Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

disposition of seized property

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Canada

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REPORT 27

DISPOSITION

OF

SEIZED PROPERTY

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REPORT

ON

DISPOSITION
OF
SEIZED PROPERTY

Post-Seizure Procedures

February, 1986

The Honourable John Crosbie, P.C., Q.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 disposition of seized property.

Yours respectfully,

Allen M. Linden
President

Gilles Létourneau
Vice-President

Louise Lemelin, Q.C.
Commissioner

Joseph Maingot, Q.C.
Commisioner

John Frecker
Commissioner

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In memoriam

The Commission records with sadness the passing, on May 28th, 1985, of our former employee and valued consultant, Lee Paikin. An expert on the law of search and seizure, Lee participated actively in the development of both the Working Paper and the Report on this subject and was a source of inspiration and advice to others who laboured in this field. Indeed his work for the Commission as Principal Consultant on Working Paper 30 on *Search and Seizure* was widely admired and is regarded by many as the best Canadian writing on the subject. He will be sorely missed by his friends and colleagues at the Commission.

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CHAPTER ONE

The Reform Process

I. Introduction

The lawful seizure, after search, of things connected with offences is made along a law enforcement continuum which may be segmented into four stages, namely: the authorization of a search and seizure; the execution of those powers; the detention of things seized for lawful state purposes; and the disposition of things seized.

The authorization and execution stages of the appropriation process concern, primarily, the balance between the powers given to the police to pursue legitimate law enforcement objectives and the rights of individuals to a reasonable degree of privacy. We examined these issues in our Working Paper[1] and Report[2] on the subject of *Search and Seizure* and proposed that the present law be subjected to a thorough consolidation, rationalization and reform. The final stages of the process involving the detention and disposition of seized things deal with a slightly different balance. Here we are concerned with the needs of the police or the courts to maintain custody of things seized for purposes of the proper administration of justice while giving due consideration to the rights of individuals to their property. In addressing these issues, we are acutely aware that the lawful owners of seized property are often victims of crime. Our recommendations have been guided by the knowledge that detention of seized objects for long periods of time can be a serious infringement upon individuals' enjoyment of their property and can, in fact, exacerbate the suffering of those who have already been victimized. We recognized in our Working Paper 39, entitled *Post-Seizure Procedures*,[3] that improvements in the procedures governing the detention and disposition of seized things would go some way toward ensuring that our legal system treats victims of crime fairly and with sensitivity. We affirm this principle in this final Report on detention and disposition of seized property.

1. Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement* [Working Paper 30] (Ottawa: Minister of Supply and Services Canada, 1983).
2. Law Reform Commission of Canada, *Search and Seizure* [Report 24] (Ottawa: Minister of Supply and Services Canada, 1984).
3. Law Reform Commission of Canada, *Post-Seizure Procedures* [Working Paper 39] (Ottawa: Minister of Supply and Services Canada, 1985).

II. Working Paper 39 and the *Criminal Law Amendment Act, 1985*

Our work necessarily involves us in a process of close consultation with the Department of Justice, as it is the department which usually has ultimate responsibility for the introduction and carriage of criminal legislation. Indeed, our work in the area of criminal procedure presently falls under the umbrella of the Criminal Law Review — an integrated three-phase project involving the participation of the Law Reform Commission of Canada, the Department of Justice and the Department of the Solicitor General.

The work of the Law Reform Commission constitutes Phase One of the Review. In this phase the Commission studies the present law and after consulting with provincial representatives and others, makes proposals for reform. In Phase Two, the Department of Justice and the Department of the Solicitor General analyse the Law Reform Commission's recommendations, in consultation with other federal departments and provincial authorities, and make recommendations to the federal Cabinet. After that, in Phase Three, legislative changes, based on Phases One and Two, are made. However, this sequence of events is by no means inevitable. If, for any reason, the Minister of Justice deems it advisable, our work may be taken up (at whatever stage of development it may be at) and may be introduced into Parliament for passage into legislation. Such was the recent experience with our recommendations in Working Paper 39, pertaining to *Post-Seizure Procedures*.

On December 2, 1985, the *Criminal Law Amendment Act, 1985*[4] was proclaimed in force. That legislation contained many important initiatives in the area of criminal law and procedure. Much of the work in which the Commission had been engaged over the past ten years was to be found, in one form or another, within the proposals contained in the *C.L.A.A.* Also contained within that legislation was a statutory scheme to govern the detention and disposition of seized property modelled in part on our draft Working Paper recommendations in this area. As a result of these developments we are tabling this, our final Report, on the subject of detention and disposition of seized property at a point after the government has introduced legislation responding to many of our concerns. Our purpose in publishing our Report at this time is to draw attention to some additional matters that may be addressed in the future to further improve upon the amendments that have already been made.

Indeed, the views expressed in our Working Paper did not represent our final views on the subject. As will become evident, this Report does not vary dramatically from the scheme which we proposed in our Working Paper, but some variations do occur and where necessary this document will indicate the nature of those changes. Also, in Appendix A to this Report we have indicated some of the differences between the scheme which we propose and the one which Parliament has enacted. The present *Criminal Code* Review exercise in which we are engaged has as its ultimate objective

4. *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19 (hereinafter referred to as the *C.L.A.A.*).

the production of a new and modern Criminal Code, one designed to better serve the needs of contemporary Canada. We believe that the proposals which we now put forward will augment those necessary amendments which have already been made and assist in the creation of a better Code.

Because so much of our work has already passed into law in this area, this Report will adhere to a somewhat modified format. In the interests of completeness we believe it would be helpful to set forth our entire scheme of recommendations and accompanying commentary, but where relevant we will also make reference to the *C.L.A.A.* and we will compare its provisions to our scheme, as appropriate. (For ease of reference we are providing in Appendix B the relevant provisions of the *Criminal Code*[5] as amended by the *C.L.A.A.* Also, as mentioned, we are providing in Appendix A a table which compares our proposals with the scheme enacted by Parliament. This table includes statutory cross-references to the *C.L.A.A.* where applicable.)

III. A Proposed Scheme to Govern the Disposition of Seized Property: An Overview

This Report contains a scheme of procedures which is designed to apply to all things seized in crime-related investigations. Our proposed framework therefore differs from that which presently exists under the *Criminal Code* and also, to a lesser extent, from the scheme which is enacted in the *C.L.A.A.* We believe that to be truly comprehensive, a scheme governing the detention and disposition of things seized should not be limited to searches and seizures accomplished under the *Criminal Code*, but should embrace all federal crime-related search, seizure and disposition powers. (The procedures which are set forth in the *C.L.A.A.* typically are "[s]ubject to this or any other Act of Parliament, ..."[6] In comparison, our scheme would seek to replace the search, seizure, detention and disposition powers which are to be found in other federal crime-related statutes.[7])

This Report is not concerned with the disposition of things which are seized for purposes unrelated to criminal investigations or prosecutions. For this reason, found property would not be subject to the proposed scheme of post-seizure procedures. Whether found by police or by an individual citizen and turned over to police, found property generally will not have come under police control for purposes relating to a criminal case.

5. This and all references to the *Criminal Code* pertain to R.S.C. 1970, c. C-34, as amended.

6. See, for example, *C.L.A.A.* (s. 73, enacting s. 445.1(1) of the *Criminal Code*).

7. In referring to search and seizure powers under the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and the *Food and Drugs Act*, R.S.C. 1970, C. F-27, as "crime-related," we do not dispute the constitutional basis of the decision in *R.* v. *Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.). Our position in this respect is outlined in the Search and Seizure Working Paper, *supra*, note 1, Part 1, para. 98, p. 40.

Similarly, things which have been seized from a person in custody to protect that person's own property, to prevent his escape or to preserve order in the custodial setting, have been exempted from this scheme. Things seized in this context for such limited custodial purposes should be returned to the person entitled to possession or to someone authorized to receive them on his or her behalf as soon as possible. Certainly the return of such goods should be expedited where the prisoner is released and no charges are laid, as well as in situations where it is conceded that the things seized are not regarded as "objects of seizure."[8] Also exempted from the operation of the proposed scheme by reason of their special nature, are samples or substances seized from an individual by means of the procedure governing investigative tests which is set forth in our Report 25 on *Obtaining Forensic Evidence*.[9] Access to, and testing and disposition of, such samples are the subject of separate rules, comprehensively developed in that Report.

Finally, the proposed scheme would not cover the subjects of *in rem* procedures which are applicable to weapons (s. 101), hate propaganda (s. 281.3(2)) and crime comics and obscene publications (s. 160(2)). For reasons which we have outlined in our Report on *Search and Seizure*, these are matters which more appropriately should be incorporated into federal regulatory legislation.[10] The disposition of the things seized under these provisions should correspondingly be set out in regulations. The special procedures presently applicable to these matters were unaffected by the passage of the *C.L.A.A.*

Subject to the above exceptions, this Report sets forth a scheme of procedures which would apply to all things seized in crime-related investigations. Unlike the framework which presently exists under the *Criminal Code*, the application of the scheme is *not* dependent upon whether the things were seized pursuant to a search warrant. The *C.L.A.A.* adopts a similar approach.[11] Accountability mechanisms for warrantless seizures are incorporated in the form of post-seizure inventories which are to be made available to specified persons affected by the seizure, and post-seizure reports which are to be taken before a justice.

Judicial control is to be asserted over all things seized by means of custody orders made by a justice on the basis of the post-seizure reports and returned warrants. To aid in the expeditious return of unnecessarily seized goods, we have advocated an exception for those things which the police officer in charge has concluded are not

8. "Objects of seizure" is defined in *supra*, note 2, Recommendation One, s. 3(1), pp. 11-5.

9. Law Reform Commission of Canada, *Obtaining Forensic Evidence* [Report 25] (Ottawa: LRCC, 1985). The scheme set out in the *C.L.A.A.* covers the seizure of blood samples in the context of an impaired driving offence (s. 36, amending s. 240 of the *Criminal Code*; s. 73, enacting s. 445.1(1) of the *Criminal Code*).

10. The reasons underlying our recommendation that section 101 and subsections 281.3(2) and 160(2) of the *Criminal Code* be incorporated into federal regulatory legislation are outlined in *supra*, note 2, Part One, Recommendation Three, pp. 51-4.

11. The changes brought about by the *C.L.A.A.* in this regard are set out, *infra*, at note 19.

necessary either as evidence or for other investigatory purposes. Further exceptions to our general procedures are provided in relation to things for which solicitor-client privilege is claimed, things of a dangerous nature such as weapons and explosives, and for perishables.

Also included in the scheme are procedures to govern access to things detained under a custody order, and provisions to limit the duration of such custody orders.

Applications for restoration of things seized and detained under a custody order may be made to a judge by a person clearly entitled to possession. In an effort to facilitate the early return of property and thus minimize interference with interests of persons affected, our restoration order scheme has been designed to encourage the use of evidentiary alternatives wherever possible; that is, an alternative mode of proof would be admissible in place of the original where restoration is ordered prior to trial.

Where the Crown's detention of seized articles is challenged in the context of a restoration application and the applicant has satisfied the court that he or she is clearly entitled to possession, the onus shifts to the Crown to establish, to the court's satisfaction, legitimate justification for the continued detention of the property.

The detention of things seized may represent a substantial intrusion upon a person's property and privacy interests. However, seizure powers are also obvious and necessary tools for meeting the demands of criminal law enforcement. The Commission is therefore sensitive to the fact that the legitimate interest of the state in enforcing the criminal law must be carefully balanced against the rights of individuals to privacy and to use and control their own property. In the presence of legitimate law enforcement demands, some reasonable limitations upon personal freedom are both necessary and inevitable. In appropriate circumstances it is justifiable for the property rights of individuals to be subordinated to the state's interest in effective law enforcement. The proper administration of justice on such occasions demands that the individual property holder suffer some deprivation. The Commission perceives this balance as being best ensured by the application of standards of reasonableness which impose elements of judiciality upon the appropriation process in order to prevent the arbitrary exercise of power and to open it to a measure of judicial review.[12]

The importance of reasonableness as a standard is reaffirmed and strengthened by its inclusion in section 8 of the *Canadian Charter of Rights and Freedoms*[13] which guarantees the right of everyone to be secure against *unreasonable* search or seizure. Although detention of things seized constitutes an infringement of the Charter when the authorization or execution of the initial intrusion is unreasonable, the Commission believes that in certain circumstances the unreasonable detention of things seized under

12. Lee Paikin, "The Standard of 'Reasonableness' in the Law of Search and Seizure," in Vincent M. Del Buono, ed., *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982), pp. 94-7.

