent circumstances common to drug investigations.⁹⁰ The profits from illicit drugs attract organized and experienced traffickers; this sophistication, together with the ease with which illicit drugs may be concealed, transported and disposed, make the time element a critical factor in drug enforcement. Even if justices of the peace were more readily available, the delay entailed in seeking the authorization of a warrant would frequently jeopardize the success of the investigation. Thus, where time is of the essence — and in drug enforcement this is said to be more frequently the case than not — the search warrant is too frequently a wholly impracticable alternative.

For its part, the Commission would pitch its criteria of necessity rather higher. The writ's utility and convenience are of course acknowledged, but neither of these attributes qualifies the writ as a necessary instrument of search and seizure. Indeed, the writ's utility and convenience are advantages common to all powers of search without warrant. But to qualify as a necessary instrument of search and seizure, the writ must be evaluated against more stringent criteria.

For the Commission, the question to be addressed before writs of assistance can properly be pronounced necessary or unnecessary is this: Do the objects of the *Narcotic Control Act* and the *Food and Drugs Act* present such peculiar enforcement problems that, in the absence of a regime of licensed search without warrant, these objects would be frustrated? Are there, in other words, instances of search and seizure which cannot be accomplished within the rule of search with warrant or within the principled exceptions to that rule: recognized exigency and informed consent?

In order to answer that question, it is helpful first to refer to some of the case histories typically cited to demonstrate the necessity for writs of assistance.⁹¹

Case history 1:

Importation

A shipment of drugs is detected on arrival at an airport and the destination address and consignee are fictitious. Surveillance is instituted to determine who will claim the drugs and the destination to which they will ultimately be delivered. The location of the ultimate destination only becomes known to the R.C.M.P. after they have followed the courier and the drugs to it. The most effective search must take place within a few minutes after the drugs have been delivered when the suspects are busy unpacking and the financiers or bosses are present to ensure they have got their money's worth. There is not sufficient time to get a Search Warrant for that particular rooming-house if the search is to be made at the best moment and a Writ of Assistance must be used to enter the premises and search....

Case history 2:

Development of a Heroin Trafficking Conspiracy at the Street Level

Information is received that a heroin trafficker is selling drugs from a local pool hall. As a result of this information observations are commenced by the R.C.M.P. The trafficker meets an addict in the pool hall and a transaction appears to take place as money changes hands and the addict places something in his mouth. The addict leaves the pool hall and is followed by the R.C.M.P. surveillance team. It is not feasible to search the addict on the street as invariably the addict carries the heroin in his mouth and if approached simply swallows the evidence. The addict is followed to a local rooming-house where he obtains a room. Time now becomes an important factor as the investigators must conduct the search when the heroin has been readied for injection, as this is the only time the addict cannot easily dispose of the evidence by swallowing or flushing down the drain. A Writ of Assistance must be utilized as the investigators must act within three to five minutes of the addict entering the room. There is not sufficient time to obtain a search warrant and one could not have been obtained at the commencement of the investigation as the addict only rented the room after obtaining the heroin....

Case history 3:

Controlled Delivery

Reliable information has been received that a shipment of cocaine has arrived via first-class mail for a known drug trafficker. The Post Office Act does not permit investigators to open or tamper with the parcel and consequently the drugs cannot be substituted with a harmless powder or even a sample obtained for analysis and evidential purposes. Through liaison with Postal Officials it is ascertained the date and approximate time the parcel will be delivered. The addressee lives in a highrise apartment building. Prior to delivery of the parcel, R.C.M.P. investigators obtain a Search Warrant⁹² for the suspect's apartment and commence surveillance of the building. The parcel is delivered by a Postal Carrier and accepted by the suspected trafficker. A search cannot be conducted immediately, as to prove knowledge of the drugs the parcel must first be opened. As this apartment building is frequented by the drug milieu, the investigators cannot seek the co-operation of the Superintendent or other tenants. Consequently, it is impossible to maintain continuous surveillance on the door to the apartment of the accused, although all building exits are covered. After the suspect has been allowed time to open the parcel (approximately five to ten minutes) the apartment is entered under authority of a Search Warrant. While the suspect's wife is at home, both the suspect and the package of drugs have disappeared. Through interrogation of the wife it is learned the suspect took the parcel and went next door to his friend's apartment. As there is not sufficient time to obtain a Search Warrant, the friend's apartment is entered under authority of a Writ of Assistance. Both the suspect and his friend are apprehended in the process of flushing the cocaine down the toilet, as they had heard the investigators enter the apartment across the hall and knew that eventually the friend's apartment would also be searched. Sufficient drugs were recovered to charge both individuals with Illegal Importation of Cocaine. If a Writ of Assistance had not been held by one of the investigators, there would have been no case as the drugs would have been destroyed by the time a Search Warrant was obtained.

Case history 4:

Police Surveillance Resulting in Search

A residence (dwelling house) is known to house a high level trafficker and is maintained under police surveillance for a given length of time. It is known that he is awaiting a shipment of heroin and has been accumulating the necessary ingredients and paraphernalia to "cut" (dilute) and package it in ounce or capsule lots for resale. Reliable information or indications are such that two of his associates arrive with the heroin and to assist in this operation. As a warrant under the

Narcotic Control Act cannot be issued in advance of drugs arriving at a certain location, it is imperative that a Writ of Assistance be available to enter these premises at the most opportune time, usually within a half hour after the drugs have arrived. Because of the time element, it may be impossible to obtain a search warrant in order to enter the premises while all three subjects are in possession of the heroin.

Case history 5:

Heroin Capping-Up Operation

Reliable information is received by drug investigators that Trafficker A has a large quantity of heroin at his disposal. Surreptitious searches of the area reveal the drugs to be secreted in the basement (or other) area of a large apartment complex (or outside in the yard). The cache is substituted with a known diluent and continuous surveillance is then maintained on it. Trafficker A has B, another member of the drug syndicate, pick-up the narcotics in order to package them for street level trafficking. Police follow target B to his destination, a previously unknown dwelling house, where he is met by traffickers A and C, who is yet another member of this drug trafficking organization. A short time after all are in the premises, the police enter using a Writ of Assistance and are able to apprehend three very important traffickers in possession of the narcotics. Aside from considering the time element involved in which enforcement action must be taken, situations of this nature often occur during the early hours of the morning and great distances from a Justice of the Peace from whom a Search Warrant would have to be obtained.

Case history 6:

Heroin Trafficking in Edmonton

Three members of a major drug trafficking syndicate were arrested in Edmonton after the seizure of 3,250 capsules of heroin, ten pounds of tetracaine and in excess of \$8,000.00. This was a lengthy and complex investigation where the traffickers were followed for approximately two weeks. The investigation was eventually terminated after one of the traffickers was observed entering his hotel room with two suitcases which were suspected of containing the drugs. As soon as he left the room, a Writ of Assistance was used by police to gain lawful entry and to confirm that the suitcases did in fact contain the drugs. Samples were taken and constant observations were maintained on the room. Shortly after the return of the two traffickers, a Writ of Assistance was again utilized to enter the room, make the arrests and effect the seizure. Had Writs of Assistance not been available, the police would have only had one hour and fifty minutes to obtain a Search Warrant and confirm that the drugs were present prior to the return of the traffickers. The

principal figure in this trafficking conspiracy was convicted and sentenced to imprisonment for 10 years. A Stay of Proceedings was entered against the other two accused.

Case history 7:

Heroin Trafficking in Toronto

A major heroin investigation was terminated in Toronto with the seizure of 10 lbs. of heroin from a hotel room and an additional 15 lbs. from a private residence. This investigation involved negotiations between an undercover operator and a trafficker for the purchase of the heroin. Final negotiations were conducted in the operator's hotel room and then the operator left with the trafficker to obtain the heroin at an unknown location. They were followed to the trafficker's room in a separate hotel and a Writ of Assistance was utilized in order that immediate enforcement action could be taken for the protection of the undercover operator and to effect the seizure. Subsequent investigation revealed the location of the remainder of the heroin and a Writ of Assistance was also utilized to search the dwelling house in which it was located due to the urgency of the situation and because a Justice of the Peace was not readily available at that early hour of the a.m. to issue a Search Warrant. This investigation resulted in a life sentence for an internationally known heroin trafficker.

Even the most superficial scrutiny of these case histories demonstrates quite clearly that the writ of assistance does not represent the power of last resort. Quite inexplicably, the writ's proponents seem not to appreciate that subsection 450(1) of the *Criminal Code* permits private premises to be entered in order to effect an arrest without warrant.⁹³ The Commission will have more to say about the propriety of this ancillary power of entry when it completes its work on police powers of arrest. For the moment, however, it should be understood that the power of arrest without warrant, in conjunction with its ancillary powers of entry and search incidental to arrest, would have sufficed to authorize all but one of the searches described in the case histories cited above.

Thus, for example, the police in Case history 1 could have entered the premises (apparently, a rooming house) in which the courier, financiers and distributors were making their transaction. The police could then have arrested the parties⁹⁴ and, as a lawful incident of that arrest, searched them⁹⁵ and the areas within their control.⁹⁶ All this, without resort to an arrest warrant, a search warrant or, for that matter, a writ of assistance. Nor, prior to entering the premises, need the police have given notice of their purpose and

demanded admittance, since these common-law limitations upon forcible entry may be dispensed with if, to observe the requirements, would be to risk the destruction or removal of the contraband.⁹⁷

Having entered, made their arrests and conducted their searches of the parties and the areas within their control — all without the authorization of a warrant — the police might then have had reasonable grounds to conduct a more extensive search of the premises. In that event, with the premises secured by the arrest of the occupants, there would be no obvious impediment to obtaining a search warrant to authorize the search of the remainder of the premises.

With minor variations, the arrest without warrant powers of subsection 450(1) of the *Criminal Code*, together with its ancillary powers of entry and search incidental to arrest, would have sufficed as authorization for all but one of the searches of residential premises described in the case histories. The exception, which is to be found in Case history 6, is the surreptitious entry or intelligence probe.⁹⁸

It will be recalled that in Case history 6 a trafficker was observed to enter his hotel room with two suitcases, suspected by the police to contain drugs. During an interval of one hour and fifty minutes while the trafficker was away from his room, the police entered, ostensibly under the authority of a writ of assistance, for the purpose of confirming their suspicions about the contents of the suitcases. Their suspicions having been confirmed, the police kept the hotel room under surveillance until the traffickers returned, whereupon entry was again effected using a writ of assistance, the suspects were arrested, and the drugs were seized.

It can of course be conceded that, in the one hour and fifty minutes available, the police would have been hard-pressed to obtain a search warrant for the first of their entries.⁹⁹ More to the point, however, it is very doubtful whether a search warrant could properly have been issued to authorize the surreptitious entry described in Case history 6. This entry, it will be recalled, was directed to confirming the investigators' suspicions that drugs were on the premises. As a standard of certainty, mere suspicion falls short of the reasonable belief required for obtaining a search warrant. Quite simply, there is no statutory or common-law authority which would permit these entries or probes, whether surreptitious or otherwise, where they are undertaken for the purpose of confirming or refuting

an investigator's suspicions, or for the purpose of elevating mere suspicion into reasonable belief.¹⁰⁰

To take this issue one step further, let us suppose that the police in the illustration at hand did have sufficient reasonable grounds to believe that there were drugs on the premises; let us assume, in other words, that they could lawfully have obtained a warrant. Instead of seeking merely to confirm their suspicions, they were anxious to enter surreptitiously in order to avoid alerting the suspects, and so jeopardizing the investigation, in the event that the drugs were not in fact on the premises.

The Commission would concede that, subject to a reasonable belief as to the presence of narcotics or drugs on the premises, both the *Narcotic Control Act* and the *Food and Drugs Act* would permit a surreptitious entry under the authority of a search warrant or a writ of assistance.¹⁰¹ The Commission would observe, however, that unoccupied premises present no risk of the contraband's destruction or removal. That risk is obviously one that can only be presented by suspects on the premises *and* in possession of the contraband. Where, then, is the exigency which makes it necessary to resort to a writ of assistance? If the suspects *and* the contraband are present, the premises can be entered, the suspects arrested and the contraband seized, quite independently of the writ of assistance. Should the contraband be present but the suspects absent, the police have three options: they can obtain a search warrant and seize the contraband; they can obtain a search warrant but delay execution until the suspects' return; or they can await the suspects' return and rely upon the statutory power of arrest without warrant and its ancillary powers of entry and search incidental to arrest.

In the result, the Commission would conclude that the objects of the *Narcotic Control Act* and the *Food and Drugs Act* do not present such peculiar enforcement problems that, in the absence of writs of assistance, those objects would be frustrated. To answer the question posed earlier in this section, we do not accept that there are instances of search and seizure which cannot be accomplished within the rule of search with warrant or within the principled exceptions to that rule — recognized exigency and informed consent.

7. Conclusion and Recommendations

In this Report, the Commission has variously characterized the writ of assistance as an instrument of unconstitutional search and seizure, as an affront to common-law traditions, and as an unnecessary instrument of search and seizure. For all of these reasons, therefore,

We recommend that the writ of assistance be forthwith abolished by amendments to the *Narcotic Control Act*, the *Food and Drugs Act*, the *Customs Act*, and the *Excise Act*.

We further recommend that all writs of assistance now extant be forthwith submitted to the Administrator of the Federal Court of Canada for immediate cancellation.

We further recommend that subsection 134(1) of the *Customs Act* be amended to provide for the issuance of search warrants for execution by day or, upon reasonable cause having been shown, by night; and that subsection 134(3) of the *Customs Act* be repealed so as to abolish the customs officer's powers of entry without warrant where no justice is to be found within five miles of the premises to be searched.¹⁰²

APPENDIX:

Sample

Writs of Assistance

1. *Narcotic Control Act*47
2. *Food and Drugs Act*48
3. *Customs Act*49
4. *Excise Act*50

In the Federal Court of Canada
Trial Division

T-665-76 (14)

Elizabeth II, *by the Grace of God of the United Kingdom,
Canada and Her Other Realms and Territories
Queen, Head of the Commonwealth,
Defender of the Faith*



To X
A member of the Royal Canadian Mounted Police

GREETING:

You are hereby authorized and empowered, pursuant to subsection (3) of Section 10 of the *NARCOTIC CONTROL ACT*, aided and assisted by such person as you may require, at any time, to enter any dwelling house and search for narcotics.

Issued under the authority of a Judge of our Federal Court of Canada, at Ottawa, this 23rd day of February in the year of our Lord one thousand nine hundred and seventy-six and in the 25th year of our Reign.

Cour Fédérale du Canada
Division de Première Instance

Elisabeth II, *par la grâce de Dieu, Reine du Royaume-Uni,
du Canada et de ses autres royaumes et ter-
ritoires, Chef du Commonwealth, Défenseur
de la Foi*

A X
Un membre de la Gendarmerie Royale du Canada

SALUT:

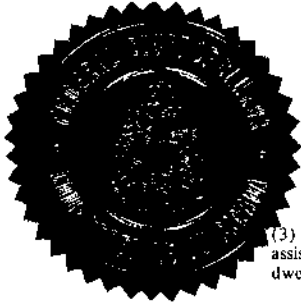
Vous êtes autorisé et habilité par les présentes, conformément au paragraphe (3) de l'article 10 de la LOI SUR LES STUPEFIANTS, aidé et assisté de tel individu que vous pouvez requérir, à entrer à toute heure dans une maison d'habitation quelconque pour y découvrir des stupéfiants.