13. The *Canadian Charter of Rights and Freedoms* is Part I of the *Constitution Act, 1982*, c. 11 (U.K.).

an otherwise lawfully authorized and executed search and seizure may also constitute an infringement of the Charter. We believe that, left to their own devices, our courts will ultimately come to this same conclusion. But unstructured legislation provoking costly and protracted litigation is not an effective way to pursue clarity and fairness under the law.

For these reasons, it is both timely and urgent that a legislative scheme regulating detention and disposition of things seized (that is, one governed by a reasonableness standard) be enacted in Canadian law as part of the *Criminal Code*.

In balancing the competing interests of the state and of individuals respecting seized goods, particular attention should be paid to the interests of victims of crime. This is especially relevant where the things seized represent "takings" of an offence.

The criminal justice system has recently been subjected to considerable criticism for its failure to recognize adequately the needs of victims or to provide redress for damages suffered by them.[14] In this regard, the Federal-Provincial Task Force on Justice for Victims of Crime in its comprehensive report,[15] issued in May of 1983, recognized that the criminal justice system, which was designed to deal with public wrongs, has "relegated the victim to a very minor role and left victims with a conviction that they are being used only as a means by which to punish the offender."[16] In order to alleviate this situation, the Task Force recommended that the *Criminal Code* be amended to impose a duty on both police and court officials to return a victim's property as soon as possible, with a maximum period of detention and an extension of this period only where the property is still required to be retained as evidence.[17] Further, a recommendation was made that a procedure be implemented for photographing stolen property for use as evidence so that property may be returned to victims as promptly as possible.[18]

A primary motivation behind the Commission's restoration scheme is our desire to provide an effective and accessible remedy for victims of crime — in this context through restoration of the "takings" of an offence as soon as practicable to the person

14. See for example, *Report of the Federal-Provincial Task Force on Justice for Victims of Crime* (Ottawa: Minister of Supply and Services Canada, 1983) (hereinafter cited as the *Victims' Task Force Report*); Law Reform Commission of Canada, *Studies on Sentencing* (Ottawa: Minister of Supply and Services Canada, 1974), pp. 47-9; Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Minister of Supply and Services Canada, 1982), pp. 29-31.

15. *Victims' Task Force Report*, *supra*, note 14.

16. *Id.*, p. 5. Property recovery statistics of the Ottawa Police Force for 1983, for example, indicate that although over $5,000,000 worth of stolen property was recovered and returned to its owners, this represented only 26.6 per cent of the total value of property reported stolen. See Ottawa Police, *Annual Report 1983*, p. 8.

17. *Victims' Task Force Report*, *supra*, note 14, Recommendation 1, p. 89. The Task Force's recommendation that the *Criminal Code* be amended to set out a maximum period of detention has been adopted in the *C.L.A.A.*. In section 74, the Act amends section 446 of the *Code* to provide for a maximum detention of three months, subject to renewal. Further, the Act requires that peace officers return seized objects as soon as practicable where there is no dispute as to ownership and the objects are not needed for evidence (s. 73, enacting s. 445.1(1)(*a*) of the *Criminal Code*).

18. *Victims' Task Force Report*, *supra*, note 14, Recommendation 2, p. 89.

lawfully entitled to possession. The Commission considers that the adoption of its procedures for the restoration of things seized will assist in rectifying this perceived injustice without in any way sacrificing prosecutorial efficiency or impairing the Crown's ability to secure convictions.

Our requirement that inventories of seized things be prepared and made available to specified persons affected by the seizure when combined with other aspects of increased judicial control will result in heightened visibility in the seizure and detention process. These measures will ensure increased accountability and will serve to promote more efficient and effective property management. One salutary by-product of encouraging the early return of seized property in appropriate cases and promoting a more extensive use of alternative forms of evidence is a lessening of the burden on police forces to store vast quantities of seized things. Further, the early return of seized property to victims would also have a positive effect on relations between the police and the public. Heightened public confidence and respect for the operation of the criminal justice system are important goals in any endeavour at criminal justice law reform.

CHAPTER TWO

Recommendations for Reform

I. The Need for a Comprehensive Regime

RECOMMENDATION

1. A comprehensive regime of post-seizure procedures should apply in general to all things seized in crime-related investigations regardless of the mode of authorization of the seizure.

Comment

This recommendation is central to the proposed scheme, for it addresses the major defects of the present law governing post-seizure procedures, namely, lack of comprehensiveness and misplaced emphasis on the mode of authorization of the seizure.

Under the law prior to the *C.L.A.A.*, things seized pursuant to a search warrant issued by a justice under the general search warrant provision in section 443 of the *Criminal Code* were to be returned before a justice, to be dealt with by him according to law. Section 446 provided for detention orders, restoration procedures and applications for examination of things seized, while imposing duties on a justice to take reasonable care in preserving things seized. However, the judicial control and procedural safeguards of section 446 were limited in their application to things seized under the authority of a section 443 search warrant or under section 445 to things seized in addition to those mentioned in the warrant. Subject to section 445, things seized without a warrant were generally ignored.[19]

19. The *C.L.A.A.* provides for controls on the detention and disposition of things seized in the amended section 446 of the *Code* (s. 74, amending s. 446 of the *Criminal Code*). These controls would apply to objects seized by warrant, telewarrant (s. 70, enacting s. 443.1 of the *Criminal Code*), pursuant to section 445, or under the exercise of duties under any Act of Parliament. However, as these controls are subject to those in other federal statutes, they are not completely comprehensive (s. 73, enacting s. 445.1(1) of the *Criminal Code*).

Post-seizure procedures and the ultimate disposition of the things seized without warrant have depended, to a great extent, on the divergent administrative policies and practices of the individual police forces which effect seizures. Historically this process was largely unsupervised. However, recent cases have indicated a willingness on the part of the courts to monitor such practices, either through the exercise of inherent jurisdiction or in the context of constitutional challenges alleging unreasonable search or seizure.[20]

The past preoccupation of the law with the mode of authorization of searches and seizures (that is, whether the search was carried out pursuant to a warrant or whether it was a warrantless search) created serious problems of accountability. The discrepancies which existed in procedural requirements applied to things seized pursuant to a warrant and those seized without a warrant resulted in differing degrees of police accountability and judicial control. Comprehensive, uniform procedures provide post-seizure control and are aimed at protecting the interests of people affected by searches and seizures. They do so by ensuring that peace officers make returns or reports, before a judicial official, of all things seized.

II. Accountability Mechanisms

A. Inventories

RECOMMENDATION

2. To ensure the return of things seized before a judicial official, the following accountability mechanisms should be imposed:

(1) Inventories of *all* things seized should be prepared by the peace officers effecting seizure in all cases. A copy of the inventory should be given on request to the person who has been searched or whose place or vehicle has been searched. Where the officer who makes the search and seizure is aware of the identity of a person with a proprietary interest in the things seized, other than the person who has been searched or whose place or vehicle has been searched, the person with a proprietary interest should also be provided with an inventory on request. The inventory should describe the things seized with reasonable particularity.

20. See for example, *Re Gillis and The Queen* (1982), 1 C.C.C. (3d) 545 (Qué. S.C.); *Re Trudeau and The Queen* (1982), 1 C.C.C. (3d) 342 (Qué. S.C.); *Capostinsky* v. *Olsen* (1981), 27 B.C.L.R. 97 (B.C. S.C.); *Re Butler and Butler and Solicitor General of Canada* (1981), 61 C.C.C. (2d) 512 (B.C. S.C.); *Batsos* v. *City of Laval* (1983), 9 C.C.C. (3d) 438 (Qué. S.C.).

Comment

This recommendation serves two important functions. First, it informs persons affected, those who have been searched or whose place or vehicle has been searched, or those with a proprietary interest in things seized, of what has been seized. The term "proprietary interest" in this context is intended to include, not only rights of ownership, but possessory and equitable interests as well.[21] The inventory should list the things seized with reasonable particularity and should indicate where the things seized are being held, thus enabling persons affected to locate things seized and to take any reasonable action, such as seeking access, applying for restoration or challenging the seizure. Second, providing persons affected with inventories of things seized operates as an accountability mechanism whereby they may ensure that all things seized have been included in the list. A similar recommendation "that the property taken in a search should be fully recorded and a receipt given" was proposed by the English Royal Commission on Criminal Procedure.[22]

Notwithstanding the absence of a statutorily imposed requirement that inventories be prepared in Canada, inventory procedures have been implemented in a number of Canadian police departments.[23] Since the practice in most forces is to prepare an inventory for administrative purposes, the imposition of a legal requirement that one be made would impose little extra burden upon police resources.

The extent of detail on the inventory should be that which is sufficient to describe the things seized with reasonable particularity. Where only a small quantity of things is seized, it should be listed in sufficient detail to allow it to be easily identified. Where the volume of materials seized makes a meticulous list impossible or impracticable, the inventory should be as detailed as is reasonable.

Concern was expressed that situations may arise in which a person affected would not wish to be given an inventory.[24] Accordingly, we have proposed that the provision of an inventory to a person from whom things have been seized stem from the request of that person. In order to assist in informing the person who has been searched, or whose place or vehicle has been searched, of his right to receive an inventory from the peace officer who executed the seizure, a notice to that effect should be printed on the search warrant.

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21. The equivalent term in the civil law system could be "un droit réel."

22. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (London: HMSO, 1981), p. 36.

23. *Supra*, note 1, Part II, para. 264, p. 224.

24. *Id.*, Part II, paras. 265-6, pp. 224-5.

B. Post-Seizure Reports

RECOMMENDATION (*Cont.*)

(2) The peace officer who makes a seizure of things pursuant to a warrant should prepare a post-seizure report either by endorsing the warrant with a report of facts and circumstances of execution, including an inventory of things seized and things returned pursuant to Recommendation 2(6), or by including that information in a separate report. An unexecuted warrant should be endorsed with the reasons why it was not executed, and that warrant should be returned to the justice who issued it.

(3) The peace officer who makes a seizure of things should be required to complete a post-seizure report in cases where things are seized without warrant and where objects not mentioned in the search warrant are seized after a search with warrant.

(4) The report should include the time and place of the search and seizure as well as an inventory of things seized. Where a seizure is made of property that is not specified in a warrant, or property is seized in the course of a warrantless search, reasons for the seizure should also be included in the report.

(5) Either the endorsed warrant or the post-seizure report should be taken before a justice of the territorial jurisdiction in which the search and seizure was executed as soon as practicable.

(6) Notwithstanding any other requirement, where a seizure has been made by a peace officer either pursuant to a warrant or without a warrant, and the peace officer deems continued detention of the seized thing unnecessary, and no post-seizure report has yet been taken before a justice, the officer in charge may return the seized thing to the person entitled to possession.

(7) Recommendation 2(6) is not to apply in circumstances where conflicting claims exist with respect to entitlement to possession of the seized thing.