Délivré en vertu de l'autorité d'un juge de notre Cour fédérale du Canada, à Ottawa, ce 23^{ème} jour de février en l'an de grâce mil neuf cent soixante-seize , dans la 25^{ème} année de notre Règne.

..... Marcel A.J. Dompierre... (Signed).....
Registry Officer — Fonctionnaire du Greffe

In the Federal Court of Canada
Trial Division

Elizabeth II, *by the Grace of God of the United Kingdom,
Canada and Her Other Realms and Territories
Queen, Head of the Commonwealth,
Defender of the Faith T-3-76(35)*



To X
A member of the Royal Canadian Mounted Police

GREETING:

You are hereby authorized and empowered, pursuant to subsection (3) of section 37 and section 45 of the FOOD AND DRUGS ACT, aided and assisted by such person as you may require, at any time, to enter any dwelling house and search for controlled drugs and restricted drugs.

Issued under the authority of a Judge of our Federal Court of Canada, at Ottawa, this 8th day of January in the year of our Lord one thousand nine hundred and seventy-six and in the 24th year of our Reign.

Cour Fédérale du Canada
Division de Première Instance

Elizabeth II, *par la grâce de Dieu, Reine du Royaume-Uni,
du Canada et de ses autres royaumes et ter-
ritoires, Chef du Commonwealth, Défenseur
de la Foi*

A X
Un membre de la Gendarmerie Royale du Canada

SALUT:

Vous êtes autorisé et habilité par les présentes conformément au paragraphe (3) de l'article 37 et à l'article 45 de la LOI DES ALIMENTS ET DROGUES, aidé et assisté de tel individu que vous pouvez requérir, à entrer à toute heure dans une maison d'habitation quelconque pour y découvrir des drogues contrôlées ou des drogues d'usage restreint.

Délibéré en vertu de l'autorité d'un juge de notre Cour fédérale du Canada, à Ottawa, ce 8ième jour de janvier l'an de grâce mil neuf cent soixante-seize, dans la 24^e année de notre Règne.

.....
Registry Officer — Fonctionnaire du Greffe



Court No. T-1306-73 (2)
NO. DE LA COUR

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

ELIZABETH II, the by Grace of God of the
United Kingdom, Canada and
Her Other Realms and Territories
Queen, Head of the Commonwealth,
Defender of the Faith.

To X , a Customs officer;

GREETING:

You are hereby authorized, pursuant to section 145 of the Customs Act, to enter, at any time in the day or night, into any building or other place within the jurisdiction of this Court, to search for and seize and secure any goods which you have reasonable grounds to believe are liable to forfeiture under the Customs Act, and, in case of necessity, to break open any doors and any chests or other packages for that purpose.

Witness a Judge of our Federal Court of Canada, at Ottawa, this 6th day of April in the year of our Lord one thousand nine hundred and seventy-three and in the twenty-second year of our Reign.

DIVISION DE PREMIÈRE INSTANCE DE LA
COUR FÉDÉRALE DU CANADA

ÉLISABETH DEUX, par la Grâce de Dieu, Reine du
Royaume-Uni, du Canada et de ses autres
royaumes et territoires, Chef du
Commonwealth, Défenseur de la Foi.

A X , fonctionnaire des douanes.

SALUT:

Vous êtes autorisé par les présentes, en vertu de l'article 145 de la Loi sur les Douanes, d'entrer en n'importe quel temps de jour ou de nuit, dans tout bâtiment ou autre lieu, qui relève de la juridiction de cette Cour, pour y chercher, saisir, et mettre en sûreté tous effets que vous avez des motifs raisonnables de supposer possibles de confiscation en vertu de la Loi sur les Douanes, et en cas de nécessité, vous pouvez, dans ce but, enfoncer les portes et briser les coffres et autres colis.

Témoin, un Juge de la Cour Fédérale du Canada, à Ottawa, ce 6ième jour d'avril en l'an de grâce mil neuf cent soixante-treize et la vingt-deuxième année de notre Règne.

(S) (SGD) T.J.L. Howard

Registry Officer
Fonctionnaire du greffe

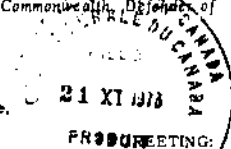
COURT No. T-4740 B
No DE LA COUR

In the Federal Court of Canada
Trial Division

Elizabeth 11, by the Grace of God of the United Kingdom, Canada and Her Other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

To **X**

a member of the Royal Canadian Mounted Police,



You are hereby authorized, pursuant to Section 78 of the EXCISE ACT, to enter, in the night time, if accompanied by a peace officer, and at any time without being so accompanied, any building or other place, to search for, seize and secure any goods or things liable to forfeiture under the EXCISE ACT, and in case of necessity, to break open any entrance or other doors, walls, floors, windows or gates and any chests or other packages for that purpose.

Witness a Judge of our Federal Court of Canada, at Ottawa, this **21st** day of **November** in the year of our Lord one thousand nine hundred and **seventy-three** and in the **22nd** year of our Reign.

* * * * *

Division de première instance de la
Cour Fédérale du Canada

Elizabeth Deux, par la Grâce de Dieu, Reine du Royaume-Uni, du Canada et de ses autres royaumes et territoires, Chef du Commonwealth, Défenseur de la Foi.

Au **X**

membre de la Gendarmerie royale du Canada,

SALUT:

Vous êtes autorisé par les présentes, en vertu de l'article 78 de la LOI SUR L'ACCISE d'entrer de nuit, si vous êtes accompagné d'un agent de la paix, et de jour sans être ainsi accompagné, dans tout bâtiment ou autre lieu, pour y perquisitionner, saisir et mettre en sécurité toutes marchandises ou choses passibles de confiscation en vertu de la LOI SUR L'ACCISE, et en cas de nécessité, vous pouvez ouvrir de force les entrées ou autres portes, démolir les murs, planchers, fenêtres ou barrières et défoncer les coffres ou autres colis à cet effet.

Témoin, un Juge de la Cour Fédérale du Canada, à Ottawa, ce **21^{ème}** jour de **novembre** en l'an de grâce mil neuf cent **soixante-treize** et en l'année de Notre règne, **22^{ème}** année de Notre règne.

D. J. J. J. J.
DEPUTY CLERK OF PROCEEDS
Registry Officer
Fonctionnaire du greffe

Endnotes

1. *An Act for preventing Frauds, and regulating Abuses in his Majesty's Customs*, (hereinafter referred to as the *Act of Frauds*) 1662, 13 & 14 Car. 2, c. 11, s. 5(2).
2. For a closer analysis of what the 1662 writ was *not*, see M. H. Smith, *The Writs of Assistance Case* (Berkeley: University of California Press, 1978), especially pp. 31-40 and pp. 401-2.
3. Sir Edward Coke, *Third Institute*, p. 162; cited and elaborated by Smith, *supra*, note 2, pp. 32-3.
4. Smith, *supra*, note 2, pp. 38-9, credits William De Grey, Attorney General of England, for correctly perceiving the essential significance of the writ of assistance, citing in support De Grey's August 20, 1768 Opinion "touching the Granting Writts of Assistance in America":

The Power of the Custom House Officer ... is given by Act of Parliament, and not by This Writ, wch. does nothing more than facilitate the Execution of the Power by making the disobedience of the Writ a Contempt of the Court; the Writ only requiring all Subjects to permit the Exercise of it to aid it. *The Writ is a Notification of the Character of the Bearer to the Constable & others to Whom He applies & a Security to the Subject agst. others Who might pretend to such authority.* (*Ibidem*, p. 38 — Emphasis added)

The entire text of the Opinion is reproduced as Appendix A to Smith, *supra*, note 2, p. 520.
5. The task of chronicling and dispelling the various confusions between writs of assistance and search warrants has been most ably accomplished by M. H. Smith. See Smith, *supra*, note 2, especially pp. 37-40.
6. *Ibidem*, pp. 401-2.
7. *Ibidem*, pp. 31-2, 39.

8. *Ibidem*, pp. 307-8.
9. For an account of the role of writs of assistance in pre-revolutionary America, see Smith, *supra*, note 2.
10. This phrase, “prohibited and uncustomed”, and its subsequent dilution to “prohibited *or* uncustomed”, has its own considerable history. See Smith, *supra*, note 2, pp. 27, 42, 45-50. Briefly, it seems that the principal reason for this double-barrelled qualifier was that one year earlier the customs had been put in farm, an arrangement which left customs enforcement in private hands from 1661 to 1671. A statute purporting to authorize intrusions upon residential premises by perambulating customs “privateers” in search of merely undutied goods would have been too extreme for the temperament of the times. Hence, if customs searches of residential premises were to be countenanced, the permissible objects of seizure had necessarily to be specified in terms of a distinctively public interest. As Smith, *supra*, note 2, puts it at pp. 42 and 47-8:

A mode of enforcement that trenched upon the rights of hearth and home was one thing when directly and exclusively for the public benefit; it was quite another when the principal interest served was substantially a private one.... A power of customs entry for search for prohibited goods was unobjectionable, if not positively desirable, since prohibition was a matter of public interest exclusively. But goods that were undutied represented a mere private loss, in regard to which so serious an encroachment upon another man’s private rights was less acceptable.

11. Although writs of assistance and search warrants were distinct instruments of search and seizure, it would seem that both of these latter features were designed to ensure that the writ corresponded as closely as practicable to common-law requirements for search warrants, i.e., that they be executed by day and that they be directed to constables or other public officers rather than to private persons.

On this point, and on the role of Sir Matthew Hale in identifying (or creating) these common-law restraints upon search and seizure with warrant, see Smith, *supra*, note 2, pp. 26-7.

12. This doctrine had been given statutory expression in the customs legislation (*An Act to prevent Fraudes and Concealments of His Majestyes Customs and Subsidyes*, 1660, 12 Car. 2, c. 19) that most immediately preceded the *Act of Frauds* of 1662. The short-lived customs search warrant for which provision was made in 1660 was subject to this proviso in section 4:

Provided alsoe That if the Information wherupon any House shall come to be searched shall prove to be false, that then and in

such case the party injured shall recover his full damages and costs against the Informer by Action of Trespass to be therefore brought against such Informer.

The 1660 statute provided in section 3 for its own demise upon “the end of the first Session of the next Parliament”. It received a second and presumably fatal death-blow in 1825, as one of 442 statutes relating to customs to be repealed by *An Act to repeal the Several Laws relating to the Customs*, 1825, 6 Geo. 4. c. 105.

Notwithstanding its brief legislative appearance, the doctrine of “justification by the event” was yet another manifestation of the common law’s reluctance to countenance intrusions upon private property which might disrupt the peace. It was given its most succinct expression in Sir Matthew Hale’s *History of the Pleas of the Crown* (1736):

If the goods be not in the house, yet it seems the officer is excused, that breaks open the door to search, because he searcheth by warrant, and could not know, whether the goods were there till search made; but it seems the party, that made the suggestion is punishable in such case, for as to him the breaking of the door is *in eventu* lawful, or unlawful, *viz.* lawful if the goods are there; unlawful if not there. (Vol. II, p. 151)

In seventeenth century England the doctrine was one of general application, punishing the informant for unsuccessful searches whether with warrant or writ of assistance, and extending as well to condemnation proceedings that failed to result in an order for forfeiture. Well into the eighteenth century in the case of search with warrant, and at least well into the nineteenth century in the case of writ-assisted search and seizure, the common law obliged those engaging in such potentially disruptive activities to condition their intrusions upon a standard of certainty approaching the absolute. Thus, for example, De Grey C.J. in *Bostock v. Saunders* (1773), 96 E.R. 539, p. 540, in an action for trespass against an excise officer who had undertaken an unsuccessful search under the search warrant of two commissioners, procured by himself:

But the suspicion must be very well founded to justify entering a house without the owner’s consent. Every man’s house is his castle. Lord Hale, 2 H.P.C. 150, lays down these guards upon executing search-warrants, even at common law: — 1. There must be an oath; 2. Grounds declared; 3. The warrant must be executed in the day-time; 4. By a known officer; 5. In the presence of the party informing. Yet though all these precautions are observed, the informer is liable to an action if nothing [is] found. He is justifiable or not by the event.... In the Customs, by the statute of 12 Car. 2, c. 19, power may be given by the Barons

of the Exchequer to make search in the day-time. And any person so authorized by writ of assistance(s), may search in the day-time, and accompanied by a peace officer. But he is still only justifiable in an action of trespass by the event.

Bostock v. Saunders was subsequently overruled by *Cooper v. Booth* (1785), 170 E.R. 564, at least in so far as it purported to apply the doctrine of justification by the event to searches conducted pursuant to magistrate-issued warrants, for which there was express statutory provision that they be obtainable by a sworn attestation of reasonable grounds of suspicion. *Per* Lord Mansfield in *Cooper v. Booth*, p. 568, "the Act is entirely adapted to the case of probable circumstances: the objection [that the excise officer, either in his capacity as procurer or executor of the warrant, is liable in trespass for an unsuccessful search] requires positive certainty." However, Lord Mansfield, *in obiter*, left open the question of what application, if any, the doctrine of justification by the event might have to writ-assisted search and seizure:

[T]he distinction I have always taken is this, that to justify under a writ of assistance, the officer must find the goods he searches for; but a warrant will justify without. (*Ibidem*, p. 565)

The rigours of the doctrine of justification by the event had in any case been relaxed for warrant-authorized search and seizure by the statute of 19 Geo. 2, c. 35 (1746) "to the extent that if the court certified probable cause for the seizure an action for damages was in effect barred." (Smith, *supra*, note 2, p. 13, n. 9)

The doctrine seems, however, to have been more resilient in relation to writs of assistance, presumably because customs officers were perceived as acting, if not in their own private interest, certainly on their own information. Whatever the reason, as late as 1830 Lord Tenterden C.J. was asserting, in *R. v. Watts and Watts*, 109 E.R. 749, p. 753, that the customs legislation providing for writs of assistance did not confer a "general and unqualified authority to search", but that such entry and search required some kind of justification. In the particular circumstances of the case, Lord Tenterden declined to specify precisely the nature of the required justification, but adverted to three possibilities:

whether ... the officer can only be justified by the event; or whether the officer will be justified if he enters upon reasonable cause of suspicion to be proved by him, as his justification, at the trial; or will be justified by proving that uncustomed goods were actually in the house at the time of his entry, are points which it is not now proper to determine.... (*Ibidem*, p. 753)

13. *Leglise v. Champante* (1728), 93 E.R. 871: "... in these cases [writ-assisted customs enforcement] the officer seizes at his peril, and ... a probable cause is no defence."
14. "In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of the peace may grant a warrant to search in those suspected places mentioned in his warrant..." (Hale, *supra*, note 12, p. 113)

Although Hale's *Pleas of the Crown* was not published until 1736, some sixty years after his death, his specifications for warrant-authorized intrusions presumably reflected those of the common law at the time the writ was introduced in 1662. See Smith, *supra*, note 2, p. 338.
15. Smith properly emphasizes, however, that until the 1760s there was very little in the way of firm judicial precedent about how particularly search warrants ought properly be framed as to the premises to be searched. Apart from Hale's observation that "the general warrant to search all places, whereof the party and officer have suspicion, tho it be usual, yet it is not so safe" (cited in Smith, *supra*, note 2, p. 338), there was little authoritative doctrine against general warrants until they were finally disposed of by *Entick v. Carrington* (1765), 95 E.R. 807. See Smith, *supra*, note 2, p. 241.
16. This antinomy between writs of assistance and search warrants as to the requirements of judiciality and particularity is perhaps the more remarkable for Smith's very plausible conjecture that the writ was actually devised by Sir Matthew Hale. At a minimum, Smith is surely correct in asserting that the writ of assistance would not have been introduced without the knowledge and approval of the Chief Baron of the Court of Exchequer, who, in 1662, was none other than Sir Matthew Hale. See Smith, *supra*, note 2, p. 40.
17. Smith, *supra*, note 2, pp. 512-517.
18. Customs 29/1: entry *sub cap.* "Informations and Informers", 9 June 1710; cited in Smith, *supra*, note 2, p. 517, n. 9.
19. *Act for preventing Frauds and Abuses in the publick Revenues*, 1719, 6 Geo. 1, c. 21; cited in Smith, *supra*, note 2, p. 513.
20. Henry Crouch, *Complete Guide to the Officers of His Majesty's Customs in the Outports* (London, 1732), p. 280; cited in Smith, *supra*, note 2, pp. 513-514.
21. Smith, *supra*, note 2, p. 517.