Comment

These recommendations provide that warrants may be endorsed and returned to a justice along with an inventory of things seized. However, in circumstances where it would be impracticable to endorse the warrant with a post-seizure report and inventory (for example, where the number of seized things is great), a peace officer may prepare a separate post-seizure report and inventory to be taken before a justice. All warrantless seizures should be reported in a post-seizure report which is to be taken before a justice

along with an inventory of things seized. Notwithstanding the mode of authorization of the seizure, a report of all things seized and the facts and circumstances surrounding the seizure is to be made to a judicial official. The report or returned warrant will function as the basis upon which a custody order with respect to those things detained may be granted. These recommendations differ from provisions of the *Criminal Code* existing prior the enactment of the *C.L.A.A.* which were limited to things seized pursuant to a search warrant and did not require any specific report or information to accompany the things seized upon their return to the justice. Also, post-seizure reports were not required to be prepared in cases where searches or seizures were carried out pursuant to the provisions of the *Criminal Code*.[25]

Justices are charged with the responsibility of issuing search warrants under most existing crime-related warrant regimes and under the scheme of procedures recommended in our Report on *Search and Seizure*. The Commission recognizes justices of the peace as appropriate judicial officials to deal with post-seizure reports and custody orders.

Our recommendation specifies that the required reports be made to a justice of the territorial jurisdiction in which the search and seizure was executed. It is unnecessary to require that things seized be returned to "the issuer of the warrant." The Commission believes that it is the judicial office, rather than the actual judicial officer, which is important. We also recommend that a central filing system for search warrants and related documents be instituted in each territorial jurisdiction. A centralized system would facilitate retrieval of all documents relating to a particular search and seizure where public access is sought, and ensure that all relevant supporting documentation would be more readily accessible to the justice receiving the returns and making the custody order — especially in cases where he or she had not been responsible for issuing the search warrant.

While the Commission stresses the necessity of reports and warrants being brought promptly before a justice, our requirement that reports be brought before a justice of the peace "as soon as practicable" is designed to take into account operational realities such as shift work and varying schedules in different police forces without sacrificing the need for a timely response.[26]

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25. The *C.L.A.A.* requires that a peace officer who does not immediately return a seized object to the person lawfully entitled to it must bring the object before a justice, or report its detention to a justice, whether the object was seized pursuant to a warrant, a telewarrant (see *supra*, note 19), section 445, or in the execution of his duties under any Act of Parliament (s. 73, enacting s. 445.1(1)(*b*) of the *Criminal Code*).

26. It may be noted for comparative purposes that "within three days of issuance" was the time-limit recommended for reporting a search and seizure made pursuant to a telewarrant in the Law Reform Commission of Canada's Report entitled *Writs of Assistance and Telewarrants* [Report 19] (Ottawa: Minister of Supply and Services Canada, 1983), Recommendation 2(9), p. 92. The *C.L.A.A.* now requires that peace officers return seized objects or make a report "as soon as practicable" (s. 73, enacting s. 445.1(1) of the *Criminal Code*). It also requires peace officers to file a report "as soon as practicable" but not exceeding seven days after execution of a telewarrant (s. 70, enacting s. 443.1(9) of the *Criminal Code*).

Where items have been seized by the police, either pursuant to a warrant or without a warrant, and continued detention is not considered necessary, we recommend that the police should be free to return such items to the person entitled to possession *before* filing a return with the justice. The only caveat would be that where there exist conflicting claims of entitlement to possession, the matter is to be dealt with by the courts.[27] The purpose of this recommendation is to reduce the administrative burden on both the police and individuals in situations where it is clear that detention of seized things is unnecessary in the circumstances. It is intended to respond to concerns expressed by victims of crime and was urged upon us by representatives from various groups with whom we consult, including two important groups, the police and the Canadian Bar Association. The *C.L.A.A.* amendments are also responsive to these concerns.

III. Custody Orders

A. Nature of the Custody Order

RECOMMENDATION

3. Subject to Recommendation 2(6), all things seized should be subject to judicial control.

(1) Custody orders should be made by a justice on the basis of the inventories and reports; there should be no requirement that the actual things seized be physically before the justice. This would not, however, preclude a justice from ordering production of things either at the time of making a custody order or at any time during the duration of the order.

(2) The custody order should provide for the storage and supervision of things seized.

Comment

The Commission is of the opinion that assuring effective judicial control over things seized is more likely to be achieved by requiring the seizing authorities to apply to a justice for a custody order which would govern care and control of things for as long as their detention is required or until the proper disposition can be determined through restoration applications or other proceedings.

27. This is the approach set out in the *C.L.A.A.* (see *supra*, note 17). Where there is a dispute as to ownership, a peace officer must either bring the seized object before a justice or report its detention to a justice as soon as practicable to be dealt with by him (s. 73, enacting s. 445.1(1)(*b*) of the *Criminal Code*).

Our proposed scheme of custody orders is responsive to the state interest in preserving evidence relevant to criminal proceedings. While things are being detained for this purpose, the scheme does not distinguish between the objects of seizure we have classified as takings and contraband and those which we have classified as evidence. It is at the disposition stage, after the things have served their evidentiary purpose, that such distinctions are made.

This procedure would be initiated upon the endorsed warrant or post-seizure report being taken before a justice. It effectively provides a means of reporting the facts and circumstances of a search and seizure to a judicial official as well as an application for the issuance of a custody order for things seized and detained.

Recommendation 3(1) anticipates a custody order being made without the necessity of physically producing the actual things seized before the justice. This represents a departure from the terms of subsection 443(1) of the *Criminal Code* (since amended by the *C.L.A.A.*) which requires that things seized pursuant to a warrant be "carried" before the justice, and subsection 446(1) which provides for detention of anything "seized under section 445 or under a warrant issued pursuant to section 443 [that] is brought before a justice, ..."[28] In practice it is frequently impractical, if not impossible, to carry all things seized before a justice. Requiring a peace officer to file a written report effectively achieves the same objective of ensuring a measure of accountability in respect of all things seized.

Notwithstanding this recommendation, a discretion should remain with the justice to have things brought before him, or to be taken to view them, where there is concern over the accuracy of the description, quantity, perishability, or any other factor relevant to the making of the custody order. This discretion should be exercisable at any point during the life of the order, thus permitting the justice to ensure compliance with its terms.

In our Working Paper on *Post-Seizure Procedures*, we recommended that the officer who actually executed a search and seizure be required to appear personally before a justice with an endorsed warrant or post-seizure report. However, we recognize that the questions that a justice may wish to ask concerning the execution of a search and seizure may often be answered without requiring the appearance of the executing officer, for example, by an officer who appears regularly before a justice to swear informations. Further, in a situation where many officers were involved in the execution of a seizure, it would be impractical to require all of those officers to appear subsequently before a justice. One officer, perhaps the officer in charge of the investigation, may be sufficiently familiar with the execution of the seizure to respond to a justice's questions. Of course, in any case where it is necessary, the officer or officers who actually executed a seizure could be called to appear before a justice to give further information about

28. The *C.L.A.A.* gives peace officers the option of taking objects before a justice or filing a report with the court (s. 69(2), enacting s. 443(1)(*e*) of the *Criminal Code*; s. 73, enacting s. 445.1(1)(*b*) of the *Criminal Code*; s. 74, amending s. 446(1) of the *Criminal Code*).

the things seized or the facts and circumstances of the seizure. We have decided, therefore, to relax the requirement for executing officers to make a personal appearance before a justice. This is reflected in our model legislation.[29]

In practice, things seized are ordinarily placed in the custody of those officers who effected the seizure and who, in all likelihood, made arrangements for the safekeeping of the things seized in an appropriate storage place. The custody order would, in such cases, formalize those control processes currently employed as a matter of good practice by peace officers.

B. Special Provisions of a Custody Order

RECOMMENDATION (*Cont.*)

(3) Custody orders should be made for all things seized and detained, with the exception of things which the justice determines should be promptly released. The justice should have the discretion to order that perishables be immediately released, with or without conditions, if the identity of a person demonstrating a clear entitlement to possession of them can be promptly established to his satisfaction.

(4) Where a peace officer has seized perishable goods, and there are two or more conflicting claims for entitlement to possession, the justice before whom such goods are returned, upon formulating the opinion that immediate disposal of the goods is essential in order to maintain their value, may in his discretion direct the sheriff to sell the goods and return the proceeds of the sale to the control of the court to await proper disposition.

(5) Special sealing and application procedures for documents for which solicitor-client privilege is claimed, set out in the *C.L.A.A.* (s. 72, enacting s. 444.1 of the *Criminal Code*), should be augmented by two new provisions, namely, that the protection afforded by these procedures should extend to materials in possession of the client to which solicitor-client privilege is claimed and the Crown should not be permitted access to the documents at issue in the application. Upon a determination that seized documents are subject to solicitor-client privilege, they should be returned to the person from whom they were seized. If no solicitor-client privilege is found to exist, the documents should be treated in the same manner as other things seized.

(6) A peace officer effecting seizure of any firearms, weapons, explosives or substances of a dangerous nature, should, as soon as possible, remove them to a place of safety where they may be detained until the custody order is granted; where there exists a substantial and imminent danger to the lives, health or safety of the public, such seized things may be destroyed.

29. S. 3(3); see the requirement of the *C.L.A.A.*, *supra*, note 25.

Comment

Recommendation 3(3) sets out the general rule that custody orders are to be made for all things seized, subject to certain specified exceptions. In addition to expanding the scope of the detention provisions of the pre-*C.L.A.A.* section 446 of the *Criminal Code* to things seized both with and without a warrant, this recommendation removes the discretion of the justice to whom seized things are returned to decide whether or not to make a custody order.[30]

Recommendations 3(3) and 3(4) create exceptions to this general rule by providing that certain things, such as perishables and things for which solicitor-client privilege is claimed, be exempt as a result of the special nature of the seized things. Under Recommendation 3(3), perishables may be immediately released if the identity of a person demonstrating a clear entitlement to possession can be promptly established to the satisfaction of the justice. However, in accordance with Recommendation 12, a seized thing may not be returned, for example, to the person from whom it was seized, where there are competing claims as to possession.

In order to protect the rights of the person who is *bona fide* entitled to possession of the seized goods, it is recommended that where conflicting claims to possession of perishable goods exist and such goods would lose their value if detained until the dispute is resolved, the court may, in its discretion, direct the sheriff to sell such goods and order the return of the proceeds of the sale to the court's control while awaiting proper disposition.

These post-seizure procedures are not intended to apply to weapons seized under the authority of subsections 101(1) and (2) of the *Criminal Code*. Section 101 is an *in rem* procedure, that is, a procedure taken against property which has for its object the disposition of property without reference to the title of individual claimants. The Commission believes that special detention and disposition procedures to deal with things seized pursuant to such powers should be eliminated from the *Code* and placed in regulatory legislation.[31] Similarly, the proposed scheme of post-seizure procedures would not apply to weapons seized from a person in custody for the limited purposes of preventing escape or preserving order in the custodial institution where no justification exists for detaining the weapons afterwards.

No special post-seizure procedures are required for the seizure of weapons which are "objects of seizure." Our general proposals regarding custody orders and restoration applications are so designed as to encompass *all* things seized, including firearms,

30. The *C.L.A.A.* requires a justice either to return seized objects to their lawful owner or to make a detention order whether seized pursuant to a *Code* warrant or otherwise (s. 74, amending s. 446(1) of the *Criminal Code*). However, as to whether this applies to objects seized other than pursuant to the *Criminal Code*, see *supra*, note 19.

31. See *supra*, note 10.

whether takings, evidence or contraband. If enacted, our scheme would supplant the provisions of sections 100, 446 and 446.1 which specifically regulate the seizure of weapons under sections 99, 100 and 443.[32]

IV. Access

RECOMMENDATION

4. (1) With respect to access to the things seized, the following rules should apply: Where access to the things seized is denied, a justice should have the discretion to order that an applicant be permitted to examine anything seized and detained if:

(a) the applicant establishes an interest in the things seized and detained; and

(b) the applicant has given four days notice to the Attorney General or his agent.

Where access to seized documents has been granted, a justice may, upon application, order that the applicant receive photocopies either upon payment of a reasonable fee determined in accordance with the tariff of fees fixed or approved by the Attorney General of the province, or without charge.

(2) A person who considers himself aggrieved by an order made under Recommendation 4(1) should have a right of appeal from the order to a judge of the "court of appeal" as defined in section 2 of the *Criminal Code*.

Comment

Our Working Paper included a declaration that custody orders and supporting documents were part of the court record and, therefore, open to public examination. We also proposed a mechanism for restricting the publication of the contents of these documents in the interest of protecting the privacy of innocent persons and the right of accused persons to a fair trial. The approach adopted in our Working Paper has its origins in our Report on *Search and Seizure*[33] where the interests at stake in publishing

32. Seized weapons which cannot be categorized as takings of an offence, evidence of an offence or contraband should be returned to the person authorized to receive them, or to someone authorized to receive them on his behalf, as soon as possible after his release unless charges are laid and it is alleged that the weapon is an object of seizure. The *C.L.A.A.* does not directly affect the forfeiture of weapons and explosives under sections 446.1 and 447 of the *Criminal Code*. However, a broad definition of "weapon" has been added to section 2 of the *Criminal Code* (*per* s. 2(8) of the *C.L.A.A.*) and the definition of "explosive substance" in section 2 has been expanded (*per* s. 2(2) of the *C.L.A.A.*).

33. *Supra*, note 2, Part 1, Recommendation One, s. 17, pp. 29-33.

the contents of search warrants were found to be essentially the same. However, since putting forward our recommendations on publication of the contents of search warrants and custody orders in those previous publications, the Commission has decided, in view of the complexity and importance of the issues, to address matters of publicity in a separate, comprehensive work on Media Coverage of Legal Proceedings. The passage of the Charter has precipitated a considerable amount of case-law in the area of freedom of the press and the right to a fair trial. We think it best to take into account these developments and to revisit our previous recommendations in a separate Working Paper. As such, our recommendations on this issue are deferred to that forthcoming work. It should be noted that the publication of certain information prior to the laying of a charge is addressed in the *C.L.A.A.*[34] We confine ouselves here to matters of physical access to seized things.

Practical and legal problems that may be encountered if the public were given access to all things seized must be considered in relation to advantages gained by such access. The administrative and supervisory duties of those involved in handling and storing things seized, as well as problems regarding the need to establish continuity of possession to things seized which are required as exhibits at trial, would be greatly increased if the public were granted general access. As the accountability concerns raised in relation to search, seizure and detention of things seized are satisfied by public access to court documents, the Commission recommends that access to things seized and detained should not be universally available to the general public, but should be restricted to persons with an interest in the things.

An application to examine anything detained may be made by "a person who has an interest in what is detained." This phrase has been judicially interpreted so as to extend the notion of "interest" in regard to subsection 446(1) of the *Criminal Code* beyond strictly proprietary confines.[35]

Also important to the question of access are special considerations pertaining to the rights of accused persons. Section 531 of the *Criminal Code* presently gives the accused the right to inspect anything which the prosecution intends to introduce as an exhibit and, upon payment of a fee, to receive a copy of the evidence, his own statement and the indictment. The Commission's recommendations in its Report on *Disclosure*

34. The *C.L.A.A.* contains restrictions on the publication of the location of a search or the identity of the occupant or a suspect without consent, unless a charge has been laid (s. 70, enacting s. 443.2(1) of the *Criminal Code*). This restriction, however, applies only to searches authorized by warrant or telewarrant. It appears to extend to the publication of the contents of other documents, such as post-seizure reports, if prepared after execution of a warrant or telewarrant. There is no restriction on publication of the nature of the things seized.

35. The *C.L.A.A.* entitles a "person who has an interest in what is detained" to apply for access to seized objects for purposes of examination after three clear days notice to the Attorney General (s. 74, enacting s. 446(15) of the *Criminal Code*). Also, a person claiming solicitor-client privilege in respect of detained documents may be permitted to examine or make copies of the documents (s. 72, enacting s. 444.1(9) of the *Criminal Code*).

by the Prosecution[36] would augment the accused's rights by entitling him to request and receive copies of exhibits where it is practicable and to receive them without charge. The right of the accused to receive copies of other specifically enumerated documents and to inspect evidence relevant to the case against him was also articulated in that Report.

While it is the Commission's view that the cost of disclosure in criminal matters should be borne by the Crown, we are of the opinion that the imposition of the cost of reproducing documents at an early stage of the proceedings, when it is unknown which documents will be introduced in evidence in any subsequent proceedings, should be discretionary. In some circumstances, it would be inappropriate to require the person from whom documents were seized to pay for copies of them, such as where they are needed by an innocent party to carry on business. On the other hand, an application to have photocopies made of seized documents may be unreasonable where their number is particularly great or an urgent need for them cannot be demonstrated. In the latter cases, the court should have the discretion to require an applicant to pay for the copies. Of course, it would always be open to such a person to apply for access to seized documents for the purpose of visually examining them and taking notes in relation to them, or to apply for their restoration. It has been recognized in the case-law that access can range from mere visual examination to scientific testing[37] and that the reproduction of documents should be permitted in order to allow retention of their contents.[38]

The *Criminal Code* now provides in subsection 446(15) (formerly s. 446(5)) that a person with a legal interest in something that is detained may apply to a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction for an order permitting him to examine anything so detained. We find such a process cumbersome and overly formal in many instances. A formal application for access should not have to be brought in every case where access is sought. Rather, to promote efficiency, a judicial hearing should be available and should result where a person claiming an interest in the things seized in cases has been denied access.

The Commission recommends that a justice — the judicial official entrusted with issuance of the custody order — determine questions of access to things seized. This represents a departure from present law requiring an application to be made to a judge of a superior court or of a court of criminal jurisdiction. Since no provision for an appeal of a decision made under subsection 446(15) exists in relation to access to things seized,[39] the Commission believes that a right of appeal should be provided concerning decisions made with respect to access to things seized. Appeals in this regard would

36. Law Reform Commission of Canada, *Disclosure by the Prosecution* [Report 22] (Ottawa: Minister of Supply and Services Canada, 1984).

37. The release of exhibits for scientific testing is authorized by section 533 of the *Criminal Code*.

38. See *Re Sutherland and The Queen* (1977), 38 C.C.C. (2d) 252 (Ont. Co. Ct.). See the provision in the *C.L.A.A.* regarding privileged documents, *supra*, note 35.

39. *R.* v. *Stewart*, [1970] 3 C.C.C. 428 (Sask. C.A.).

be brought before a judge of the "court of appeal" (as defined in section 2 of the *Criminal Code*) and would be disposed of in the same manner as appeals relating to other things seized. The applicable procedure is now set out in subsection 446(17) of the *Code* (formerly s. 446(7)).

V. Duration of Custody Orders

RECOMMENDATION

5. (1) Where no criminal proceedings have been instituted the custody order should terminate at the earliest of the following:

(a) when three months have passed from the date of seizure;

(b) when the prosecution finds no need for detaining the things; or

(c) when another order respecting the disposition of the thing seized is made by a court of competent jurisdiction.

(2) Before the expiration of the three-month period or of an extention granted herein, the issuing official should be empowered, upon application by the prosecution, who has given notice of his application to the person(s) entitled to an inventory under Recommendation 2(1), to extend the custody order for a period not exceeding three months where he is satisfied that having regard to the nature of the investigation, the further detention of the things is reasonably necessary.

(3) Where criminal proceedings have been instituted and the thing is detained for use as evidence, the custody order should terminate at the earliest of the following:

(a) when another order respecting the seized thing is made by a court of competent jurisdiction;

(b) thirty days after criminal proceedings are completed; or

(c) when the prosecution finds no need for detaining the thing in custody for evidentiary purposes.

Comment

The state's interest in detaining things for evidentiary purposes (hence delaying their ultimate disposition) can never justify subjecting objects of seizure to indefinite detention. Rather, the duration of the detention authorized by the custody order must be limited to what is reasonable. With the exception of contraband which cannot be lawfully possessed by anyone, the detention of seized goods for evidentiary purposes will almost invariably compromise the interests of a private individual in the thing detained.

Subsection 446(1) of the *Criminal Code* prior to the *C.L.A.A.* imposed a three-month limit on the detention of things seized pursuant to section 443 or 445. If, before the expiration of that period, proceedings had been instituted in which the thing detained was required, the time-limit ceased to run. Also, a justice could, on application by the Crown, extend the deadline to a further specified date. The Commission considers the three-month period, with the possibility of an extension in appropriate circumstances, to be an adequate period in the vast majority of cases for law enforcement and prosecuting officials to decide the question of whether or not to institute criminal proceedings. Some inconvenience to the general public is inevitable and necessary in the interests of the effective investigation of crime and enforcement of the criminal law. In general, it is our belief that the discomfiture occasioned by a three-month separation from one's property is not so onerous a burden to bear as to undermine the benefits which society derives from structuring our rules of procedures in this way. The *C.L.A.A.* also adopts a three-month period in the amended subsection 446(2) of the *Code*.

A restoration order may be granted even though a custody order is in effect. In consequence, a person entitled to possession of things would be entitled to bring an application for restoration within the three-month period. Our proposal mirrors the pre-*C.L.A.A.* law which provided, in subsections 446(1) and (3), for detention and restoration respectively. These provisions had been interpreted as operating independently of each other.[40] In effect, the granting of a restoration order terminated an otherwise valid custody order.

The three-month custody period represents an appropriate balance of the competing interests involved in most cases. However, certain types of criminal investigations may be extremely complex and time-consuming. The nature of the offence or the amount of evidence collected may require an investigation lasting more than three months before a decision on whether proceedings should be instituted can be reached. To respond to this reality, paragraph 446(1)(*a*) of the *Criminal Code* allowed for an extension of specified duration where a justice was satisfied that, having regard to the nature of the investigation, further detention of the things was warranted.[41] In the interest of clarity and accountability we deem it advisable to limit the duration of the extension to a period not exceeding three months. The prosecution would, under our scheme, be free to apply for successive extensions but on each occasion would have to satisfy the issuing official that the further detention of the seized things is reasonably necessary in the circumstances.[42] (This proposal, which would allow for successive extensions of periods not exceeding three months, differs substantially from the position set forth in Working

40. *Re Flite Investments Ltd. and The Queen* (1977), 36 C.C.C. (2d) 380 (Ont. Prov. Ct.).

41. This is similar to the approach adopted in the *C.L.A.A.* (s. 74, amending s. 446(2) of the *Criminal Code*). The extension of the order would be for a "specified period" where warranted or for an indefinite period if the object is needed for proceedings which have been instituted. However, see *infra*, note 42.

42. The *C.L.A.A.* permits successive detention orders to a cumulative maximum of one year. If, prior to the expiration of one year, proceedings are instituted or a superior court judge is satisfied that the "complex nature of the investigation" warrants further detention, the seized objects may be detained longer (s. 74, amending s. 446(3) of the *Criminal Code*).

Paper 39 on *Post-Seizure Procedures* and is responsive to practical concerns raised with us by representatives of the police and by various Crown counsel.) Any extension sought must, under our scheme, be applied for during the currency of the existing order.

In recognition of the state's interest in retaining relevant evidence for possible use in criminal proceedings, the Commission proposes that the custody order remain in effect for as long as the things are required to be detained as evidence. The custody order should remain in effect until another order respecting the things is made, or until the prosecution finds no need for detaining the things, or if neither of these applies, until all proceedings are completed.[43]

VI. Disposition

A. Upon Termination of the Custody Order

RECOMMENDATION

6. (1) Where a custody order terminates in accordance with Recommendation 5(1)(c), by an order of a court of competent jurisdiction, the disposition of the thing should be in accordance with the terms of the order.