22. *Per* Blackstone J., in *Bostock v. Saunders* (1773), 96 E.R. 539, p. 540.
23. *Supra*, note 9.
24. As this Report was being prepared, the legality of writs of assistance, in the face of section 8 of the *Constitution Act, 1982*, had not yet been authoritatively tested. Section 8 provides that “[e]veryone has the right to be secure against unreasonable search or seizure”.
25. *Narcotic Control Act*, R.S.C. 1970, c. N-1; *Food and Drugs Act*, R.S.C. 1970, c. F-27; *Customs Act*, R.S.C. 1970, c. C-40; *Excise Act*, R.S.C. 1970, c. E-12.
26. This proposition was first established in Canadian jurisprudence in *Willinsky v. Anderson* (1909), 19 O.L.R. 437, an action for malicious prosecution, arising out of an allegedly malicious and wrongful issuance and execution of a search warrant. The Ontario High Court of Justice having determined that the issuance of search warrants entailed an exercise of judicial jurisdiction, then proceeded to declare itself competent to entertain an application on *certiorari* and quashed the warrant.

Several English precedents were cited in the *Willinsky* case as authority for the judicial nature of search warrant issuance procedures: *Elsee v. Smith* (1822), 1 D.& R. 97; *Grainger v. Hill* (1838), 4 Bing N.C. 212; 132 E.R. 769; *Hope v. Evered* (1886), 17 Q.B.D. 338. Perhaps the most definitive statement of the proposition appears in *Webb v. Ross* (1859), 4 H. & N. 111; 157 E.R. 778, *per* Martin B. at 780: “A search warrant is partly a ministerial and partly a judicial act.”
27. 1 Ann., 1701, stat. 1, c. 8, in [1699-1713] *Statutes at Large* 91.
28. Smith, *supra*, note 2, p. 35.
29. Customs and excise writs were features of Canada’s pre-Confederation status as an imperial possession and have simply been carried over into all subsequent customs and excise legislation. The narcotic writ was added in 1929, and the food and drugs writ as recently as 1961.

In connection with the addition of writs to the enforcement provisions of narcotics legislation, it is interesting to note that the 1929 amendment to the *Opium and Narcotic Drug Act* evoked no parliamentary debate with respect to the search and seizure powers conferred upon holders of the writ. Members were instead preoccupied with the Act’s general application to physicians and pharmacists, and with the extension of whipping as a penalty for

various of the offences within the Act. (House of Commons *Debates*, February 12 & 15, 1929, 61, 151) Prior to 1929, the Act provided for whipping only in cases involving the sale or distribution of drugs to minors. Thereafter, conviction upon indictment for the unlawful import, export, sale, manufacture or possession of narcotics carried a possible penalty of whipping "at the discretion of the judge". (*Opium and Narcotic Drug Act*, S.C. 1929, 19 & 20 Geo V, c. 49, s. 4)

Partly because of these concerns, and partly perhaps because the bill was described by its presenter, the then Minister of Pensions and National Health, J. H. King (Kootenay), as "being of a technical character", the amendments were referred on February 15, 1929, after second reading, to a special committee for clause-by-clause consideration. On May 10, 1929, the bill was again considered, this time by the House sitting as a committee of the whole. Again, the chief concerns voiced related to the Act's application to professionals and its provisions for whipping. As Sir George Perley remarked, "[i]t seems extraordinary. Under this section might not a convicted person be sentenced to be whipped once a week during his imprisonment?" (House of Commons *Debates*, May 10, 1929, 2414) Another member, Mr. Ross (Kingston), managed to combine both concerns, worrying that practising physicians might be subjected to whipping for violations of the Act. The minister's response deserves to be recorded:

In such a case the judge would use his discretion. If the accused was found to be a regular trafficker, committing a crime worse than murder, and the judge decided that whipping was proper punishment, I do not think anyone would object. But ordinarily professional men are not proceeded against on indictment unless they are found to be really engaged in the drug traffic. (*Ibidem*, p. 2415)

In fairness to the minister, it should be noted that in September, 1928, Parliament had ratified the *International Opium Convention*, under article 2 of which Canada undertook to review periodically and to strengthen as required the laws relating to the control of narcotics. The times were appropriate, therefore, for a review of Canadian narcotics legislation. As well, as the minister himself observed, whipping was not peculiar to the *Opium and Narcotic Drug Act*:

[W]hipping is not a new section in this bill, or a new principle applied to this offence. Whipping already was applied at the discretion of the judge where the trafficker gave or sold drugs to a minor. We have extended that principle in order to provide a greater deterrent to those who are engaged in trafficking. From the information I have received from all parts of the Dominion since the bill was in committee, I am satisfied that those who are interested in the curtailment and suppression of this traffic are

entirely in sympathy with the provision that whipping be left to the discretion of the judge. (*Ibidem*, p. 2414)

The addition of writ provisions to the *Food and Drugs Act*, S.C. 1960-61, c. 37, similarly went largely unchallenged. Indeed, the occasion was remarkable chiefly for some members' obvious confusion with respect to the distinction between writs of assistance and search warrants. What concern was expressed had primarily to do with the misapprehension that the writ would provide something less than "the most effective enforcement of this measure" if it could only "be given on application by the minister only to an exchequer court judge". (House of Commons *Debates*, May 30, 1961, 5626, *per* Mr. Martin (Essex East)) Notwithstanding Mr. Martin's claim to "know the purpose of the writ" and to "know what a writ of assistance is", it seems obvious that he understood the writ to entail specific applications for specific searches. When advised to the contrary by Mr. Monteith (Perth), the then Minister of National Health and Welfare, Mr. Martin expressed considerable surprise:

Does the minister mean that the writ of assistance gives them the right, apart from any particular case covered in a particular application, to go in at any time? I do not think so.... It is not an authorization by the exchequer court to Mr. X to go in and examine the premises of anyone, anywhere, in any part of Canada, at any time. (*Ibidem*, p. 5626)

The minister's response to Mr. Martin, and to Mr. Crestohl, the only other member to question the inclusion of writ powers in the *Food and Drugs Act*, could not have been more explicit:

This is a special authority. The writ of assistance is a special authority for which provision is made in the narcotic act [*sic*] and the *Excise Act*. In effect, this clothes the person named therein with the general powers to search dwelling houses as well as other places. The writ of assistance in this legislation will be issued only on application of the Minister of National Health and Welfare in accordance with the prevailing practice under the narcotics act [*sic*]. The writ will be issued only to members of the R.C.M.P. at the request of the commissioner of that force; and here it will be limited to the persons who are actually engaged in the specific duties connected with the suppression of the traffic in controlled drugs. There will certainly be no abuse of this authority. It is simply a writ of assistance to permit search by peace officers, that is members of the R.C.M.P. squad connected with this particular work.... This is a standing order or permit to search. It is entirely different from section 36(2). It is a general authority to search, for these particular people who are attached to this particular type of work. (*Ibidem*)

30. *Narcotic Control Act*, *supra*, note 25. See Appendix for sample copies of writs of assistance.

31. As reproduced by Smith, *supra*, note 2, Appendix C, pp. 524-27, the provisions for assistance were as follows:

... To all & every the Officers and Ministers who now are or hereafter shall have any Office Power or Authority from or under the Jurisdiction of the Lord High Admiral of our Admiralty of England To all & every our Vice Admirals Justices of the Peace Mayors Sheriffs Constables Bailiffs Headboroughs And all other Our Officers Ministers & Subjects within every City Borough Town and County of England the Dominion of Wales & Town of Berwick upon Tweed And to every one of you... *We strictly Injoin and Command* You and every one of You... from Time to Time be Aiding Assisting & Helping in the Execution of the Premes. as is Meet And this You or any of You in no wise Omit at Your perils. (Emphasis in the original)

32. *Customs Act*, *supra*, note 25, s. 140. It should be understood that this omission is not so much an oversight as it is an instance of the “power to call in aid” being one that is available to customs and excise officers generally, as well as to those holding a writ of assistance.

33. *Excise Act*, *supra*, note 25, s. 77. The *Excise Act* provides what is perhaps the most extravagant example of this “power to call in aid”:

All justices of the peace, mayors, bailiffs, constables and all persons serving under Her Majesty by commission, warrant or otherwise, and all other persons whomsoever shall aid and assist, and they are hereby respectively required to aid and assist, every officer in the due execution of any act or thing authorized, required or enjoined by this or any other Act.

One of the many quaint features of the *Excise Act* is its combination of both restrictive *and* enabling provisions for assistance. Thus, an excise officer must be accompanied by a peace officer when conducting searches at night; but he is nevertheless empowered to compel aid and assistance from the generality of persons mentioned above.

34. Cited by Smith, *supra*, note 2, p. 32. Smith ascribes the doctrinal source of the customs writ of assistance to what Coke termed “a secret in law, that upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, *according to the force and effect of the act*”. (*Ibidem* — Emphasis added)

35. Jackett P., in *Re Writs of Assistance*, [1965] 2 Ex. C.R. 645, recognized the nature of this problem, but not its dimensions. In directing revisions to the text of the writs he was being asked to grant, Jackett P. observed:

... care must be taken to insure that the writs do not say anything other than that which Parliament has directed and does [*sic*] not contain anything that is calculated to mislead the reader into thinking that the writ is anything other than that which the terms of the legislation require. (*Ibidem*, p. 652)

However, in his concern that writs not contain *more* than was justified by the terms of the statute, Jackett P. overlooked the corresponding concern that they should not contain *less* than the powers conferred by statute.

36. *Narcotic Control Act*, *supra*, note 25, ss. 10(3) and (4); *Food and Drugs Act*, *supra*, note 25, ss. 37(3) and (4).
37. On this point, see Smith, *supra*, note 2, p. 28:

Reviewing, long afterward, enactments such as section 5(2) of the Act of Frauds of 1662, Mr. Justice Blackstone [in *Hill v. Barnes* (1777), 2 W.B1. 1135, 1137] remarked: "The spirit of all revenue laws is, that the accompanying officer must be an officer of the place, that the subject may not be unreasonably terrified at his house being entered ... by mere strangers." The stipulation in statutory provisions for entry and search that there must be "assistance" (as the function of just being present was sometimes called) by a local public officer can be seen as a sensible and practical device for minimizing the alarm and disturbance that violation of a man's home might so easily cause.

38. The responsibility for making application for writs under all four federal statutes that provide for their issuance resides, since March 22, 1978, exclusively with the Attorney General of Canada. By virtue of an Order in Council (P.C. 1978-732, dated March 9, 1978 and registered March 22, 1978) made pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, R.S.C. 1970, c. P-34 (which provides in section 2 that the Governor in Council may "transfer any powers, duties or functions ... from one minister of the Crown to any other minister of the Crown"), responsibility for writ applications pursuant to the *Narcotic Control Act*, *supra*, note 25 and the *Food and Drugs Act*, *supra*, note 25 was transferred from the Minister of National Health and Welfare to the Attorney General of Canada. Section 145 of the *Customs Act*, *supra*, note 25, and section 78 of the *Excise Act*, *supra*, note 25, similarly provide that applications for writs are to be made by the Attorney General of

Canada. Briefly, the Order in Council of March 22, 1978 did nothing more than consolidate within the office of the Attorney General of Canada exclusive responsibility for making application for writs of assistance.

39. See e.g., Federal Court File Numbers T-1874-76 and T-1875-76, relating to applications for writs to be issued pursuant to the *Narcotic Control Act*, *supra*, note 25, and the *Food and Drugs Act*, *supra*, note 25.
40. In *Re Writs of Assistance*, *supra*, note 35. It should be understood that the issue being addressed here has to do with the judicial role in the issuance of writs of assistance. Graham Parker, in "The Extraordinary Power to Search and Seize and the Writ of Assistance" (1963), 1 *University of British Columbia Law Rev.* 688, has traced the history of what is properly a parallel issue, namely, the judicial attitude to the legality of searches and seizures conducted under the authority of a writ of assistance.
41. *Re Writs of Assistance*, *supra*, note 35, p. 651.
42. *Ibidem*, p. 648.
43. *Ibidem*, pp. 651-2.
44. Quite inexplicably, a contrary opinion had been reached by the Nova Scotia Supreme Court, *en banc*, in *Re Writs of Assistance*, [1930] 2 D.L.R. 499. In that instance, the provincial attorney general was refused a writ of assistance under the Nova Scotia *Temperance Act*, which legislation was for all material purposes analogous to that being considered by Jackett P. The majority opinion, concurring with Mellish J., concluded not only that a judicial discretion must necessarily be entailed in such applications, but that it was beyond the competence of the legislature to authorize searches for evidence of unsuspected offences in unsuspected places.

In the course of delivering one of two dissenting judgments, Harris C.J. concluded that the court was entirely without discretion in issuing writs of assistance. The sole duty of the court was to "see that the writ granted does not go beyond the provisions of the Act ... [and] to see that the preliminary proceedings are in due form and all necessary consents have been given". (*Per Harris C.J.*, p. 501) Harris C.J. arrived at this result only with considerable reluctance, expressing the view that, since the court had no discretion whatever, he would very much have preferred the attorney general to issue these instruments on his own authority.

45. *Re Writs of Assistance* (1977), 34 C.C.C. (2d) 62, p. 63. Although not reported until 1977, the judgment was in fact delivered on October 6, 1975.