(2) Where a custody order terminates in accordance with Recommendation 5 and no restoration order has been made, the disposition of seized things should be as follows:

(a) if civil proceedings are pending regarding claims to ownership or possession of the things seized, the things should be transferred to the custody of the court before which the civil proceedings are pending, to be disposed of as that court orders;

(b) if there are no conflicting claims to ownership or possession of the things seized, the things should be restored to the person demonstrating a lawful proprietary interest in the things;

(c) if there are conflicting claims to ownership or possession of the things seized but no civil proceedings are pending, the things should be ordered returned to the person from whom they were seized provided that possession of the things by that person is lawful;

(d) if there are no claims to the things seized, they should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

43. The *C.L.A.A.* provides numerous ways of terminating the detention of seized objects. Prior to the expiration of the detention order, a prosecutor may make an application to terminate detention if the seized things are no longer needed. After expiration of the order, where proceedings have not been instituted, a prosecutor must apply for termination of the detention. A person from whom objects have been seized may apply after the expiration of the detention order for an order terminating it. A person claiming to be the lawful owner of the seized objects may apply to have them returned to him (s. 74, amending s. 446(5), (6), (7), and enacting s. 446(10) of the *Criminal Code* respectively).

Comment

Disposition of things which are evidence or takings may be determined by a court of competent jurisdiction through restoration orders granted restoring the things to a person demonstrating a claim to possession. Recommendation 6(2) sets out the various dispositions which may be made of such things where no restoration order has been applied for or granted. This recommendation would govern disposition once the things seized are no longer required as evidence or when, owing to the expiry of time, such detention could no longer be justified.[44]

The disposition of evidence should ordinarily be made in accordance with the principle that the state of affairs existing prior to seizure should be restored. Where there are conflicting claims to ownership or possession, and the person from whom the things have been seized is available and can demonstrate to a judicial official a lawful claim to possession, the things should be restored to that person. In the case of takings, disposition provisions should ensure that things be restored to a person demonstrating a claim to ownership or possession, such as the victim of the crime.[45]

In the case of takings of an offence or evidence, where a custody order terminates and there are civil proceedings pending in which ownership or possession of the seized things is being contested, the things should be transferred to the custody of the court before which the civil proceedings are pending. Proper procedures will have to be developed, in consultation with the provinces, to ensure that the criminal and civil processes coincide.

Where there are no conflicting claims to ownership or possession of the things, they should be restored to the person demonstrating a lawful proprietary interest in the things. The criminal courts' powers must be carefully circumscribed so as not to usurp, imitate or duplicate the role of the civil courts. Accordingly, where there are conflicting claims to seized things, the criminal court should be precluded from adjudicating property disputes. Therefore, we recommend that where conflicting claims to ownership or

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44. Under the *C.L.A.A.*, where a justice or judge hearing an application to terminate detention finds that the detention order has expired and proceedings have not been instituted, or that detention is no longer required for purposes of an investigation or other legal proceeding, he must order that the objects be returned to the person from whom they were seized (if possession of them is not unlawful) or to the lawful owner (if known). If the lawful owner is unknown, the objects are forfeited to the Crown (s. 74, enacting s. 446(9) of the *Criminal Code*).

45. Under the *C.L.A.A.*, where a judge or justice is satisfied that a person is the lawful owner of or is legally entitled to possess the seized objects, he must order that the objects be returned to that person if the detention order has expired and proceedings have not commenced or the objects are not otherwise needed. If the objects have been forfeited to the Crown, the applicant is entitled to the proceeds (s. 74, enacting s. 446(11) of the *Criminal Code*). In the situation where takings of an offence are involved and a court has determined that an accused has indeed committed an offence, the Act provides a special procedure governing the restoration of the seized objects. If the objects are before the court and are not needed for other proceedings, the court must return them to the lawful owner or person entitled to possession. This would not apply, however, to property, valuable security or negotiable instruments received in good faith for valuable consideration, or to property in respect of which there is a dispute as to ownership or possession (s. 75, enacting s. 446.2 of the *Criminal Code*).

possession exist, the seized things should be ordered returned to the person from whom they were seized. The rival claimants would be free to launch civil proceedings to dispute ownership or possession of the things by the individual in whose favour a restoration order has been made.[46]

In situations where no one is claiming a possessory or proprietary interest, and the things seized are not required for any purpose related to enforcement of the criminal law, their status is in essence that of abandoned property. Disposition at this point involves the resolution of a property issue, a matter within provincial jurisdiction and concern. Most provinces have legislation concerning the operation of police forces which either specifically provides for disposition of stolen or abandoned goods in the custody of the police, or delegates power to a specified body to make regulations in this regard.[47] As the question then is no longer one of criminal procedure (a federal responsibility), but one falling within provincial jurisdiction, the Commission recommends that, in cases where there are things that can no longer be detained and no known claimants exist, the things should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

B. Of Contraband

RECOMMENDATION (*Cont.*)

(3) Where a custody order terminates in accordance with Recommendation 5, contraband (things, funds and information possessed in circumstances constituting an offence) should be forfeited to the state to enforce the prohibition against possession if it has not been restored in accordance with Recommendation 6(2).

Comment

Contraband may be broadly defined as "objects possessed in circumstances constituting an offence."[48] In our Working Paper, we subdivided contraband into two classifications: absolute contraband, which applies to objects which cannot be possessed lawfully for any purpose; and conditional contraband, being things that are illegal to possess only for a particular purpose.[49] In the latter case, the status of the thing as contraband was conditional upon the possessor's illegal intent being proved.

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46. See the provisions of the *C.L.A.A.* in this regard as set out *supra*, in note 45.

47. *Police Act*, R.S.O. 1980, c. 381, s. 18; *Police Act*, R.S.Q. 1977, c. P-13, s. 10; *Police Act*, S.N.S. 1974, c. 9, s. 37; *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9, s. 24; *The Police Act*, R.S.S. 1978, c. P-15, s. 10; *Police Act*, R.S.A. 1980, c. P-12, ss. 43-44; *The Royal Newfoundland Constabulary Act*, S.N. 1981, c. 79, s. 28; *Police Act*, R.S.B.C. 1979, c. 331, s. 56; *Police Act*, S.N.B. 1977, c. P-9.2, s. 7; *The Provincial Police Act*, R.S.M. 1970, c. P150, s. 8; *Police Act*, S.P.E.I. 1977, c. 28, s. 9.

48. *Supra*, note 1, Part II, paras. 82-7, pp. 149-51.

49. See: *Narcotic Control Act*, s. 4(2); *Food and Drugs Act*, s. 41; and *Criminal Code*, s. 159(1).

Upon much reflection, we have decided that the distinction between absolute contraband and conditional contraband is less clear than first imagined. We now recognize that there may be situations where restoration of things that we had characterized as "absolute" contraband would be desirable. For example, a person charged with possession of an unregistered weapon may be entitled to have the weapon returned to him if he can demonstrate that he has subsequently complied with the registration requirements of the *Criminal Code*. Equally, a scientist charged with possession of a narcotic may be entitled to have the narcotic returned to him if he can demonstrate that he has obtained the necessary authorization from the Minister required by regulations under the *Narcotic Control Act*. In both situations, restoration could be made even if there was a conviction on the charge. Obviously, by its very nature, some contraband such as narcotics, counterfeit money, prohibited weapons, and so forth, will normally never be restored and should be forfeited to the state whether or not the accused is convicted of possessing it. However, a comprehensive regime of post-seizure procedures should contemplate the possibility of restoration in special circumstances, such as where possession of the seized thing can be made lawful. For that reason, we hesitate to characterize any seized property as "absolute" contraband.

In our Working Paper we characterized certain things as "conditional" contraband — property that is not illegal to possess *per se*, but that is illegal to possess for specific purposes. For these types of objects, restoration should be made in the situation of an acquittal upon a charge of unlawful possession. For example, if a person was acquitted of a charge of possession of obscene publications for the purpose of distribution under subsection 159(1) of the *Code*, the seized matter should be restored to that person as possession of it has been determined to be lawful. On the other hand, if the accused was convicted, the property should be forfeited.

In essence, for all seized property that is contraband, restoration upon termination of a custody order should be dependent upon whether possession of the property is lawful in the circumstances. If not, the property should be forfeited. Therefore, we feel that the distinction between "absolute" and "conditional" contraband is unnecessary. Instead, we propose a general power to restore seized things at the termination of a custody order to those in whose hands possession is lawful along with a power to order forfeiture of seized property where no one is lawfully entitled to possess it.[50]

VII. Restoration Application

RECOMMENDATION

7. A person from whom things have been seized or from whose place or vehicle things have been seized, or any person asserting a claim to possession of the things seized, should have the right to apply to a judge to have the things restored to him or her.

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50. There is no specific mention of contraband in the *C.L.A.A.*. There appear, however, to be powers to make restoration orders in respect of contraband in some circumstances (see s. 74, enacting s. 446(9)(*c*) and (*d*) of the *Criminal Code*; see also Appendix A, at Recommendation 6(3)).

Comment

The intrusive dispossession represented by the seizure and detention of property by the state may affect the legal and proprietary interests of a number of people. This recommendation is intended to provide standing (that is, status before a court) to invoke the courts' restorative powers to all persons whose proprietary interests have been affected by a search and seizure.[51]

Clearly, the person from whose place or vehicle the things were seized should be entitled to apply to the court for restoration of the seized things. In addition, this recommendation recognizes the rights of possible third parties asserting claims to rightful possession of the things, and therefore grants standing to such persons to apply to have their property restored.

The definition of standing which we propose here significantly departs from what had been the practice under section 446 of the *Criminal Code*. Standing with respect to an application under what was formerly subsection 446(3) for the return of seized goods was interpreted as being applicable only to the lawful owner and to the person from whom the goods were seized.[52] In contrast, Recommendation 7 affords standing to persons with possessory interests in seized things falling short of actual ownership.[53]

VIII. Notice of Restoration Application

RECOMMENDATION

8. The judge should be empowered to hear an application under Recommendation 7 after being satisfied that eight days written notice has been given by the applicant to:

(a) the prosecution;

(b) any person who has brought a competing application for restoration of the things seized;

(c) any person with a proprietary interest of which the applicant is aware; and

(d) the accused.

This notice period may be abridged with the consent of all the parties listed above or by order of the court.

51. The provisions of the *C.L.A.A.* are discussed *supra*, in notes 43, 44 and 45.

52. *Beach* v. *Attorney General of Canada* (1978), 13 A.R. 505 (Alta. S.C. A.D.).

53. The approach in the *C.L.A.A.* is set out *supra*, in note 45.

Comment

This proposal seeks to avoid a multiplicity of proceedings by attempting to ensure that all interested parties are given notice of the restoration application so that a determination as to the most appropriate disposition of the things seized can be made in a fair, efficient and effective manner.

Under our scheme, the prosecution, which has a very strong interest in the disposition of the property, must be notified and afforded the opportunity to submit representations regarding the need for the continued detention of the things. Also, any other persons claiming a possessory right to the things by way of a competing application for restoration of the property should be entitled to notice, as well as any person with a proprietary interest in the things *of which the applicant is aware*. Although the applicant should not be required to search out and notify *everyone* who may have some form of proprietary interest in the things, it is only reasonable that notice be given where a person's interest in the subject-property is known. We recommend that the accused be given notice so that he may make representations as to the sufficiency of any alternative mode of evidence.

IX. Grounds for Granting Restoration Order

RECOMMENDATION

9. (1) Upon application by a person specified in Recommendation 7, a judge should be empowered to make a restoration order as provided in Recommendation 10 if he is satisfied that the applicant has established that he or she is clearly entitled to possession, unless the prosecution shows that the things seized are reasonably required to be detained for evidentiary or investigative purposes. The judge should have regard to:

(a) the nature of the things;

(b) any alternatives to detaining the things for use as evidence;

(c) any representations on behalf of the defence regarding the need for the continued detention of the things for evidentiary or investigative purposes; and

(d) any other consideration relevant to the disposition of the seized things.

(2) In determining whether an applicant is clearly entitled to possession of the seized things, the judge should be required to consider evidence of the applicant's entitlement to possession of the things seized and any conflicting claims shown to exist with respect to the things.

(3) Restoration orders may be made for contraband where the applicant can demonstrate that possession of the seized property is no longer unlawful or where the interests of justice so require.

Comment

This recommendation is directed at restoring things detained to the person entitled to possession if such things are not required as evidence or if their evidentiary value can be preserved by alternate means. Prior to issuing the restoration order, the judge would be required to deal with the threshold question of whether the applicant is *clearly entitled* to lawful possession of the things seized, by considering two distinct factors: the nature of the proprietary or possessory rights of the applicant; and the existence of any prohibition against possession of the thing, such as its status as contraband. Relevant to the determination would be evidence of the applicant's entitlement to possession of the things as well as any conflicting claims shown to exist with respect to the things.[54]

As stated above, we are departing from the recommendations in our Working Paper to the extent that we no longer advocate the differential treatment of "absolute" and "conditional" contraband. We recognize that there may be situations where restoration of property we had characterized as "absolute" contraband would be desirable, either upon termination of the custody order or while proceedings are pending. Thus, we recommend that a person charged with the unlawful possession of any seized property be entitled to make an application for restoration. We envision two situations in which contraband may be returned while proceedings are pending: (1) where possession of the seized things is not unlawful at the time of the application, and (2) where the interests of justice so require. For example, a person charged with possession of an unregistered weapon may, before the matter is heard at trial, obtain the necessary registration for the weapon, and may then be entitled to possess it. Alternatively, even where the accused has not yet secured the necessary registration, we feel that the court should have the discretion to restore the weapon in appropriate circumstances, such as where the accused requires the weapon for his lawful occupation and is merely in technical breach of the registration requirements of the *Code*. The restoration order could be made subject to conditions as provided under Recommendation 10.

Where a person is charged with possession of contraband for an unlawful purpose, it would be rare for restoration to be granted prior to trial, since the lawfulness of the possession could normally only be established at that time. If an accused were acquitted at trial, the seized things would be restored to him, as possession would have been found to have been lawful. If the accused were convicted, on the other hand, the seized things could be forfeited.[55]

Where conflicting claims of entitlement to possession exist, a restoration order would not be appropriate since the adjudication of property disputes falls outside the parameters of the federal government's criminal law power. In our view, competing claims to possession of the things are more properly resolved in the context of a civil

54. *Ibid.*

55. See *supra*, note 50; see also Appendix A, Recommendation 9(3).

action. This is recognized by Recommendation 12 which provides that the restoration order should not be granted where there is a substantial question as to whether they should be restored to the person from whom they were seized, or where there exists a substantial question among several claimants to rightful possession.

Having regard to the substantial intrusion and dispossession of property involved in searches and seizures and to the consequential effects on the rights of individuals, we believe that the onus must fall upon the Crown, the dispossessing party, to establish clearly that there exists a legitimate justification for the continued detention of things seized. Casting the onus in this way, in this context, is well supported by existing authority.[56]

By constructing the onus in this manner we would require the Crown to establish, on a balance of probabilities, that the property forms the subject-matter of an offence or is otherwise reasonably necessary to be detained as evidence.[57] It also requires the existence of a requisite relationship between the crime alleged and the property seized.[58]

Where the Crown is able to satisfy the court that the detained articles constitute material evidence but the judge, in considering the various other factors enumerated in Recommendation 9, concludes that existing alternatives to detaining the things as evidence are practical and appropriate in the circumstances, he should make an order in favour of the applicant. In these circumstances, a consideration of the adverse effects on the property rights of the applicant should outweigh any consideration of convenience to the Crown.

Where reasonable alternatives to detaining the things seized exist, the things themselves should not be detained. Only in this way can the plight of the victim be adequately responded to. Prompt restoration is the key, and it can only be facilitated where alternate means of proving the case exist. This proposal, central to our scheme, is not addressed in the *C.L.A.A.*[59]

Photographic evidence is at present routinely received where it is impossible or impractical to bring the exhibit into court. There appears to be no valid reason why this practice could not be extended beyond its present strict confines. Modern video

56. *Leitman* v. *Mackey*, [1963] 2 C.C.C. 356 (Ont. H.C.).

57. *R.* v. *Birnstihl*, January 26, 1983 (Ont. H.C.), 9 W.C.B. 160.

58. See *Leitman* v. *Mackey*, *supra*, note 56, p. 359.

59. There is no specific mention of alternatives to detention of seized objects in the *C.L.A.A.*, other than for documents. Copies certified by the Attorney General have the same probative force as the original (s. 74, enacting s. 446(14) of the *Criminal Code*). Generally, a justice may not order detention of seized objects where the lawful owner is known unless he is satisfied that detention is required for the purposes of any investigation or legal proceeding. It would be open to the justice to consider alternatives to physical detention at that preliminary stage (s. 74, amending s. 446(1) of the *Criminal Code*). Similarly, where a justice is satisfied that continued detention is not required, he must order that seized property be restored to the lawful owner or person from whom it was seized. Again, consideration of alternatives to detention may be made at this later stage (s. 74, enacting s. 446(9), (11) of the *Criminal Code*).

equipment as well as improved photographic and duplicative techniques should be used to full advantage to record and preserve the evidentiary value of seized things. Where duplicative technology is accurate and reliable, we see no reason to preclude its use in appropriate circumstances.

It is not suggested that the Crown be required to utilize alternative forms of evidence in all cases, but where the government's sole interest in retaining a seized article is for its use as evidence, the court should consider whether this purpose could be equally well served by an alternative form of evidence.[60]

Where the state can prove its case by means other than the detention of the seized property, it is fair and reasonable to call upon it to do so. In this way, interference with the property rights of the person affected by the seizure is minimized. The widely held belief that the things seized must themselves be produced at trial in order to satisfy the requirements of the best evidence rule is contradicted by a line of relatively recent cases. Although the rationale underlying the best evidence rule is sound, the rule as applied has often failed to comprehend adequately advances in modern technology. The present practice is not to confine ourselves to the best evidence but to admit all relevant evidence.[61] This has been recognized by the Federal-Provincial Task Force on Uniform Rules of Evidence[62] which has recommended that duplicates produced by technologically advanced, accurate means be admissible in legal proceedings to the same extent as an original, unless the judge is satisfied that there is reason to doubt the authenticity of the original or the accuracy of the duplicate.[63]

In our view, the absence of clearly articulated rules governing the acceptability and admissibility of technologically recorded evidence discourages efforts to innovate policies of property disposition. The Commission believes that by requiring the court on restoration applications to consider possible alternatives to detaining the things seized, and by providing a schematic framework in Recommendation 11 to ensure that the evidentiary value of such alternative evidence is preserved, the criminal justice system will be better able to respond to the concerns of victims of crime and to effect prompt return of property. From a practical and economic standpoint, the increased use of alternate forms of evidence will reduce the resource burdens which police departments shoulder in warehousing and safeguarding seized property.

In recognition of the fact that the potentially endless variety of circumstances which may arise cannot be addressed within a rigid framework, Recommendation 9(1)(d) constitutes a "catch-all" classification to supplement the more precise considerations

60. *United States* v. *Premises Known As 608 Taylor Avenue*, 584 F. (2d) 1297 (1978).

61. See *Garton* v. *Hunter*, [1969] 1 All E.R. 451 (C.A.), p. 453.

62. *Report of the Federal-Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982), p. 380.

63. *Id.*, Recommendation 29.15(*b*), p. 402. The fact that modern technology can guarantee a high degree of accuracy in producing duplicates was recognized in *R.* v. *McMullen* (1978), 42 C.C.C. (2d) 67 (Ont. H.C.) where Mr. Justice Linden stated at page 69 that "sophisticated xeroxing equipment can produce copies that can hardly be distinguished from the original."

enumerated in Recommendation 9(1)(a) through (c). Under this heading then, the judge may have regard to any fact or circumstance which is relevant to the disposition to be made.

X. Restoration Order

RECOMMENDATION

10. (1) Where he is satisfied that the applicant or another person is clearly entitled to possession of the things seized and that the grounds set out in Recommendation 9 have been met, the judge should be required to order that the things be restored to that person.

(2) Restoration under such an order should be made as soon as reasonably possible.

(3) A judge making an order under Recommendation 10(1) should be empowered to stipulate that such order be absolute or made subject to specified conditions and on such terms as appear to the judge necessary or advisable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

Comment

This recommendation empowers a judge, upon being satisfied that certain enumerated requirements have been met, to order that things seized be restored to the person clearly entitled to possession. Recommendation 10(2) requires that the actual restoration of the property be carried out as soon as is reasonably possible.

A restoration order may be either absolute, by which we mean subject only to a right of appeal under Recommendation 14, or it may be conditional, that is, subject to terms and conditions. The power to make conditional restoration orders endows the disposition process with a greater degree of flexibility and allows for a more effective means of arriving at an appropriate balance between the state's interest in detaining the things as evidence and an individual's right to use and enjoy his property.

We anticipate that the conditions most often imposed would be directed towards preventing the alteration of the restored property for a specified period of time in order to safeguard the things for possible future use. Restoration orders imposing other typical conditions such as, for example, that the owner not dispose of or alter the property until after the proceedings are concluded, or that he or she produce the things if and

when required by the court as evidence, would go a long way towards alleviating the plight of victims of property offences. At the same time the Crown's right to requisition the property in the event that it should subsequently prove necessary to produce the thing at trial would be preserved.

We recognize that there is, inherent in the use of conditional orders, a danger that the person to whom an object is returned may violate the terms of the order and effectively deprive the state of the ability to use the object as evidence. However, an individual who breached the terms of a restoration order, conditional or otherwise, would be exposed to the possibility of a criminal prosecution under section 116 of the *Criminal Code*[64] and would be liable to imprisonment for two years. A particularly deliberate and wilful disregard for an order of this nature might even, depending upon circumstances, constitute an obstruction of justice.

XI. Alternative Evidence

RECOMMENDATION

11. Where an order for restoration of things seized is made under Recommendation 10(1), the judge, after comparing the thing seized with any copy or reproduction thereof, should be empowered to certify as an accurate record of the things seized, a photograph, videotape or other form of reproduction or duplication, and in any subsequent proceedings:

(a) such certified record shall be admissible in place of the original; and

(b) no weight may be attached to the absence of the original.

Comment

This recommendation is designed to meet three primary objectives. First, it facilitates the prompt return of seized property to the person entitled to possession wherever possible in instances where the Crown would be able to preserve the evidentiary value of seized items by alternate means to detaining them. Second, it reduces the administrative and supervisory obligations on police departments and court offices to store vast quantities of seized things. Third, it encourages the use and acceptance of alternate forms of evidence by lawyers and the courts in appropriate cases by providing a framework to govern the admissibility of such alternate forms and the evidentiary weight to be attached thereto.

64. Section 116 of the *Criminal Code* makes it an offence to disobey "a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, ..."

The Commission emphasizes that, under its proposed procedure, a careful adjudication would have to take place before the making of an order for the restoration of seized things to determine whether the evidentiary value of the things can be maintained by alternate means. The provision for preserving the evidence by alternate means would be dependent upon a judicial determination that, having regard to the circumstances, the nature of the things, any alternatives to detaining the things and any submissions by the prosecution or defence with respect to the need for their continued detention, it is appropriate that the things seized be restored. Where the circumstances are such that the evidence could not reasonably be preserved by alternate means, or where the Crown otherwise demonstrates that the things seized should be retained, it would not be appropriate to make a restoration order. The proposed recommendation is designed to encourage the use of alternate forms of evidence wherever possible by providing that a record of the things seized made pursuant to a restoration order be admissible in place of the original and that no weight may be attached to the absence of the original.[65]

This recommendation does not constitute a complete departure from existing practice, as stolen property is often identified by means of registration or serial numbers without the necessity of producing the article itself at trial. Also, photographs are widely used to introduce evidence of physical damage to vehicles and to identify large items such as stolen cars, boats and trucks. Furthermore, copies of entries made in books or records kept by a financial institution are admissible under section 29 of the *Canada Evidence Act*[66] and, *prima facie*, have the same probative force as the original.