46. *Ibidem*, p. 65. Collier J. added a footnote to his judgment:

I am not suggesting writs of this kind should never be asked for or granted. There may be moral, political or social grounds. The material in support of this application, for example, is completely devoid of any facts which might indicate there is some political, moral, social, economic, or administrative ground for granting this particular individual the powers sought.

Although not reproduced in the published case report, the footnote appears in the reasons for judgment found in Federal Court File No. T-3369-75.

47. Subsequently, on February 10, 1977, Collier J. took the occasion of an *ex parte* application by the Attorney General of Canada for fourteen excise and fifteen customs writs to repeat his objections to these procedures. He concluded his reasons for judgment by indicating that he was granting the applications “reluctantly and despairingly”: Federal Court File Nos. T-464-77 and T-465-77.

Five days after these applications were granted, Mr. Justice Collier’s reasons for judgment were raised in the House of Commons by Mr. Ray Hnatyshyn (Saskatoon-Biggar). On February 15, 1977, Mr. Hnatyshyn inquired of the Honourable Monique Bégin, the then Minister of National Revenue, whether the government, “having regard to the Bill of Rights and the human rights legislation now before the House”, was planning to “change this procedure with respect to applications under these two particular acts ...”. (House of Commons *Debates*, February 15, 1977, 3045) The “procedure” to which Mr. Hnatyshyn referred was the *application* procedure, although his comments were directed as well to the scope of writs of assistance, which he referred to as “orders to unknown officers, granting them unlimited powers with no date of expiry”. (*Ibidem*, p. 3045)

The procedural change Mr. Hnatyshyn seems to have had in mind was one in which the responsible ministers “would review individually the applications to be made to the court with respect to this kind of application”. (*Ibidem*, p. 3053) His proposal for procedural change was elaborated somewhat further when the question of writs of assistance was raised the following day. (House of Commons *Debates*, February 16, 1977, 3094-5) At that time Mr. Hnatyshyn asked for an undertaking from the Honourable Ron Basford, the Acting Solicitor General and Minister of Justice, “to have amendments to present legislation introduced, in order, at the very

least, to allow courts discretion in the granting of writs of assistance". (*Ibidem*, p. 3095) For that purpose, Mr. Hnatyshyn asked also that the minister "undertake that, henceforth, all applications for writs of assistance being made by those coming under his departments, or by the minister, in his capacity as Attorney General of Canada, will be supported by the fullest possible disclosure of facts as to why the issuance of the writs is required, those facts to include details of the premises, persons and areas affected, and the minimum period of time for which the writs are required"(*ibidem*). In declining to give those undertakings, Mr. Basford indicated, somewhat prematurely, that these investigative powers and others were being reviewed by the Law Reform Commission. At the same time, Mr. Basford acceded to a request from Mr. James A. McGrath (St. John's East) that he review the possibility of there being a conflict of interest in the office of the Attorney General of Canada, the same officer being responsible for applying for writs of assistance and for protecting the rights to privacy set out in the *Canadian Bill of Rights*. (*Ibidem*, p.3095)

Later in the afternoon of February 16, 1977, Mr. Walter Baker (Grenville-Carleton) referred to the judgment of Mr. Justice Collier and asked for an undertaking from the Honourable Francis Fox, the then Solicitor General, to "adopt the practice of personally reviewing and approving any further applications by the RCMP for writs of assistance under these statutes until an investigation is completed". (*Ibidem*, p. 3101) Mr. Fox took the occasion to emphasize that responsibility for writs of assistance lay not with the Solicitor General, but with the Attorney General in the case of customs and excise, and with the Minister of National Health and Welfare in the case of narcotics and food and drugs. Mr. Fox then expressed the hope that Mr. Baker "does not question the very principle of a writ of assistance but rather that he considers the process of application for these writs". (*Ibidem*, p. 3102)

Mr. Baker did indeed question the principle of the writ:

I appreciate the difficulties with respect to law enforcement which have been raised by the Solicitor General, but I hope he will not balance those against the rights of individuals and the clear principle which has long been embodied in our law that the rights of individuals should be safeguarded. Surely, with the number of judges there are in this country and with the number of opportunities for applications to be made, the Solicitor General would not consider it unreasonable if I asked him whether he would make a general review of statutes with respect to the application of these wide, sweeping powers so that any police force, even the Royal Canadian Mounted Police, does not have the power to act arbitrarily in this situation. (*Ibidem*)

The subject of writs of assistance, and specifically the absence of issuance procedures which entailed some measure of judicial discretion, came up again on February 17, 1977 (House of Commons *Debates*, 3170) and February 21, 1977 (House of Commons *Debates*, 3228). Then on February 25, 1977, the Honourable Ron Basford (Minister of Justice) announced in the House that “[n]o further writs of assistance will be asked for, either by myself, or by my colleague the Minister of National Health and Welfare — under the *Narcotic Control Act* — until the matter is at least reviewed. If writs of assistance are to be continued, the court should be provided with full information. In the meantime, we are continuing our examination as to whether they are needed at all”. (House of Commons *Debates*, February 25, 1977, 3424-5)

The minister not having stipulated a date by which the review of writs of assistance was to be completed, Mr. Hnatyshyn reiterated on March 8, 1977 his recommendation for “changes in the legislation which would have the effect of allowing some discretion by the judiciary in the issuance of writs of assistance in the future”. (House of Commons *Debates*, March 8, 1977, 3793) “When we put the judiciary in the position of being glorified notaries public, I wonder why we waste the time of the courts by asking them to give approval to that kind of application. It might be simpler in all the circumstances to have the minister himself grant these writs”. (*Ibidem*, p. 3794)

Mr. Hnatyshyn pressed the Minister of Justice again on March 16, 1977 (House of Commons *Debates*, 4035) and on July 4, 1977 (House of Commons *Debates*, 7286) for a firm commitment with respect to the amendment of writ-related legislation. The minister declined on each occasion to give such a commitment, indicating that he proposed instead to await the results of the review then being undertaken by his department.

Some nine months later, on April 6, 1978, Mr. Basford announced that a “review and evaluation has now been completed by the Department of Justice in consultation with other responsible government departments and agencies”. (*News Release*, from the Minister of Justice and Attorney General of Canada, Ottawa, April 6, 1978) As a consequence of that review, the government intended to abolish customs and excise writs. Writs were to be retained for the *Narcotic Control Act* and the *Food and Drugs Act*, but in a substantially modified form: (1) responsibility for making application for writs of assistance under the *Narcotic Control Act* and the *Food and Drugs Act* was to be transferred from the Minister of National Health and Welfare to the Attorney General of Canada (this responsibility had in fact already been transferred, by Order in Council, P.C. 1978-732, dated March 9, 1978 and registered March 22, 1978); (2) the Federal Court was to be given a measure of discretion with respect to the

writ's issuance (it had to be shown to be in the "best interest of justice") and with respect to the competence of individual nominees to hold the writ (R.C.M.P. members of two years' standing and at least six months experience in drug enforcement); (3) all writs were to be valid for a specific, but unspecified, period of time; (4) a procedure was to be introduced requiring the officer using the writ to make a return, justifying his conduct, to the issuing court; and (5) a mechanism was to be established for the continuing reporting and evaluation of the effectiveness of, and necessity for, writs of assistance.

Notwithstanding the minister's announcement, however, none of these procedural changes has been implemented to date. Nor, correspondingly, has the minister's moratorium on the further issuance of writs of assistance been lifted, with the result that no new writs of assistance have been issued since the moratorium was announced on February 25, 1977. In fact, the twenty-nine writs issued on February 10, 1977 by Mr. Justice Collier were the last but one to be granted to date. An additional customs writ was issued on February 18, 1977: Federal Court File No. T-561-77.

48. Order in Council, P.C. 1978-73, pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, *supra*, note 38.
49. As one customs officer put it, "[a] police officer has a uniform and a badge. Our writs act like a uniform." Gerald Latreille, quoted in the *Globe and Mail*, March 14, 1978, p. 9, col. 3.
50. The *Customs Act* and the *Excise Act*, *supra*, note 25, are virtually identical in this respect, except that the latter provides a rather more extensive list of what precisely may be broken open in furtherance of the search. According to section 139 of the *Customs Act*, the bearer of a writ of assistance "... in case of necessity, may break open any doors and any chests or other packages for that purpose". Subsection 76(1) of the *Excise Act* provides that the writ-holder "... in case of necessity, may break open any entrance or other doors, walls, floors, windows or gates and any chests or other packages for that purpose".
51. *Narcotic Control Act*, *supra*, note 25, s. 10(4) and *Food and Drugs Act*, *supra*, note 25, s. 37(4). It should be noted that these statutes provide the same authority to use force whether the officer is searching with a writ of assistance or a search warrant, in the case of dwellings, or searching without a warrant in the case of places other than dwellings. Authority to use force, in other words, is not confined to those acting with a writ of assistance, but is rather a discretionary power attached to drug searches generally. Strictly speaking, then, this is not properly an instance of the writ-holder's powers having

been enlarged, but rather of legislation which confers extensive *general* powers of search and seizure, powers in which writ-holders participate, in common with those searching with or without a warrant.

As was indicated earlier (*supra*, page 13), it is difficult to describe the unique features of the writ of assistance independently of the general search powers provided for the enforcement of these statutes. Objections to the search powers that these statutes confer tend to focus upon the writ of assistance when they ought properly be registered against the legislation itself. With respect to the writ-holder's authority to use force, however, the pattern is clear: in 1662, the customs officer could employ force only "in case of resistance"; in 1983, both customs and excise officers are entitled to use force "in case of necessity"; and drug enforcement officers are entitled to resort to force independently of either of these limiting circumstances.

52. *Wah Kie v. Cuddy (No. 2)* (1914), 23 C.C.C. 383 (Alta. S.C.). *Per* Beck J., p. 387, citing *Launock v. Brown* (1819), 106 ER 482:

The court *en banc* of four Judges, affirming the decision of the trial Judge, held that a search warrant under the statute was unlawfully executed inasmuch as no demand of admittance had been made before breaking open the outer door of the dwelling house of the plaintiff's house.

I think this rule is applicable to all search warrants or orders for search unless it is clear from the statute authorizing the search warrant that a demand to open is not necessary. The second preliminary, therefore, I think to the execution of a search warrant, is, generally speaking, *when the place is [sic.] to be searched is a dwelling house*, is a demand to open. (Emphasis in the original)

53. See Smith, *supra*, note 2, p. 26.
54. *Customs Act*, *supra*, note 25, s. 139; *Excise Act*, *supra*, note 25, s. 76(1).
55. *Narcotic Control Act*, *supra*, note 25, s. 10(1); *Food and Drugs Act*, *supra*, note 25, s. 37(1). As was noted with respect to the use of force, the drug statutes impose no constraints upon when a search may be conducted. The absence of limitations as to time or force is, however, a feature of drug searches generally, rather than one peculiar to searches conducted pursuant to a writ of assistance.
56. See the writ of assistance of George III, 1761, reproduced in Smith, *supra*, note 2, Appendix C, p. 526.

57. *Excise Act, supra*, note 25, s. 79: "A writ of assistance addressed to a collector or any superior officer shall have full force and effect in the hands of any officer to whom he delegates his authority for its execution."
58. *Narcotic Control Act, supra*, note 25, s. 10(3); *Food and Drugs Act, supra*, note 25, s. 37(3).
59. Section 145 of the *Customs Act, supra*, note 25, and section 78 of the *Excise Act, supra*, note 25, are identical in this respect, both providing that such writs as are issued "shall remain in force for as long as the (any) person named therein remains an officer, whether in the same capacity or not".
60. *Customs Act, supra*, note 25, s. 139: "Under the authority of a writ of assistance, any officer ... may enter ... and search ...".
61. The delegation procedures described with respect to the excise writ in *R. ex rel. Kelly v. Hobinsky*, [1929] 1 W.W.R. 313 were pronounced by Simpson C.C.J., as so haphazard as "to declare a writ of assistance to be a mere piece of general office equipment" (p. 319).
62. *Narcotic Control Act, supra*, note 25, s. 10(1). The search and seizure powers of the *Narcotic Control Act*, and indeed of the *Food and Drugs Act*, are not unique to writ-holders. Again, this is an instance of powers being available to peace officers generally, as well as to those holding a writ of assistance.
63. *Customs Act, supra*, note 25, s. 139.
64. *Ibidem*.
65. *Excise Act, supra*, note 25, s. 76(1).
66. *Re Writs of Assistance, supra*, note 44, p. 507. Mellish J. was here referring to the writ of assistance created by the Nova Scotia *Temperance Act*, an item which had clearly been modelled after its customs and excise counterparts.
67. *Customs Act, supra*, note 25, s. 145; *Excise Act, supra*, note 25, s. 78. The legislation providing for the drug writs is curiously silent on the matter of the writs' duration. In practice, it is generally assumed that these writs are similarly valid for the career of the officer.
68. *Supra*, note 25.
69. *Supra*, note 47.

70. *Supra*, note 24.
71. *Excise Act*, *supra*, note 25.
72. *Customs Act*, *supra*, note 25.
73. *Narcotic Control Act*, *supra*, note 25 and *Food and Drugs Act*, *supra*, note 25.
74. For present purposes, the Commission's preference for search with warrant as the rule and search without warrant as the exception is referable only to what we term investigative powers of search and seizure, i.e., searches undertaken within a sequence of offence and investigation, prompted by a reasonable belief that an offence against the *Criminal Code* or other federal statute has been committed and that takings, evidence or contraband relevant to that offence will be disclosed by a search of particular premises or persons. We reserve for later consideration the question of the rule's application to searches undertaken within a continuum of inspection, monitoring, supervision and regulation designed to ensure compliance with a particular statutory or regulatory regime.
75. *Payton v. New York*, [1980] 100 S. Ct. 1371.
76. *Per* Jackson J. in *Johnson v. U.S.*, 333 U.S., 10, pp. 13-14; cited by Stevens J. in *Payton v. New York*, *supra*, note 75, p. 1380, n. 24.
77. *Leigh v. Cole* (1853), 6 Cox C.C. 329. The power to search an arrested person has been recognized quite generally, even though no express power to conduct such searches is conferred by statute. See e.g., *R. v. Brezack* (1950), 2 D.L.R. 265, and *Re Laporte and R.* (1972), 29 D.L.R. (3d) 651.
78. "We think that a police officer presently has the right to enter premises, including a dwelling house, by force if necessary, *without a warrant*, to prevent the commission of an offence which would cause immediate and serious injury to any person, if he believes on reasonable and probable grounds that any such offence is about to be committed." *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 59. (Emphasis in the original)
79. *Thomas v. Sawkins* (1935), 2 K.B. 249.
80. *Eccles v. Bourque*, [1975] 2 S.C.R. 739.
81. *Supra*, note 25.

82. *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12, s. 11.
83. *Aeronautics Act*, R.S.C. 1970, c. A-3, s. 6(1)(l).
84. *Fisheries Act*, R.S.C. 1970, c. F-14, s. 35.
85. *Animal Contagious Diseases Act*, R.S.C. 1970, c. A-13, s. 18.
86. Australian Law Reform Commission, *Criminal Investigation, Interim Report No. 2* (Canberra: Australian Government Publishing Service, 1975), pp. 89-91. In making its recommendations, the A.L.R.C. was considering the Australian equivalents of the customs and excise writs, and as well, a variety of state provisions for general warrants, some of them restricted to searches for stolen property, and others that were unrestricted as to place, time or offence.