XII. No Restoration Order Where Competing Claims Exist

RECOMMENDATION

12. The judge should not be empowered to make a restoration order where it appears that the thing should be restored but there is a substantial question as to whether it should be restored to the person from whom it was seized, or substantial question as to who among several claimants is entitled to possession.

Comment

This recommendation reflects our belief that the criminal courts should not duplicate, imitate or encroach upon the role of the civil courts. Under the proposed disposition procedure, the court would not be engaged in making quasi-civil determinations of

65. There is no provision for alternate modes of evidence for things other than documents in the *C.L.A.A.*, but see *supra*, note 59.

66. R.S.C. 1970, c. E-10, as amended.

property ownership, but would be restricted to deciding the appropriateness of the detention of the seized things by the state. As a corollary of a court's finding that the detention of the things is not reasonably justified in the circumstances, the court should be empowered to order that they be returned to the person clearly entitled to possession.

This recommendation limits the jurisdiction of the court by providing that no restoration order should be made where there exists a substantial question as to whether the things should be restored to the person from whom they were seized or as to who among several claimants is entitled to possession. The Commission does not believe that there should be any discretion to make a restoration order in such cases, as the criminal courts are not an appropriate forum for the determination of property rights between rival claimants.

Where no clear entitlement to possession of the seized things is demonstrated, the court would retain possession and the things would be disposed of upon termination of the custody order in accordance with Recommendation 6.

XIII. Property Rights Unaffected by Restoration Order

RECOMMENDATION

13. An order for restoration to a person from whom things were seized or to a person with a claim to possession should neither establish nor extinguish any property rights in the things that would not have existed but for the order.

Comment

This recommendation reinforces the fact that a restoration order is not a determination of title or ownership. The restoration order should neither establish nor extinguish any property rights in the things which are the subject of the order, but, rather, the order is made simply for the purpose of returning the things to the custody of the person who was entitled to possession before the seizure, that is, to reinstate the pre-seizure *status quo*.

XIV. Appeals

RECOMMENDATION

14. (1) A person who considers himself aggrieved by an order relating to the disposition of things seized should have a right of appeal from the order to a judge of the "court of appeal" as defined in section 2 of the *Criminal Code*.

(2) Seized property should not be disposed of pending an appeal from an order relating to the disposition of the property, or within thirty days of such an order, unless a judge of the court of appeal orders otherwise.

Comment

This recommendation recognizes that the dispossession of property resulting from the exercise of search and seizure powers may affect the legal and proprietary interests of a number of different people. For this reason, any "person who considers himself aggrieved" by a restoration order may launch an appeal from that order. The wording of this recommendation closely follows what was formerly subsection 446(7) of the *Criminal Code* which was the appeal provision of the pre-*C.L.A.A.* restoration order scheme. A similar provision is now set out in subsection 446(17). Anyone detrimentally affected by a restoration order, including the Crown, whether or not he or she actually participated in the original hearing, should be entitled to appeal. The broad appeal provision acts as a means of disputing the end result of the hearing as well as a means for seeking redress for defects in the process itself.

In order to come within the scope of the appeal provisions and to qualify as a person "aggrieved," potential appellants, other than Crown agents, would be required to demonstrate a legal or proprietary interest in the subject-property sufficient to give them standing to bring a restoration application under Recommendation 7.

CHAPTER THREE

Summary of Recommendations

I. The Need for a Comprehensive Regime

1. A comprehensive regime of post-seizure procedures should apply in general to all things seized in crime-related investigations regardless of the mode of authorization of the seizure.

II. Accountability Mechanisms

A. Inventories

2. To ensure the return of things seized before a judicial official, the following accountability mechanisms should be imposed:

(1) Inventories of *all* things seized should be prepared by the peace officers effecting seizure in all cases. A copy of the inventory should be given on request to the person who has been searched or whose place or vehicle has been searched. Where the officer who makes the search and seizure is aware of the identity of a person with a proprietary interest in the things seized, other than the person who has been searched or whose place or vehicle has been searched, the person with a proprietary interest should also be provided with an inventory on request. The inventory should describe the things seized with reasonable particularity.

B. Post-Seizure Reports

(2) The peace officer who makes a seizure of things pursuant to a warrant should prepare a post-seizure report either by endorsing the warrant with a report of facts and circumstances of execution, including an inventory of things seized

and things returned pursuant to Recommendation 2(6), or by including that information in a separate report. An unexecuted warrant should be endorsed with the reasons why it was not executed, and that warrant should be returned to the justice who issued it.

(3) The peace officer who makes a seizure of things should be required to complete a post-seizure report in cases where things are seized without warrant and where objects not mentioned in the search warrant are seized after a search with warrant.

(4) The report should include the time and place of the search and seizure as well as an inventory of things seized. Where a seizure is made of property that is not specified in a warrant, or property is seized in the course of a warrantless search, reasons for the seizure should also be included in the report.

(5) Either the endorsed warrant or the post-seizure report should be taken before a justice of the territorial jurisdiction in which the search and seizure was executed as soon as practicable.

(6) Notwithstanding any other requirement, where a seizure has been made by a peace officer either pursuant to a warrant or without a warrant, and the peace officer deems continued detention of the seized thing unnecessary, and no post-seizure report has yet been taken before a justice, the officer in charge may return the seized thing to the person entitled to possession.

(7) Recommendation 2(6) is not to apply in circumstances where conflicting claims exist with respect to entitlement to possession of the seized thing.

III. Custody Orders

A. Nature of the Custody Order

3. Subject to Recommendation 2(6), all things seized should be subject to judicial control.

(1) Custody orders should be made by a justice on the basis of the inventories and reports; there should be no requirement that the actual things seized be physically before the justice. This would not, however, preclude a justice from ordering production of things either at the time of making a custody order or at any time during the duration of the order.

(2) The custody order should provide for the storage and supervision of things seized.

B. Special Provisions of a Custody Order

(3) Custody orders should be made for all things seized and detained, with the exception of things which the justice determines should be promptly released. The justice should have the discretion to order that perishables be immediately released, with or without conditions, if the identity of a person demonstrating a clear entitlement to possession of them can be promptly established to his satisfaction.

(4) Where a peace officer has seized perishable goods, and there are two or more conflicting claims for entitlement to possession, the justice before whom such goods are returned, upon formulating the opinion that immediate disposal of the goods is essential in order to maintain their value, may in his discretion direct the sheriff to sell the goods and return the proceeds of the sale to the control of the court to await proper disposition.

(5) Special sealing and application procedures for documents for which solicitor-client privilege is claimed, set out in the *C.L.A.A.* (s. 72, enacting s. 444.1 of the *Criminal Code*), should be augmented by two new provisions, namely, that the protection afforded by these procedures should extend to materials in possession of the client to which solicitor-client privilege is claimed and the Crown should not be permitted access to the documents at issue in the application. Upon a determination that seized documents are subject to solicitor-client privilege, they should be returned to the person from whom they were seized. If no solicitor-client privilege is found to exist, the documents should be treated in the same manner as other things seized.

(6) A peace officer effecting seizure of any firearms, weapons, explosives, or substances of a dangerous nature, should, as soon as possible, remove them to a place of safety where they may be detained until the custody order is granted; where there exists a substantial and imminent danger to the lives, health or safety of the public, such seized things may be destroyed.

IV. Access

4. (1) With respect to access to the things seized, the following rules should apply: Where access to the things seized is denied, a justice should have the discretion to order that an applicant be permitted to examine anything seized and detained if:

(a) the applicant establishes an interest in the things seized and detained; and

(b) the applicant has given three clear days notice to the Attorney General or his agent.

Where access to seized documents has been granted, a justice may, upon application, order that the applicant receive photocopies either upon payment of a reasonable fee determined in accordance with the tariff of fees fixed or approved by the Attorney General of the province, or without charge.

(2) A person who considers himself aggrieved by an order made under Recommendation 4(1) should have a right of appeal from the order to a judge of the "court of appeal" as defined in section 2 of the *Criminal Code*.

V. Duration of Custody Orders

5. (1) Where no criminal proceedings have been instituted the custody order should terminate at the earliest of the following:

(a) when three months have passed from the date of seizure;

(b) when the prosecution finds no need for detaining the things; or

(c) when another order respecting the thing seized is made by a court of competent jurisdiction.

(2) Before the expiration of the three-month period or of an extension granted herein, the issuing official should be empowered, upon application by the prosecution, who has given notice of his application to the person(s) entitled to an inventory under Recommendation 2(1), to extend the custody order for a period not exceeding three months where he is satisfied that having regard to the nature of the investigation, the further detention of the things is reasonably necessary.

(3) Where criminal proceedings have been instituted and the thing is detained for use as evidence, the custody order should terminate at the earliest of the following:

(a) when another order respecting the seized thing is made by a court of competent jurisdiction;

(b) thirty days after criminal proceedings are completed; or

(c) when the prosecution finds no need for detaining the thing in custody for evidentiary purposes.

VI. Disposition

A. Upon Termination of the Custody Order

6. (1) Where a custody order terminates in accordance with Recommendation 5(1)(c), by an order of a court of competent jurisdiction, the disposition of the thing should be in accordance with the terms of the order.

(2) Where a custody order terminates in accordance with Recommendation 5 and no restoration order has been made, the disposition of seized things should be as follows:

(a) if civil proceedings are pending regarding claims to ownership or possession of the things seized, the things should be transferred to the custody of the court before which the civil proceedings are pending, to be disposed of as that court orders;

(b) if there are no conflicting claims to ownership or possession of the things seized, the things should be restored to the person demonstrating a lawful proprietary interest in the things;

(c) if there are conflicting claims to ownership or possession of the things seized but no civil proceedings are pending, the things should be ordered returned to the person from whom they were seized provided that possession of the things by that person is lawful;

(d) if there are no claims to the things seized, they should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

B. Of Contraband

(3) Where a custody order terminates in accordance with Recommendation 5, contraband (things, funds and information possessed in circumstances constituting an offence) should be forfeited to the state to enforce the prohibition against possession if it has not been restored in accordance with Recommendation 6(2).

VII. Restoration Application

7. A person from whom things have been seized or from whose place or vehicle things have been seized, or any person asserting a claim to possession of the things seized, should have the right to apply to a judge to have the things restored to him or her.

VIII. Notice of Restoration Application

8. The judge should be empowered to hear an application under Recommendation 7 after being satisfied that eight days written notice has been given by the applicant to:

(a) the prosecution;

(b) any person who has brought a competing application for restoration of the things seized;

(c) any person with a proprietary interest of which the applicant is aware; and

(d) the accused.

This notice period may be abridged with the consent of all the parties listed above or by order of the court.

IX. Grounds for Granting Restoration Order

9. (1) Upon application by a person specified in Recommendation 7, a judge should be empowered to make a restoration order as provided in Recommendation 10 if he is satisfied that the applicant has established that he or she is clearly entitled to possession, unless the prosecution shows that the things seized are reasonably required to be detained for evidentiary or investigative purposes. The judge should have regard to:

(a) the nature of the things;

(b) any alternatives to detaining the things for use as evidence;

(c) any representations on behalf of the defence regarding the need for the continued detention of the things for evidentiary or investigative purposes; and

(d) any other consideration relevant to the disposition of the seized things.

(2) In determining whether an applicant is clearly entitled to possession of the seized things, the judge should be required to consider evidence of the applicant's entitlement to possession of the things seized and any conflicting claims shown to exist with respect to the things.

(3) Restoration orders may be made for contraband where the applicant can demonstrate that possession of the seized property is no longer unlawful or where the interests of justice so require.

X. Restoration Order

10. (1) Where he is satisfied that the applicant or another person is clearly entitled to possession of the things seized and that the grounds set out in Recommendation 9 have been met, the judge should be required to order that the things be restored to that person.

(2) Restoration under such an order should be made as soon as reasonably possible.