Although the Australian Law Reform Commission was inclined to treat the writ of assistance as a statutory warrant rather than as a licence to search *without* warrant, their objection to such powers was nevertheless clear and vigorous:

It is nonetheless perfectly obvious that the powers conferred are all of them quite extraordinarily wide in their scope. There is no requirement in any of them that before the powers are exercised an independent judicial mind should consider the circumstances of the *particular case*, weighing the public interest as against that of the individual concerned. Nor is there any effective way in which any of the powers once exercised can be the subject of *ex post facto* judicial review....

The power to search and seize is undoubtedly a very necessary one for police to have. It has great destructive potential so far as the right to privacy and civil liberties generally are concerned. The power must therefore be capable of justification on every single occasion on which it is used. On this view, the continued existence of general search warrants cannot be countenanced. In the Commission's view such provisions should long ago have disappeared from the Commonwealth and Territorial statute books. We recommend that their demise be delayed no longer. (*Ibidem*, pp. 89-91)

87. *News Release*, from the Minister of Justice and Attorney General of Canada, Ottawa, April 6, 1978. See also, *supra*, note 47, for an account of the events which culminated in this announcement.

The Minister's press release is also instructive for its conception of what made the revenue writs unnecessary and the drug writs necessary:

The collective public interest in the effective enforcement of the laws of Canada must be carefully balanced against the essential freedom of the individual from unreasonable search and seizure. On balance, the government has concluded that while the effective enforcement of the Customs and Excise laws does not require such extra-ordinary search powers, the enforcement of the Narcotic Control and Food and Drug [sic] Acts does require the existence [sic] and utilization by the R.C.M. Police of writs of assistance.... One of the primary difficulties in effectively policing illicit possession and trafficking in drugs is the pervasive influence of organized crime. That influence, plus the covert nature and ease of transportation and disposal of illicit drugs, requires extra-ordinary measures to efficiently and effectively enforce the Narcotics [sic] Control and Food and Drug [sic] Acts. This, when coupled with the difficulty of obtaining search warrants on very short notice, justifies, in the government's view, retention of special search powers. (*Ibidem*, pp. 2-3)

With the introduction of Bill C-162 on June 7, 1983, the federal government confirmed that it would not retain the writ of assistance for customs enforcement. Conspicuously absent from the proposed *Customs Act* is any reference to powers of entry, search or seizure being exercised pursuant to a writ of assistance.

88. See, *supra*, note 47, for a description of the modifications which were to be worked upon the drug writs.
89. *Supra*, note 87, p. 3.
90. See, for example, the Solicitor General's brief on "Writs of Assistance/Drug Law Enforcement", prepared for distribution to the Justice and Legal Affairs Committee on November 26, 1981. Section F of that brief deals with writs of assistance and contains a subsection (c), attributed to the R.C.M.P., and entitled "Illustrative Cases Showing the Need for Writs of Assistance". At page 2, the subsection sums up, in these terms, the illustrative cases which follow:

There are numerous other similar cases on file, however, in a final analysis the necessity for the use of a Writ of Assistance is always the unavailability of a conventional Warrant due to the exigent circumstances of the investigation.

In examining the claims for the writ's necessity, the Commission looked of course to the R.C.M.P. Operational Manual: see "Bulletin No. OM-175", issued December 1, 1982 for inclusion in Ch. II.6.D. and F. of the Operational Manual. The two principal conditions precedent to the use of writs of assistance are (a) that there be "insufficient time to obtain a Warrant to Search", and (b) that the

writ-holder ensure that he “can satisfy a justice as [he] would in an Information to Obtain a Search Warrant that there are reasonable grounds to believe that the items sought are on the premises” (p. 3).

The Commission is not presently obliged to take a position as to how scrupulously R.C.M.P. personnel respect these criteria. In any event, the conclusion that the writ of assistance is unnecessary does not need to be founded on evidence that it is being abused or that it is being used inconsistently with the administrative guidelines enunciated in the R.C.M.P. Operational Manual.

91. The case histories following have been taken from the Solicitor General's brief on “Writs of Assistance/Drug Law Enforcement”, *supra*, note 90, section F(c), pp. 4-9.
92. As the R.C.M.P. correctly acknowledged in Case history 4, warrants can be issued under the *Narcotic Control Act* only in relation to narcotics reasonably believed to be on the premises at the time the warrant is issued. In the terms of subsection 10(2) of the *Narcotic Control Act*, “[a] justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic ... in any dwelling house may issue a warrant....” Strictly speaking, then, the warrant referred to in Case history 3 should not have been issued.
93. *Eccles v. Bourque*, [1975] 2 S.C.R. 739. Paragraph 450(1)(a) of the *Criminal Code* permits a peace officer to arrest without warrant anyone who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence. *Eccles v. Bourque* established that this statutory power of arrest without warrant was available without regard to spatial limitations. Thus, a peace officer may arrest without warrant *anyone* reasonably and probably believed to have committed or to be about to commit an indictable offence; and he may exercise that power of arrest without warrant *anywhere*, whether in a public place or in a dwelling or other private premises. In effect, the police have a power of forcible entry commensurate with their powers of arrest; moreover, this power is not reserved to exigent circumstances. *Per* Dickson J. in *Eccles v. Bourque*, *ibidem*, p. 743:

[T]here are occasions when the interest of a private individual in the security of his house must yield to the public interest, when the public at large has an interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of one of his friends.... Thus it will be seen that the broad basic principle of sanctity of the home is subject to the exception that upon proper demand the officials of the King may break down doors to arrest.

For a different view, however, see the majority judgment of Houlden J.A. in *R. v. Landry* (1982), 63 C.C.C. (2d) 289 (Ont. C.A.).

The common law has imposed some restrictions upon the right implied in the power of arrest without warrant to enter private premises. However, these restrictions attach not to the arrest power *per se*, but rather to the power of entry that is implied when the arrest is to be effected on private premises. Indeed, the same restrictions attach whether the entry upon private premises is to be accomplished with or without warrant, and whether the purpose of the entry is to effect an arrest or to conduct a search. *Per* Dickson J. in *Eccles v. Bourque*, *ibidem*, p. 746, “the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance”.

The common law’s requirements of notice as a condition of lawful entry are, however, defeasible requirements, in the sense that they may be dispensed with in certain exigent circumstances, including the following: (a) to prevent danger to life or safety; (b) to prevent the destruction of contraband or evidence; and (c) to arrest a person found committing a criminal offence who is being freshly pursued and who takes refuge in such premises. In the result, whenever these or other recognized exigencies obtain, the police may dispense with the notice and make forcible entry.

The significance of this brief exegesis for present purposes is simply this. As the law presently stands, the statutory power of arrest without warrant, together with its ancillary powers of entry and search incidental to arrest, provides as much authority as could conceivably be needed to accommodate the exigencies of drug enforcement. More explicitly, but for one of the search incidents described in the R.C.M.P. case histories, no search warrant was necessary; nor, correspondingly, was the writ of assistance necessary either.

94. Pursuant to subsection 450(1) of the *Criminal Code*, which reads:

450(1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence, [or]

(b) a person whom he finds committing a criminal offence....

Which of paragraphs (a) or (b) would obtain would depend upon the particular circumstances, but, in combination, these provisions confer a power to arrest for all indictable offences — past, present and imminent. Clearly, the police had reasonable grounds to believe that the parties within the rooming house had committed, were committing, or were about to commit the indictable offence of

trafficking in a narcotic or drug, contrary either to section 4 of the *Narcotic Control Act*, *supra*, note 25, or section 34 of the *Food and Drugs Act*, *supra*, note 25.

95. The power to search incidental to arrest is a common-law power of some longstanding. The standard for the power's exercise has fluctuated somewhat, but, at a minimum, it is available where the arresting officer reasonably believes it to be "prudent and right", in the words of Williams J. in *Leigh v. Cole* (1853), 6 Cox C.C. 329, p. 332. The permissible purposes of a search incidental to arrest are essentially two: (a) to discover concealed weapons or articles which the suspect might use to injure himself or others, or which might be used to assist him to escape; and (b) to secure or preserve evidence with respect to the offence for which the person has been arrested. See *Gottschalk v. Hutton* (1921), 36 C.C.C. 298 (Alta. S.C. A.D.), pp. 301-302; and *Reynen v. Antonenko* (1975), 20 C.C.C. (2d) 342 (Alta. S.C. T.D.).

For present purposes, the important point is perhaps that, although the power to search does not follow automatically from the power to arrest, the search power is nevertheless available whenever a search would be reasonably prudent — a rather more relaxed standard of belief than that which governs the arrest power itself, i.e., reasonable and probable grounds.

96. The exact scope of the power of search incidental to arrest is somewhat sketchily-defined in Canada. However, it is generally conceded to extend to areas within the control of the person arrested. According to the *Report of the Canadian Committee on Corrections*, *supra*, note 78, p. 62:

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

97. *Per* Dickson J. in *Eccles v. Bourque*, *supra*, note 93, p. 747:

In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry. Minimally they should request admission and have admission denied although it is recognized there will be occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required.

98. The terms "surreptitious entry" and "intelligence probe" are close equivalents, though it should be understood that the former term is often used to describe a quite distinct class of entries, i.e., those entailed in the installation, maintenance and removal of electronic surveillance devices. The legality of this class of entries will be addressed in the Commission's forthcoming Working Paper on Electronic Surveillance.

The surreptitious entries or intelligence probes with which we are here concerned typically relate to drug enforcement. In a brief to the McDonald Inquiry, the R.C.M.P. submitted that surreptitious entries were essential investigative techniques for offences involving drug manufacturing and trafficking: Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report, vol. 1, (Ottawa: Supply and Services, 1981), pp. 143-44.

For present purposes, it is important to emphasize that this class of entries has two principal characteristics: (a) they are necessarily covert, and (b) they are conditioned upon suspicion rather than reasonable belief. It was this latter characteristic which led the McDonald Inquiry to conclude that "any broad power to search private premises ... upon mere suspicion that there might be evidence there of the commission of an offence or the intended commission of an offence, would be contrary to the established traditions of criminal law enforcement procedure in Canada." (*Ibidem*, p. 144)

99. In Part Two of this Report, the Commission recommends that procedures be made available to permit search warrants to be obtained by telephone or other means of telecommunication in circumstances where a personal appearance before a justice would be impracticable. If implemented, this recommendation would substantially reduce the amount of time required to obtain a search warrant.
100. Note that the Commission is asserting here only that there is no statutory or common-law authority which would permit an entry, surreptitious or otherwise, for what might loosely be described as intelligence purposes. This is not, for the moment, to say that such entries are illegal. In this, we concur with the McDonald Inquiry, *supra*, note 98, p. 123: "[W]e have no hesitation in saying that surreptitious entry ... is conduct 'not authorized or provided by law' and therefore not to be permitted, as a matter of policy, unless the law expressly permits it in the circumstances." For a contrary view, see the memorandum prepared for the Department of Justice by the law firm of Lang, Michener, Farquharson and Wright, dated June 14, 1981; and the memorandum prepared by the Honourable Wishart Spence, released by the Department on August 27, 1981.

101. Subsection 10(1) of the *Narcotic Control Act*, *supra*, note 25, and subsection 37(1) of the *Food and Drugs Act*, *supra*, note 25, are identical in this respect. Both permit warranted or writ-assisted entries upon residential premises to search; but neither obliges the seizure of any narcotics or drugs so found. According to paragraph 10(1)(c) of the *Narcotic Control Act*, for example, "a peace officer may ... seize and take away any narcotic found." Correspondingly, he may not, if it were thought preferable to delay the seizure until the suspect could be more definitively linked with the drugs.
102. One of the many curious features of the *Customs Act*, *supra*, note 25, is that it makes no provision for the issuance of search warrants. Instead, the *Customs Act* provides a declaration procedure, according to which entry, search and seizure upon private premises are conditioned upon a sworn information to a justice of the peace that there is "reasonable cause to suspect that goods liable to forfeiture are in [a] particular building", etc. (subsection 134(1)). However, the justice to whom such a declaration is made would appear to have no discretion to refuse permission to search; nor, clearly, does the justice have any capacity to issue a warrant authorizing the search. In practice, the justice can sometimes be prevailed upon to issue what is styled an "Authorization to Search". Strictly speaking, however, this document is not an authorization, but a certificate attesting to the customs officer's having made a sworn declaration showing reasonable cause to suspect the presence of goods liable to forfeiture.

Also rather curious is the *Customs Act*'s failure to make provision, except by means of a writ of assistance, for a search by night. Since the declaration procedure permits searches only between sunrise and sunset, it is sometimes asserted that writs of assistance are necessary to permit searches by night. The more obvious solution to both problems, however, is to provide for the issuance of search warrants for execution by day or, where reasonable cause can be shown, by night. Hence our recommendation and, presumably, hence also section 104 of Bill C-162 of the proposed *Customs Act*, given first reading on June 7, 1983.

If the *Customs Act*'s powers of entry, search and seizure upon private premises were to be regulated within the rule of search with warrant or within the principled exceptions to that rule, it would be entirely inconsistent to retain subsection 134(3), which reads:

Such acts [entry, search and seizure] may be done by an officer without oath or the assistance of a justice of the peace, in places where no justice of the peace resides, or where no justice of the peace can be found within five miles at the time of the search.

In urging the repeal of subsection 134(3), the Commission is also aware that, in jurisdictions where the office of the justice of the peace

has been abolished, customs officers have sometimes given this section altogether too literal an interpretation: the office of justice of the peace having been abolished, customs officers are therefore exempt from the obligation in subsection 134(1) of making a sworn declaration before a justice prior to entry and search. In any event, should it prove a problem to find a justice of the peace — or his successor in those provinces which have abolished the office — a search warrant could be obtained by telephone or other means of telecommunication, in accordance with the recommendations in Part Two of this Report.

PART TWO:
TELEWARRANTS

1. Introduction

Central to the Commission's approach to police powers of search and seizure in criminal-law enforcement has been the precept that those powers should, as a rule, be exercised by judicial warrant, issued before the event and upon particular information; and, as a corollary to that rule, exceptional powers of search without warrant should be reserved to circumstances of recognized exigency or informed consent.

Precisely which exigencies the Commission would recognize will be spelled out in our forthcoming Report to Parliament on Police Powers of Search and Seizure. For the present, it is enough to emphasize that those exigencies would not include the frequently-recited difficulties of obtaining access to a justice of the peace. Even conceding these difficulties, the solution cannot be to dispense with the requirements of judicial authorization prior to search. It must rather be to make the justice of the peace more accessible. To this end, we recommend that it be permissible to issue search warrants by telephone or other means of telecommunication in circumstances where a personal appearance before a justice would be impracticable.

Procedures for granting search warrants by telephone have already been adopted in some jurisdictions¹ and recommended for implementation in several others.² In every jurisdiction in which these procedures have been endorsed, it has been in recognition of the need, if the rule is to be search by warrant, to facilitate access to the requisite judicial officers. Canada's justices of the peace are by no means unique in being concentrated in urban areas, enjoying regular office hours, and carrying a host of judicial and administrative responsibilities. Similarly, the problems which Canada's federal, provincial and municipal police officers encounter in obtaining search warrants in areas both urban and rural, both within and without regular office hours, are common to a good many other jurisdictions as well. If one is to encourage respect for, and indeed insist upon, a regime of judicially-regulated powers of search and seizure, then some of the constraints upon access to the office of the justice of the peace must be removed.

We believe that access could best be facilitated by adapting the issuance of search warrants to the technology of telecommunications. In essence, this adaptation would entail nothing more than dispensing, in appropriate cases, with the usual requirement that the “information upon oath” be tendered personally and in writing.³

Clearly, if police officers were not obliged in all cases to appear personally before a justice, the search warrant process would be that much more accessible and that much more expeditious.⁴ But at what cost to the integrity of the search warrant process? Would dispensing with the requirement that the “information upon oath” be tendered personally and in writing undermine those hallmarks of the search warrant process, judiciality and particularity? Much would depend, of course, upon the procedures devised for obtaining search warrants by telephone or other means of telecommunication. At first blush, however, there would seem no obvious impediment to ensuring that telewarrants were as judicial and as particular as conventional warrants.

Ensuring that telewarrants remain as particular as conventional warrants is a simple matter of insisting upon the usual requirements that the “information upon oath” particularly describe the offence alleged, the items liable to seizure, and the premises to be searched.⁵ Similarly, such warrant as may issue must state the offence alleged with enough precision to apprise anyone concerned of its nature; it must also describe the items to be seized with enough specificity to permit their identification by those who execute the warrant; and the warrant must describe the location to be searched with sufficient accuracy to enable one, from a mere reading of it, to know what premises are authorized to be searched. In aggregate, these requirements of particularity are not so exacting that they could not as easily be tendered by telephone as by written information on oath.

Preserving the judiciality of the search warrant process would require close adherence to the spirit, if not the letter, of the *Criminal Code*'s general provisions for the issuance of search warrants.⁶ Thus, if telewarrant procedures were not to undermine the judiciality of the process, it would be imperative

- (a) that the “information upon oath” satisfy the prevailing substantive and probative criteria (though not the formal criteria prescribed by section 443 of the *Criminal Code*);

- (b) that the “information upon oath” be reduced to writing (though not necessarily prior to the application for the warrant);
- (c) that the search warrant be issued in writing “under the hand” of the authorizing justice, and that it satisfy the prevailing formal and substantive criteria; and
- (d) that there be a report upon the execution of the warrant either to the issuing justice or to a justice for the territorial division in which the warrant was executed, or to both.

The argument could be made that, even if the prevailing standards of judiciality and particularity were maintained, the telewarrant would still present serious risks to the integrity of the process. For example, would not justices of the peace be vulnerable to the pressures of urgent, late-night entreaties from police officers seeking search warrants? Would dispensing with the requirement of a personal appearance not deprive the justice of the opportunity to observe the applicant’s demeanour and so diminish the judicial character of the procedure? Further, would not the absence of a written information on oath dilute the prevailing standards of particularity as to the offence, the premises to be searched, and the items to be seized, especially in complex cases? Or worse perhaps, would not the absence of a written information on oath be conducive to relaxing the prevailing requirement that there be reasonable grounds to believe that an offence has been committed and that items referable to that offence are to be found on the premises to be searched? Or worse still, what of the spectre of “left-handing” search warrants, where police officers fraudulently prepare facsimiles of search warrants, with or without the intention of seeking judicial authorization after the event?⁷

Whether taken individually or collectively, these questions are not to be lightly dismissed. We would observe, however, that many of these questions express a concern about the integrity of justices and peace officers, rather than a concern about the integrity of the procedures for the issuance of search warrants by telephone or other means of telecommunication. Thus, while recognizing that these are legitimate matters of concern, we would also recognize that they are not peculiar to telewarrants *per se*, and, as such, the adaptation of search warrant issuance to telecommunications can neither be expected to resolve, nor, correspondingly, to compound these concerns.

In any event, it seems a doubtful proposition that an information on oath presented by telephone would make for greater pressures upon the justice than one presented personally. And it seems unquestionable that an information on oath, recorded verbatim and subsequently transcribed, is as much a record of the application as one tendered in Form 1, as prescribed by section 443 of the *Criminal Code*. That being so, search warrant issuance would remain an essentially documentary procedure, one in which the applicant's demeanour would continue to be of little significance.⁸ To be sure, there are doubtless cases of such complexity that the absence of an information in writing would occasion difficulties, both for the peace officer in his presentation and for the justice in his evaluation. Usually, however, complex investigations proceed more painstakingly and more slowly; we should expect, therefore, that such investigations would rarely prompt an application for a search warrant by telephone or other means of telecommunication. If such an application were to be made, and if the peace officer's information were not sufficiently coherent to permit its proper evaluation, it would remain for the justice to refuse the application.

On balance, therefore, we believe that the telewarrant presents no substantial risk of a diminution in the standards of judiciality and particularity which presently attach to the issuance of search warrants.

2. Recommendations and Commentary

RECOMMENDATION

1. Part XIII of the *Criminal Code* of Canada should be amended by substituting the words "this or any Act of Parliament" for the words "this Act" in paragraphs 443(1)(a) and (b).

The question of whether search warrants may be issued pursuant to section 443 for offences other than those found in the *Criminal Code* has occasioned considerable litigation.⁹ Had Bill C-21, the *Criminal Law Amendment Act, 1978*, been passed by Parliament, that question would have been resolved in the affirmative: section 58 of that bill would have replaced the words "this Act" in paragraphs

443(1)(a) and (b) with the words “this Act or any other Act of Parliament”. We propose a similar amendment, though for additional reasons.

The amendment proposed for paragraphs 443(1)(a) and (b) is intended to accomplish three objectives. First, it ensures that the procedures for telewarrants would be modelled upon what we believe is the most appropriate procedural regime presently available, i.e., section 443 of the *Criminal Code*. Better the model of section 443 than, for example, the gaming, betting and bawdy-house warrants of section 181, which require no sworn information and no specification of the items to be seized. Second, it ensures that both conventional and telecommunicated search warrants would be available not only for *Criminal Code* offences, but also for the investigation of offences against the *Narcotic Control Act*, the *Food and Drugs Act*, and other items of federal legislation. Third, it forecloses the possibility that there might subsequently be a proliferation of telewarrant regimes, each with its own differing justifications and procedures.

RECOMMENDATION

2. The following provisions for the issuance of search warrants by telephone or other means of telecommunication should be enacted as section 443.1 of the *Criminal Code*:

(1) Where a peace officer believes that it would be impracticable to appear personally before a justice to make application for a search warrant in accordance with section 443, he may submit an information on oath by telephone or other means of telecommunication.

In making alternative procedures available for the issuance of search warrants, it is necessary to specify *when* and *by whom* resort to such procedures would be permissible. As we conceive it, the telewarrant procedures represent nothing more than a belated adaptation of search warrant issuance to available communications technology. We can therefore see no good reason for confining the telewarrant within a narrow class of exigent circumstances. Nor, correspondingly, are we inclined to recognize the telewarrant as a mere convenience to peace officers seeking the authorization of a judicial warrant. Instead, we would urge that, as a general rule, it be

available whenever circumstances of time or distance make it impracticable to insist upon the applicant making a personal appearance before a justice.¹⁰

Similarly, since we are confident that the telewarrant would entail no diminution in the prevailing standards of judiciality and particularity, we see no reason for reserving responsibility for their issuance to any higher judicial officer than the justice of the peace. We appreciate that, in some provinces, responsibility for issuing search warrants is exercised by provincial court judges. Under the scheme here being proposed, the designation of the order of judicial officer responsible for search warrant issuance would similarly accommodate the situation in each province.

Although we recommend no special constraints upon when and by whom telewarrants might be issued, the proposed subsection 443.1(1) would permit only peace officers to apply for search warrants by telephone or other means of telecommunication. By contrast, both private individuals and peace officers may apply for and execute search warrants issued pursuant to section 443 of the *Criminal Code*. In our Working Paper 30, *Police Powers: Search and Seizure in Criminal Law Enforcement*, we recommended that private individuals continue to be entitled to apply for search warrants, but that responsibility for their execution be reserved exclusively to peace officers. For telewarrants, however, we would go one step further and insist upon the applicant and executor being in all cases a peace officer. We impose this limitation principally because it is the peace officer's access to a justice of the peace which the telewarrant procedures are designed to facilitate. Additional reasons for this limitation will become apparent as this proposal is further elaborated, reasons having primarily to do with ensuring the integrity of the telewarrant issuance procedures.

(2) An information submitted by telephone or other means of telecommunication shall be on oath and shall be recorded verbatim by the justice, who shall as soon as practicable thereafter cause to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution a transcription of that record, certified by him as to time, date and contents.

This provision requires that a sworn information be tendered in support of an application for a search warrant by telephone or other

means of telecommunication. As well, this provision makes the justice solely responsible for maintaining a verbatim record of the application and obliges him to file a certified transcription of that record.

In the majority of cases, we would expect that the application for a telewarrant would be recorded electronically. However, a stenographic or longhand verbatim record would also be permissible. What is important is not the means by which the record is made; rather, what is important is that the record be verbatim, that it be made by the justice, and that, as soon as practicable thereafter, it be transcribed, certified by the justice and filed.

We have stipulated in subsection 443.1(2) that a certified transcription of the record of the application is to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution. Alternatively, we could have stipulated that the transcription be filed with the clerk of the court for the territorial division in which the warrant was issued. However, as our proposal for telewarrants is elaborated, it will become evident that we are anxious to ensure that persons whose premises are searched have all lawful access to the information on oath, to the warrant (or its facsimile), and to the report filed by the peace officer upon execution of the warrant. To facilitate that access, we have designated the territorial division in which the warrant is executed as the appropriate location for maintaining the necessary records. As well, the territorial division of execution is both the most likely locale for whatever prosecution might be connected with the investigation and the most convenient place for the peace officer to file his report after execution of the warrant.

(3) For purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

The proposed subsection 443.1(3) merely makes explicit provision for the administration of oaths by telephone or other means of telecommunication. The provision is, by its terms, limited to facilitating the swearing of the information submitted in support of an application for a telewarrant.

(4) An information on oath submitted by telephone or other means of telecommunication shall include

- (a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before the justice;**
- (b) a statement of the offence alleged, the premises to be searched and the items asserted as being liable to seizure; and**
- (c) a statement, within the terms of paragraphs 443(1)(a), (b) or (c), of the peace officer's grounds for belief that items liable to seizure in respect of the offence alleged will be found in the premises to be searched.**

In seeking to have a search warrant issued by telephone or other means of telecommunication, a peace officer is essentially seeking a dispensation from the usual requirements that he attend personally before the justice and submit a written information on oath. The proposed paragraph 443.1(4)(a) thus obliges the applicant peace officer to establish to the justice's satisfaction that a personal appearance would be impracticable in the circumstances and, accordingly, that it would be reasonable to dispense with that requirement. Since granting or refusing this dispensation entails an exercise of judicial discretion, the facts and circumstances on which that discretion is exercised ought to form a part of the record.

The proposed paragraph 443.1(4)(b) also builds into the telewarrant procedures a requirement not found in the present section 443 of the *Criminal Code*. Essentially, this paragraph is designed to separate the substantive elements of the information (i.e., the specification of the offence alleged, the premises to be searched and the items sought to be seized) from the probative elements (i.e., the specification of the grounds for believing that an offence has been committed, and that items liable to seizure in respect of that offence are to be found upon the premises to be searched). We believe it is particularly important that these elements be separated within the information submitted for a telewarrant because we recognize that an information on oath presented orally can entail a greater potential for confusion than one presented in writing.

The proposed paragraph 443.1(4)(c) is intended merely to ensure that in all other respects an information submitted in support of an application for a telewarrant conforms to the same probative and temporal criteria as are stipulated by section 443 for the issuance of conventional search warrants.

(5) A justice who is satisfied that an information on oath submitted by telephone or other means of telecommunication

(a) conforms to the requirements of subsection 443.1(4),

(b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and

(c) discloses reasonable grounds for the issuance of a search warrant,

may issue a warrant to a peace officer conferring the same authority to search and seize as may be conferred by a warrant issued pursuant to subsection 443(1).

Before considering whether the grounds for issuing a telecommunicated search warrant have been sufficiently made out, the justice is obliged by subsection 443.1 (5) to satisfy himself on two preliminary matters. First, does the information submitted include the statements required by subsection 443.1 (4) as to the circumstances which make a personal appearance impracticable, the offence alleged, the premises to be searched and the items to be seized, and the peace officer's grounds for belief that items liable to seizure in respect of the offence alleged will be found in the premises to be searched? Second, does the information disclose reasonable grounds for dispensing with the usual requirements of an application presented personally and in writing?

If the justice is satisfied on these preliminary matters, he would then proceed to consider whether the information submitted disclosed reasonable grounds for the issuance of a search warrant. Such warrant as might then be granted would be issued subject to the provisions of subsection 443(1) as to the powers of search and seizure conferred.

(6) Where a justice issues a warrant under subsection 443.1(5),

(a) the justice shall complete and sign the warrant in Form 5.1, noting upon its face the time, date and place of issuance;

(b) the peace officer, upon the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting upon its face the name of the issuing justice and the time, date and place of issuance;

(c) the justice shall direct the peace officer to record, and the peace officer shall record and complete upon the face of the facsimile warrant, the following endorsement:

***To the Occupant:* This search warrant was issued by telephone or other means of telecommunication. If you wish to know the basis upon which this warrant was issued, you may obtain a copy of the “information upon oath” from the clerk of the court for the territorial division in which the warrant was executed, at [address].**

You may also obtain from the clerk of the court a copy of the report filed by the peace officer who executed this warrant. That report will indicate what things, if any, were seized and where they are presently being held.

(d) the justice shall thereupon cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

Subsection 443.1(6) elaborates the procedures attendant upon the issuance of a search warrant by telephone or other means of telecommunication. By paragraph 443.1(6)(a), the justice is made responsible for the completion and signature of the original warrant document. We appreciate that, as a matter of convenience, conventional search warrants are commonly prepared by, or on behalf of, the applicant peace officer. However, the issuance of conventional warrants presents no risk of disparity between the warrant as issued and the warrant as executed. To counter that risk in the issuance of telewarrants, we require that the justice assume sole responsibility for completing the original warrant document.

As well, paragraph 443.1(6)(a) specifies that such warrant as may issue *shall* be in Form 5.1. This represents a departure from the terms of subsection 443(3) of the *Criminal Code*, which provides that a conventional warrant “*may* be in Form 5”. We recommend the mandatory use of the proposed Form 5.1 because we believe it imperative to avoid the formal problems which surfaced in our five-city survey of search warrant practices. In aggregate, some 25 per cent of the search warrants evaluated by our panel of superior and appellate court judges were pronounced fatally defective on formal grounds alone. For the most part, these fatal defects were occasioned by the inadequacies of local innovations upon the *Criminal Code*’s Form 5, both for warrants issued pursuant to section 443 and for warrants issued pursuant to such statutes as the *Narcotic*

Control Act and the *Food and Drugs Act*, which make no provision whatever for a model form of warrant.

Paragraph 443.1(6)(b) similarly requires the facsimile warrant, prepared by the peace officer upon the direction of the justice, to be in Form 5.1. Ordinarily, we expect that both applicant and issuer will prepare the warrant and facsimiles by completing a pre-printed version of the proposed Form 5.1. There may of course be occasions when, for want of the requisite forms at hand, either the justice or the peace officer may be put to the inconvenience of a longhand transcription of the whole of the warrant or its facsimiles. This occasional inconvenience is, we believe, far outweighed by the benefits to the formal validity of telewarrant issuance which are entailed in the mandatory use of the proposed Form 5.1.

Paragraphs (a) and (b) of the proposed subsection 443.1(6) also require that both the warrant and its facsimiles carry a notation of the time, date and place of issuance. These notations are intended as a further protection against disparities between the warrant which is issued and the facsimile warrant which is executed.

The endorsement required by paragraph 443.1(6)(c) anticipates the provisions made in subsections 443.1(7) and (8) for a copy of the facsimile warrant to be left with the person whose premises are searched or, in the case of unoccupied premises, to be left suitably affixed within the premises. Our reasons for requiring that a copy of the facsimile warrant be left upon the premises searched will be elaborated in the commentary to those subsections. There are, however, several very practical reasons for our recommendation that the facsimile warrant carry an endorsement in the terms proposed.

First, there is obvious merit in apprising the occupier that the document with which he is presented (or which is left upon his premises) represents an exact copy of a judicially-authorized search warrant issued by telephone or other means of telecommunication. The first sentence of the endorsement is thus directed to apprising the occupier of that fact and to allaying whatever doubts may be occasioned by the notation of the issuing justice's name in lieu of the usual signature.

Second, as was indicated earlier, we are anxious to assist the occupier in obtaining all lawful access to the information on oath, to the warrant (or its facsimile), and to the report filed by the peace

officer after execution of the warrant. In practical terms, that access is dependant upon the occupier being able to ascertain precisely where the necessary records are being maintained. According to subsection 443.1(2) of our proposed telewarrant scheme, a certified transcription of the application is to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution. The second sentence of the endorsement proposed in paragraph 443.1(6)(c) thus merely refers the occupier to the particular address from which he may obtain a copy of the information submitted in support of the application for a telewarrant.

Third, the endorsement required by paragraph 443.1(6)(c) also anticipates the provision made in subsection 443.1(9) for a report to be filed by the peace officer who executes the warrant. The second paragraph of the endorsement (443.1(9)(b)) thus advises the occupier that he may ascertain what things, if any, were seized and their whereabouts by obtaining a copy of the peace officer's post-execution report.

Paragraph (d) of the proposed subsection 443.1(6) makes the same provision for filing the original of the warrant as was earlier made by subsection 443.1(2) for filing the transcription of the information on oath. Clearly, whether provision is made for the maintenance of the necessary records in the territorial division of issuance or the territorial division of execution, it is important that the same jurisdiction be designated for all such purposes.

(7) A peace officer who executes a search warrant issued by telephone or other means of telecommunication shall, before entry or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the premises.

At present, the peace officer executing a search warrant is under a minimal duty to provide information to the 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 warrant with him. 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 clear requirement that the warrant be produced at the outset of a search or as soon as practicable thereafter.

In our Working Paper 30 entitled *Police Powers: Search and Seizure in Criminal Law Enforcement*, we recommended that such a requirement attach to the execution of conventional search warrants, principally because we believe that presenting a copy of the warrant — before the search commences or as soon as practicable thereafter — provides the occupier with the best assurance that the intrusion has been judicially-authorized. As well, of course, providing the occupier with a copy of the warrant apprises him as to precisely what premises are liable to be searched and what things are liable to be seized.

These same assurances as to the lawfulness of the search and the scope of the intrusion thereby authorized are perhaps even more imperative for telewarrants than for conventional warrants, not least because of the novelty of the procedure and the absence of the original warrant. Hence our recommendation that a person present and ostensibly in control of the premises be provided, at the earliest practicable opportunity, with a facsimile of the warrant.

(8) A peace officer who executes upon unoccupied premises a search warrant issued by telephone or other means of telecommunication shall, upon entry or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the premises.

Subsection 443.1(8) imposes upon a peace officer who executes a telewarrant upon unoccupied premises an obligation similar to that imposed by subsection 443.1(7) in relation to occupied premises. Persons whose premises are entered and searched in their absence are, we believe, entitled to be apprised of that fact and, as well, to be apprised of the process by which that intrusion was authorized. Whether the premises be occupied or unoccupied, we believe that a facsimile of the warrant provides the best assurance of the lawfulness of the intrusion; and that the facsimile warrant's proposed

endorsement provides the best assurance that the occupier will be able to ascertain why his premises were searched, what, if anything, was removed, and where it is being held in custody.

(9) A peace officer to whom a search warrant is issued by telephone or other means of telecommunication shall within three days of issuance file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution, which report shall include

- (a) a statement of the time and date of execution or, if the warrant was not executed, a statement of the reasons why it was not executed;**
- (b) a statement of what things, if any, were seized pursuant to the warrant and where they are presently being held;**
- (c) a statement of what things, if any, were seized in addition to the things mentioned in the warrant and where they are presently being held, together with a statement of the peace officer's grounds for belief that those things had been obtained by, or used in, the commission of an offence.**

Warrants issued pursuant to subsection 443(1) of the *Criminal Code* require that the peace officer "carry [whatever may be seized] before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law". As the prefix "tele" implies, it would frequently be quite impracticable to insist upon literal compliance with this requirement in the case of seizures made pursuant to a telewarrant. Indeed, it is frequently impracticable to carry before a justice things seized pursuant to a conventional search warrant, e.g., in cases involving the large-scale seizure of documents, or the seizure of livestock or perishables. For present purposes, however, it is enough to observe that obliging a peace officer to file a written report is a more practical means of achieving the same objective, namely, to ensure a measure of accountability to a judicial officer in respect of things seized by judicial authorization. Hence our general rationale for dispensing with the requirement that things seized pursuant to a telewarrant be carried before a justice; and for requiring instead that the peace officer file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution.

However, subsection 443.1(9) does more than propose a more practicable means of reporting upon things seized to a judicial officer.

Perhaps the most significant aspect of subsection 443.1(9) is that it imports a limitation upon the telewarrant's duration, a limitation not presently attached to conventional search warrants. As we conceive it, the telewarrant is designed for situations in which the need for the authority of a warrant is sufficiently immediate as to make it impracticable for the peace officer to appear personally before the justice. It does not seem unreasonable, therefore, to insist upon a certain proximity in time between the issuance and execution of a telewarrant. Indeed, without that proximity, there is some risk that the search will be conducted in circumstances quite different from those appropriate for an application by telephone or other means of telecommunication — or, for that matter, quite different from those which prompted the justice to authorize the search by judicial warrant.

We have fixed three days as the time within which the warrant is to be executed and the report filed. This would seem a reasonable amount of time, particularly given the results of our five-city survey of search warrant practices: 82.5 per cent of all conventional warrants were executed within two days of issuance; further, 97.1 per cent of the conventional warrants on which an expiry date was specified were executed within only one day. From these data, we have concluded first, that the specification of a date certain for execution substantially reduces the time between issuance and execution; and second, that a three-day period for executing the warrant and filing the report is a feasible limitation upon the telewarrant's duration.

By paragraph (a) of the proposed subsection 443.1 (9), the report filed is to include a statement of the time and date of execution or, if the warrant was not executed, a statement of the reasons why it was not executed. It is presently a common police practice to endorse the time and date of execution upon the warrant, so nothing further needs perhaps to be said of the first part of paragraph 443.1 (9) (a). Not so common, however, is the practice of reporting upon warrants which, for one reason or another, were not executed. We believe that both practices, neither of which is presently required in relation to conventional warrants, should be made mandatory for telewarrants. Paragraph 443.1 (9) (a) thus ensures that the material circumstances attending the execution (or attempted execution) of a telewarrant are, by virtue of their possible relevance in any subsequent civil or criminal litigation, made a matter of record and included in the return upon the warrant.

Paragraph 443.1(9)(b) merely embodies and formalizes, consistently with the terms of the endorsement proposed by subsection 443.1(6), the statutory and common-law reporting requirements which attach to the execution of search warrants.

Paragraph 443.1(9)(c) anticipates Recommendation 3 of Part Two of this Report: by an amendment to section 445 of the *Criminal Code*, we would extend to peace officers executing a telewarrant the same powers as are presently available in the execution of a conventional warrant, i.e., to seize things which, though not specified in the warrant, are reasonably believed to have been obtained by, or used in, the commission of an offence. For such cases, however, we have proposed that the post-execution report include a statement of what things were seized in addition to those mentioned in the warrant, together with a statement of the peace officer's grounds for belief that those things were liable to seizure within the terms of section 445 of the *Criminal Code*.

(10) A clerk of the court to whom a written report is made pursuant to subsection (9) shall as soon as practicable thereafter cause the report, together with the information on oath and the warrant to which it pertains, to be brought before a justice to be dealt with in the same manner as if the warrant had been issued by that justice or some other justice for the same territorial division.

By virtue of subsections 443.1(2), (9) and paragraph 443.1(6)(d), the information, the warrant and the post-execution report are to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution. The proposed subsection 443.1(10) then requires the clerk of the court to bring the consolidated filings before a justice, so as to ensure that an order is made, within the terms of section 446 of the *Criminal Code*, for the detention or release of things seized.

(11) A search warrant issued by telephone or other means of telecommunication is not subject to challenge by reason only that the circumstances were not such as to make it reasonable to dispense with an information submitted personally and in writing.

The proposed subsection 443.1(11) makes it clear that the justice's acceptance of the peace officer's grounds for belief that the circumstances made it reasonable to dispense with an information tendered personally and in writing — a decision which does not go to

the core question of whether there were reasonable grounds to issue the warrant — is not a ground for subsequent challenge.

(12) In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information on oath, transcribed and certified by the justice as to time, date and contents, or of the original warrant, signed by the justice and carrying upon its face a notation of the time, date and place of issuance, shall be *prima facie* proof that the search or seizure was not authorized by such a warrant.

As is evident from subsection 443.1(12), we attach considerable importance to the preservation of both the information on oath, duly transcribed and certified, and the original warrant, duly signed and noted. In the event of subsequent civil or criminal litigation, the absence of either the requisite record of the application or the original warrant would constitute *prima facie* proof that the search or seizure was not authorized by warrant.

One could of course conceive of more stringent consequences, such as, for example, the exclusion of any evidence obtained pursuant to a telewarrant issued or executed in breach, material or otherwise, of the provisions of section 443.1. In a similar vein, one could attach exclusionary consequences or, for that matter, the evidentiary consequences of our proposed subsection 443.1(12), to the peace officer's failure to make a return upon the warrant as prescribed by subsection 443.1(9) or to the clerk's failure to present the consolidated filings to a justice as prescribed by subsection 443.1(10).

Instead, however, we have recommended a quite modest sanction and we have, moreover, limited its application to the failure to produce, in prescribed form, either or both of the two most vital components of judicially-authorized search and seizure — the information submitted and the warrant issued.

Our reasons for insisting that the information and warrant be available for presentation in evidence are essentially two. First, as has already been indicated in Part One of this Report, we believe it to be of the essence of constitutionality that the grounds for the exercise of police powers of search and seizure be determined to be reasonable by a judicial officer, adjudicating before the event and

upon particularly sworn information. Hence our explicit preference for search with warrant as the rule and search without warrant as the exception, an exception to be confined to circumstances of recognized exigency and informed consent. Given that preference, it is self-evident that we would treat the failure to produce the original warrant, or the failure to produce the certified transcription of the information on which it was ostensibly granted, as *prima facie* proof that the search was not authorized by a warrant issued pursuant to section 443.1.

Second, our five-city search-warrant survey too frequently demonstrated record-keeping practices so indifferent as to defy the tracing and collation of particular informations and warrants. To be sure, our survey preceded the enactment of the *Canadian Charter of Rights and Freedoms*. Doubtless, the consequences which the *Charter* carries for unreasonable search or seizure have already prompted some improvements in the justices' record-keeping practices. It must be noted, however, that the shortcomings we observed were in relation to conventional search warrants, warrants applied for, and issued within, the same territorial division. Manifestly, a system which permits search warrants to be issued in one territorial division and executed in another, and which insists upon a consolidated filing of informations, warrants and reports in the territorial division of execution, can be expected to make much more substantial demands upon justices and clerks for the proper maintenance of the necessary records.

Our proposed subsection 443.1(12) thus puts a considerable premium upon the maintenance and preservation of informations and warrants. To tender any less stringent recommendation would, we believe, substantially compromise the integrity of the procedures we have proposed for the issuance and execution of telewarrants. In the absence of either the original warrant, duly signed and noted, or the information upon which it was granted, duly transcribed and certified, there can be little assurance that search and seizure by telewarrant could be effectively challenged or meaningfully reviewed.

RECOMMENDATION

3. Part XIII of the *Criminal Code* of Canada should be amended by substituting the words "sections 443 or 443.1" for the words "section 443" wherever the latter words appear in sections 444, 445, 446 and 447.

The amendments proposed by Recommendation 3 simply ensure that search warrants issued by telephone or other means of telecommunication are in all other respects congruent with conventional search warrants. Thus, the amendment proposed for section 444 ensures that a search warrant issued pursuant to either section 443 or section 443.1 will be available for execution only by day “unless the justice, by the warrant, authorizes execution of it by night”.

Similarly, the amendments proposed for section 445 and section 447 merely extend to peace officers executing a telewarrant the same powers as are presently available in the execution of a conventional warrant, i.e., to seize things which, though not specified in the warrant, are reasonably believed to have been obtained by, or used in, the commission of an offence; and to seize any explosive substance suspected of being intended for an unlawful purpose.

The amendment proposed for section 446 makes applicable to things seized under a telewarrant the same detention, preservation, production and disposition provisions as apply to things seized under a section 443 warrant or pursuant to the powers conferred by section 445.

RECOMMENDATION

4. Part XXV of the *Criminal Code* of Canada should be amended by including the following as Form 5.1.

(See next page)

FORM 5.1

WARRANT TO SEARCH (Section 443.1)

Canada,
Province of [*specify province*]
[*territorial division in which the warrant is issued*].

To A.B. and other peace officers in the [*territorial division in which the warrant is intended for execution*]:

Whereas it appears on the oath of A.B., a peace officer in the [*territorial division in which the warrant is intended for execution*] that there are reasonable grounds for dispensing with an information presented personally and in writing; and that there are reasonable grounds for believing that the following things

[*describe things to be searched for*]

relevant to the investigation of the following offence

[*describe offence in respect of which search is to be made*]

are to be found on the following premises

[*describe premises to be searched*]:

This is, therefore, to authorize and require you within three days of this warrant's issuance to enter the said premises between the hours of [*as the justice may direct*] and to search for and seize the said things and to report thereon to the clerk of the court for the [*territorial division in which the warrant is intended for execution*].

Issued at [*time*] on the [*day*] of [*month*] A.D. [*year*] at [*place*].

.....
A Justice of the Peace/
A Judge of the Provincial Court
in and for the Province of
[*specify province*].

To the Occupant: This search warrant was issued by telephone or other means of telecommunication. If you wish to know the basis upon which this warrant was issued, you may obtain a copy of the "information upon oath" from the clerk of the court for the territorial division in which the warrant was executed, at [*address*].

You may also obtain from the clerk of the court a copy of the report filed by the peace officer who executed this warrant. That report will indicate what things, if any, were seized and where they are presently being held.

Endnotes

1. ARIZONA: Ariz. Rev. Stat. Ann., ss. 13-3914(C), - 3915(C), (1978); CALIFORNIA: Cal. Pen. Code, ss. 1526(b), 1528(b), (West Supp. 1974); MONTANA: Mont. Code Ann., s. 46-5-202, (1979); NEW YORK: N.Y. Crim. Proc. Law, ss. 690.35-690.36 (M^cKinney 1982); NEW SOUTH WALES: *Poisons Act*, N.S.W. Stat., No. 88, s. 43A (1981).
2. UNITED STATES: U.S. National Advisory Commission on Criminal Justice Standards and Goals, *Report on the Police* (Washington: U.S. Government Printing Office, 1973). Recommendation 4.2, entitled "Telephonic Search Warrants", urged "that every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers". See also the *Federal Rules of Criminal Procedure* (St. Paul, Minn.: West Publishing Co., 1981), Rule 41(c)(2); and J. H. Israel, "Legislative Regulation of Searches and Seizures: The Michigan Proposals" (1975), 73 *Mich. L. Rev.* 221, pp. 258-263, 304-305.

AUSTRALIA: Law Reform Commission of Australia, *Criminal Investigation, Report No. 2: An Interim Report* (Canberra: Australian Government Publishing Service, 1975), paras. 201-202. The Australian L.R.C.'s recommendations were incorporated in the *Criminal Investigation Bill, 1977*, as section 62, and in modified form in the *Criminal Investigation Bill, 1981*, as section 59.
3. Subsection 443(1) of the *Criminal Code* refers to an "information upon oath in Form 1", thus clearly requiring that the application for a search warrant be in writing. Strictly speaking, however, there is no statutory or common-law requirement that the informant appear personally before the justice. At its highest, such an appearance is a practical requirement, since the justice may wish to examine the informant orally. Such additional facts and circumstances as may be elicited must of course be upon oath and in Form 1. Clearly, however, the informant can usefully be examined only if he is personally present before the justice, and only if he is before the justice can the "information upon oath in Form 1" be re-sworn if amended. For practical purposes, then,

the application for a search warrant is usually tendered personally by the informant.

4. See e.g., *People v. Aguirre* (1972), 103 Cal. Rptr. 153, where a search warrant was obtained by telephone in as little as twelve minutes.
5. For a full elaboration of the legal requirements pertaining to informations and warrants, see Lee Paikin, *The Issuance of Search Warrants: A Manual* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1981).
6. Sections 443-447.
7. For a description of such practices, see Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), pp. 153-154.
8. Subsection 443(1) begins as follows: "A justice who is satisfied by information upon oath in Form 1...." This opening phrase is generally taken as establishing the issuance of search warrants as an exclusively documentary procedure, and one, moreover, which confines the evidence before the justice to that which appears in the information upon oath. See *Re United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada and the Queen* (1972), 8 C.C.C. (2d) 364 (B.C. S.C.). See also Roach J.A. (dissenting) in *Re Worrall* (1965), 2 C.C.C. 1 (Ont. C.A.).

To be sure, the informant's demeanour may occasionally be of some small significance, especially where the justice seeks further particulars by examining the informant orally. By itself, however, the opportunity to observe the informant's demeanour does not figure in the formal, substantive or probative requirements for the issuance of search warrants.

9. For a brief history of that litigation, see Lee Paikin, *The Issuance of Search Warrants*, *supra*, note 5, pp. 18-21.
10. The accessibility of telewarrant procedures has varied considerably among those jurisdictions in which they have been implemented or recommended for implementation. The most restrictive access was perhaps that proposed by the Committee of Michigan Bar Commissioners, where dispensing with a personal appearance was permissible only where (a) the magistrate found reasonable cause to believe that an appearance would occasion such delay as might result in the loss or destruction of the objects sought; and (b) where the application had been approved by a prosecuting attorney. See section 5[4] of the "Proposed Provisions on Search and Seizure", which appear

as an appendix in J. H. Israel, "Legislative Regulation of Searches and Seizures: The Michigan Proposals". *supra*, note 2.

Almost as restrictive is the Montana legislation, which precludes law-enforcement officers from applying directly to the appropriate judicial officer; s. 46-5-202(3), *supra*, note 1. First, the applicant must convince the county attorney or deputy county attorney (a) that a warrant is justified, and (b) that the circumstances require its immediate issuance. Thereafter, the county attorney contacts a judge by telephone, stating his own conviction that a warrant should be issued by telephone; the judge then contacts the law-enforcement officer at a telephone number provided by the county attorney and hears his application.

Perhaps the least restrictive access is that proposed in Australia's *Criminal Investigation Bill, 1981* and that found in the New South Wales *Poisons Act, 1981*. The bill provides that an application for a search warrant may be made by telephone "[w]here, by reason of circumstances of urgency, [a Police Officer] considers it necessary to do so": sub-section 59(1). The New South Wales legislation similarly gives police officers unrestricted telephone access to stipendiary magistrates for purposes of obtaining a search warrant: section 43A, *Poisons Act, 1981, supra*, note 1. To similar effect are the present California and New York models, neither of which conditions access to the telewarrant procedures upon a finding that it would be reasonable to dispense with a written affidavit. Instead, both jurisdictions provide merely that sworn applications may be made either in writing or orally. Perhaps the most significant aspect of these latter models is that they permit the "information upon oath" to be tendered orally, either by telephone, etc., or by a personal appearance before the issuing magistrate.

Somewhere between these positions is Rule 41(c)(2) of the U.S. *Federal Rules of Criminal Procedure, supra*, note 2, which provides in subdivision (A) that a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means "[i]f the circumstances make it reasonable to dispense with a written affidavit". Rule 41(c)(2)(A) thus reserves the discretion to a federal magistrate and conditions the exercise of that discretion upon the applicant demonstrating to his satisfaction that the circumstances are such as to make it reasonable to dispense with a written affidavit. Significantly, the *Federal Rules* do not limit the magistrate's discretion to circumstances in which a personal appearance would be impracticable. Presumably, therefore, the magistrate could find that a personal appearance would be impracticable, but that the circumstances were nevertheless not appropriate for dispensing with a personal appearance, e.g., because of the complexity of the investigation, etc.

In this Report, we have designed a regime for the issuance of search warrants by telephone or other means of telecommunication which is neither so restrictive as the Michigan and Montana models nor so accessible as the California, New York and Australian models. According to our proposals, access to the telewarrant would be controlled by the justice, who is obliged to make a finding that the peace officer's information on oath discloses reasonable grounds for dispensing with an application presented personally and in writing. As will subsequently be seen in our proposed paragraph 443.1(5)(b), however, the justice's finding of reasonable grounds for dispensing with an information presented personally and in writing is not limited solely to a finding that a personal appearance would be impracticable. The applicant is obliged to set out the circumstances which make such an appearance impracticable, but the justice is not obliged to accept that claim. Nor, having accepted that claim, is the justice obliged to dispense with the requirements of an information presented personally and in writing. In effect, in deciding to dispense with the peace officer's personal appearance, the justice would, according to our proposals, have a measure of discretion equivalent to that which he enjoys in deciding to issue the search warrant itself.

In settling upon what degree of access to telewarrants we would recommend, we have sought out a middle ground between the too restrictive and the too accessible. Thus, for example, we have not conditioned access to the telewarrant upon a demonstration of reasonable grounds to believe that the delay entailed in a personal appearance might result in the loss or destruction of evidence or contraband. Nor have we stipulated the mandatory participation of crown counsel. On the other hand, we have not made the telewarrant so accessible that the decision to resort to the procedures would rest with the peace officer rather than with the justice. Nor have we gone so far as the California or New York legislation, which permits the magistrate to dispense with a written affidavit even where the peace officer is personally present before him.

Our reasons for avoiding a too restrictive access have largely to do with our confidence that the procedures we have designed make the telewarrant as judicial and particular an instrument of search and seizure as the conventional warrant. Those restrictions which we have imposed derive largely from our belief that the decision to dispense with a personal appearance and a written information should be reserved exclusively to the justice. As well, there is the further consideration that, before making the telewarrant procedures any more accessible, we would want to be assured that any such changes would not unduly strain the resources of justices of the peace.

PART THREE:

SUMMARY

OF

RECOMMENDATIONS

PART ONE: Writs of Assistance

We recommend that the writ of assistance be forthwith abolished by amendments to the *Narcotic Control Act*, the *Food and Drugs Act*, the *Customs Act*, and the *Excise Act*.

We further recommend that all writs of assistance now extant be forthwith submitted to the Administrator of the Federal Court of Canada for immediate cancellation.

We further recommend that subsection 134(1) of the *Customs Act* be amended to provide for the issuance of search warrants for execution by day or, upon reasonable cause having been shown, by night; and that subsection 134(3) of the *Customs Act* be repealed so as to abolish the customs officer's powers of entry without warrant where no justice is to be found within five miles of the premises to be searched.

PART TWO: Telewarrants

1. Part XIII of the *Criminal Code* of Canada should be amended by substituting the words "this or any Act of Parliament" for the words "this Act" in paragraphs 443(1)(a) and (b).

2. The following provisions for the issuance of search warrants by telephone or other means of telecommunication should be enacted as section 443.1 of the *Criminal Code*:

(1) Where a peace officer believes that it would be impracticable to appear personally before a justice to make application for a search warrant in accordance with section 443, he may submit an information on oath by telephone or other means of telecommunication.

(2) An information submitted by telephone or other means of telecommunication shall be on oath and shall be recorded verbatim by the justice, who shall as soon as practicable thereafter cause to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution a transcription of that record, certified by him as to time, date and contents.

(3) For purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

(4) An information on oath submitted by telephone or other means of telecommunication shall include

(a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before the justice;

(b) a statement of the offence alleged, the premises to be searched and the items asserted as being liable to seizure; and

(c) a statement, within the terms of paragraphs 443(1)(a), (b) or (c), of the peace officer's grounds for belief that items liable

to seizure in respect of the offence alleged will be found in the premises to be searched.

(5) A justice who is satisfied that an information on oath submitted by telephone or other means of telecommunication

- (a) conforms to the requirements of subsection 443.1(4),
- (b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and
- (c) discloses reasonable grounds for the issuance of a search warrant,

may issue a warrant to a peace officer conferring the same authority to search and seize as may be conferred by a warrant issued pursuant to subsection 443(1).

(6) Where a justice issues a warrant under subsection 443.1(5),

- (a) the justice shall complete and sign the warrant in Form 5.1, noting upon its face the time, date and place of issuance;
- (b) the peace officer, upon the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting upon its face the name of the issuing justice and the time, date and place of issuance;
- (c) the justice shall direct the peace officer to record, and the peace officer shall record and complete upon the face of the facsimile warrant, the following endorsement:

To the Occupant: This search warrant was issued by telephone or other means of telecommunication. If you wish to know the basis upon which this warrant was issued, you may obtain a copy of the "information upon oath" from the clerk of the court for the territorial division in which the warrant was executed, at [address].

You may also obtain from the clerk of the court a copy of the report filed by the peace officer who executed this warrant. That report will indicate what things, if any, were seized and where they are presently being held.

- (d) the justice shall thereupon cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(7) A peace officer who executes a search warrant issued by telephone or other means of telecommunication shall, before entry or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the premises.

(8) A peace officer who executes upon unoccupied premises a search warrant issued by telephone or other means of telecommunication shall, upon entry or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the premises.

(9) A peace officer to whom a search warrant is issued by telephone or other means of telecommunication shall within three days of issuance file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution, which report shall include

(a) a statement of the time and date of execution or, if the warrant was not executed, a statement of the reasons why it was not executed;

(b) a statement of what things, if any, were seized pursuant to the warrant and where they are presently being held;

(c) a statement of what things, if any, were seized in addition to the things mentioned in the warrant and where they are presently being held, together with a statement of the peace officer's grounds for belief that those things had been obtained by, or used in, the commission of an offence.

(10) A clerk of the court to whom a written report is made pursuant to subsection (9) shall as soon as practicable thereafter cause the report, together with the information on oath and the warrant to which it pertains, to be brought before a justice to be dealt with in the same manner as if the warrant had been issued by that justice or some other justice for the same territorial division.

(11) A search warrant issued by telephone or other means of telecommunication is not subject to challenge by reason only that the circumstances were not such as to make it reasonable to dispense with an information submitted personally and in writing.

(12) In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information on oath, transcribed and certified by the justice as to time, date and contents, or of the original warrant, signed by the justice and carrying upon its face a notation of the time, date and place of issuance, shall be *prima facie* proof that the search or seizure was not authorized by such a warrant.

3. Part XIII of the *Criminal Code* of Canada should be amended by substituting the words "sections 443 or 443.1" for the words "section 443" wherever the latter words appear in sections 444, 445, 446 and 447.

4. Part XXV of the *Criminal Code* of Canada should be amended by including the following as Form 5.1.

(See next page)

FORM 5.1

WARRANT TO SEARCH (Section 443.1)

Canada,
Province of [*specify province*]
[*territorial division in which the warrant is issued*].

To A.B. and other peace officers in the [*territorial division in which the warrant is intended for execution*]:

Whereas it appears on the oath of A.B., a peace officer in the [*territorial division in which the warrant is intended for execution*] that there are reasonable grounds for dispensing with an information presented personally and in writing; and that there are reasonable grounds for believing that the following things

[*describe things to be searched for*]

relevant to the investigation of the following offence

[*describe offence in respect of which search is to be made*]

are to be found on the following premises

[*describe premises to be searched*]:

This is, therefore, to authorize and require you within three days of this warrant's issuance to enter the said premises between the hours of [*as the justice may direct*] and to search for and seize the said things and to report thereon to the clerk of the court for the [*territorial division in which the warrant is intended for execution*].

Issued at [*time*] on the [*day*] of [*month*] A.D. [*year*] at [*place*].

.....
A Justice of the Peace/
A Judge of the Provincial Court
in and for the Province of
[*specify province*].

To the Occupant: This search warrant was issued by telephone or other means of telecommunication. If you wish to know the basis upon which this warrant was issued, you may obtain a copy of the "information upon oath" from the clerk of the court for the territorial division in which the warrant was executed, at [*address*].

You may also obtain from the clerk of the court a copy of the report filed by the peace officer who executed this warrant. That report will indicate what things, if any, were seized and where they are presently being held.