(3) A judge making an order under Recommendation 10(1) should be empowered to stipulate that such order be absolute or made subject to specified conditions and on such terms as appear to the judge necessary or advisable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

XI. Alternative Evidence

11. Where an order for restoration of things seized is made under Recommendation 10(1), the judge, after comparing the thing seized with any copy or reproduction thereof, should be empowered to certify as an accurate record of the things seized, a photograph, videotape or other form of reproduction or duplication, and in any subsequent proceedings:

(a) such certified record shall be admissible in place of the original; and

(b) no weight may be attached to the absence of the original.

XII. No Restoration Order Where Competing Claims Exist

12. The judge should not be empowered to make a restoration order where it appears that the thing should be restored but there is a substantial question as to whether it should be restored to the person from whom it was seized, or substantial question as to who among several claimants is entitled to possession.

XIII. Property Rights Unaffected by Restoration Order

13. An order for restoration to a person from whom things were seized or to a person with a claim to possession should neither establish nor extinguish any property rights in the things that would not have existed but for the order.

XIV. Appeals

14. (1) A person who considers himself aggrieved by an order relating to the disposition of things seized should have a right of appeal from the order to a judge of the "court of appeal" as defined in section 2 of the *Criminal Code*.

(2) Seized property should not be disposed of pending an appeal from an order relating to the disposition of the property, or within thirty days of such an order, unless a judge of the court of appeal orders otherwise.

CHAPTER FOUR

Model Legislation

Part 00

Detention and Disposition of Seized Property

Definitions

1. In this Part,

"court of appeal" has the same meaning as in section 2 of the *Criminal Code*;

"justice" has the same meaning as in section 2 of the *Criminal Code*;

"officer" means a peace officer or public officer as defined in section 2 of the *Criminal Code*;

"post-seizure report" means a report prepared in accordance with section 3 and includes, where a warrant has been issued, an endorsement upon the warrant setting out the information required by subsection 3(1).

"warrant" means a warrant to search for and to seize property issued by a justice pursuant to Part 00.

Inventories of Seized Property

2. (1) An officer who seizes property shall, at the time of seizure or as soon thereafter as is practicable, prepare and sign an inventory of the things seized, in which they are described with reasonable particularity, and provide copies of it as required by this section.

(2) An officer who seizes property shall at the time of seizure offer to provide a copy of the inventory to any person who is in apparent possession of the property, and upon the request of any such person shall provide a copy of the inventory to him.

(3) An officer who seizes property found in any premises or vehicle and not in the apparent possession of any person present shall provide a copy of the inventory to the person who has apparent control or occupation of the premises or to the registered owner of the vehicle.

(4) Where, to the knowledge of the officer who seizes property, there is any other person who holds or may hold a proprietary interest in the property, he shall offer to provide a copy of the inventory to that person, and upon the request of any such person shall provide a copy of the inventory to him.

(5) An officer who has seized property but has not yet presented a post-seizure report and inventory of the property to a justice pursuant to section 3 may, upon being given a receipt for it, return any of the property to the person who had apparent possession of it if he is satisfied that there is no dispute as to that person's right to possession of it and that it is no longer required for the purpose of evidence or investigation.

Post-Seizure Reports

3. (1) Where an officer seizes property in the course of a search conducted pursuant to a warrant, he shall prepare a post-seizure report giving the time and place of seizure, the names of any persons who have been provided with a copy of the inventory of seized property and, where any property not referred to in the warrant was seized, the reason for seizing it.

(2) An officer who seizes property otherwise than pursuant to a warrant shall prepare a post-seizure report giving the reasons for and the time and place of the seizure and the names of any persons who have been provided with a copy of the inventory of seized property.

(3) A post-seizure report prepared in accordance with subsections (1) or (2) must be presented with the inventory to a justice for the territorial division in which the property was seized as soon after the seizure as is practicable.

(4) Where a warrant expires before any search is conducted pursuant to it, or where a search is conducted pursuant to a warrant but no property is seized, the warrant shall be endorsed accordingly and returned to the justice who issued it.

(5) Where property has been returned pursuant to subsection 2(5), the time of and the reasons for returning it shall be indicated in the post-seizure report, and the receipt for the returned property shall be appended to the original of the inventory.

Issuing of Custody Orders

4. (1) A justice to whom an officer presents a post-seizure report and inventory of seized property under subsection 3(3) shall thereupon, subject to this section, make

an order for the custody of the property on such terms and conditions as he deems advisable, designating therein the person who is to have custody of it.

(2) A justice may require the production of seized property at the time of making a custody order pursuant to subsection (1) or of extending a custody order pursuant to subsection 7(2).

(3) Where the justice, upon presentation of the post-seizure report, is satisfied that seized property that is perishable may not remain in a condition suitable to permit its use for purposes of evidence or investigation, or that immediate disposal of it is essential in order to maintain its value, he may:

(*a*) if there is no question as to who is entitled to the property, order the release of the property to the person so entitled; or,

(*b*) in any other case, save that referred to in subsection (4), order the sale of the property and the retention of the proceeds in an interest-bearing account pending their disposition pursuant to section 6.

(4) Where, upon the application of any interested party, it is made to appear to the justice that seized property poses a serious danger to public health or safety, he may order the destruction, containment, treatment, removal or other disposal of the property for the purpose of eliminating or alleviating the danger.

(5) A justice who makes an order under subsection (3) or (4) may order a photograph, videotape or other representation to be made of the property before its release, sale or disposal, and upon the making of a further order by the justice certifying upon his personal examination to the sufficiency and accuracy of the representation so made it shall be admissible in any criminal proceeding to the same extent and with the same probative force as the property itself.

(6) A justice who makes a custody order may authorize the officer who seized the property to publish a notice describing any of the seized property the ownership of which is unknown or in doubt, and indicating the date of seizure.

(7) A copy of a custody order shall be issued to the person responsible for the custody of the seized property and the original shall be retained by the justice who issued it together with the post-seizure report, the inventory of the seized property on which it is based, and a copy of any warrant relied on at the time of the seizure.

(8) This section does not apply to any items of seized property that have been returned pursuant to subsection 2(5).

Claims of Solicitor-Client Privilege

Note: *No model legislation is provided for sealing and application procedures in relation to documents that may be subject to a claim of solicitor-client privilege. The Commission*

endorses the provisions of the C.L.A.A. *in this regard,*[67] *subject to the additional provisions we would include affording protection to documents in the possession of clients and restricting access to documents by the Crown.*[68]

Access to Custody Orders

Note: *No model legislation is provided for access to custody orders or publication of their contents. The Commission is undertaking a comprehensive review of these issues in its forthcoming work on Media Coverage of Legal Proceedings.*

Access to Seized Property

5. (1) A person who has been denied access to seized property by the person having custody of it may, upon four days notice to the Attorney General or his agent, apply to a justice for the territorial division in which the property was seized for permission to examine the property, and where the applicant establishes an interest in the property the justice may grant such permission.

(2) Where an application is made under subsection (1) for access to seized property that records information in any reproducible form, a justice may order that the applicant receive copies thereof either upon payment of a fee fixed by the Attorney General of the province or, if satisfied under subsection (3), without charge.

(3) In determining whether to waive the payment of a fee under subsection (2), a justice shall consider all relevant factors, including:

(*a*) the nature of the property;

(*b*) the number of seized items;

(*c*) the cost of reproduction;

(*d*) the purpose for which the copies are required; and

(*e*) the nature of the applicant's interest in the property.

(4) A person who is denied permission by a justice to examine seized property may appeal the decision to a judge of the court of appeal.

Restoration Orders

6. (1) Any person claiming a proprietary interest in seized property may apply to a judge for restoration of the seized property and shall thereupon provide notice of

67. S. 72, enacting s. 444.1 of the *Criminal Code*; see Appendix B, *infra*, p. 66.

68. See Recommendation 3(5), *supra*, p. 16.

the application to the Attorney General or his agent, the accused, and to any other person who, to the person's knowledge, claims any proprietary interest in the property or to such other person as the judge so specifies.

(2) Subject to subsection (5), a judge shall hear argument on all applications under subsection (1) then before him and, if satisfied under subsection (4), order the property restored to an applicant.

(3) A notice of application under subsection (1) shall be served at least eight days prior to the hearing, unless the judge orders otherwise or the parties described in subsection (1) consent to a shorter period.

(4) In considering whether to make a restoration order under this section, the judge shall have regard to all relevant considerations, including:

(*a*) whether there is a substantial dispute as to the applicant's entitlement to the property;

(*b*) whether the property is required to be detained for purposes of evidence or investigation;

(*c*) the nature of the property and the use for which it is required by the applicant; and

(*d*) the feasibility of employing a photocopy, photograph, videotape or other representation of the property for the purposes of evidence or investigation.

(5) Where an application under subsection (1) is made by a person charged with unlawful possession of the seized property, a judge shall hear argument on the application and, if satisfied under subsection (4), may restore the property to the applicant if:

(*a*) possession of the property by the applicant is no longer unlawful; or

(*b*) the interests of justice require restoration of the property to the applicant.

(6) A restoration order may contain any terms that, in the opinion of the judge, are necessary or advisable for the preservation of the restored property for the purposes of evidence or investigation.

(7) A judge granting a restoration order may make the order conditional on:

(*a*) the obligation of the applicant to return the property for use as evidence, or

(*b*) the provision to the judge of a sufficient and accurate record of the restored property by means of a photocopy, photograph, videotape or other representation,

and upon the making of an order by the judge certifying upon his personal examination as to the sufficiency and accuracy of a record referred to in paragraph (*b*), it shall be admissible in any criminal proceeding to the same extent and with the same probative force as the property itself.

(8) In the case of seized property that has been sold by order of a justice pursuant to paragraph 4(3)(*b*), this section applies, with the necessary modifications, to the restoration of the proceeds thereof, but:

(*a*) where the property or the proceeds are the subject of a civil action in any court, that court, on the application of any party to the action, may order the proceeds transferred to it; and

(*b*) where no application has been made under subsection (1) or under paragraph (*a*) of this subsection, the proceeds are deemed to be in the custody of Her Majesty in right of the province and may be forfeited upon the expiration of thirty days following the termination of all proceedings in relation to which the property was seized.

Expiration of Custody Orders

7. (1) A custody order in respect of seized property expires:

(*a*) when three months have elapsed from the date of seizure, unless during that period

(i) criminal proceedings have been instituted in which the seized property may be required as evidence, or

(ii) the custody order has been extended pursuant to subsection (2);

(*b*) at the termination of the period for which it has been extended, unless, during that period, criminal proceedings have been instituted or an extension for a further period has been granted;

(*c*) upon the making of an order for the sale or disposal of the property pursuant to subsection 4(3) or (4);

(*d*) upon the making of a restoration order in respect of the property pursuant to section 6; or

(*e*) when the Attorney General or his agent advises the person having custody of the property that there is no further need for detention of the property; or

(*f*) thirty days after termination of all proceedings in respect of which the property was seized.

(2) Where the Attorney General or his agent, upon four days notice to any person who was entitled under section 2 to receive or request a copy of the inventory of the seized property, applies during the currency of a custody order for its extension, the justice who made the order or another justice for the same territorial division may extend it for a further period not exceeding three months where he is satisfied that, having regard to the nature of the investigation, the further detention of the property is reasonably necessary.

(3) Where a custody order expires other than by the making of an order for the sale, disposal or restoration of seized property, the person having custody of the property shall notify the justice who made the custody order or another justice for the same territorial division of the expiration, and the justice shall thereupon:

(*a*) order the property to be returned to the lawful owner or the person lawfully entitled to possession of it, if known;

(*b*) where civil proceedings are pending in any court in relation to any proprietary interest in the property, order the property transferred to the custody of that court; or

(*c*) order the property forfeited to Her Majesty in right of the province where

(i) there is no person known to be the lawful owner or lawfully entitled to possession of the property, or

(ii) an Act of Parliament provides for forfeiture upon conviction of an offence.

General

8. Any person who considers himself aggrieved by an order made under section 6 or section 7 relating to the disposition of seized property, may appeal to a judge of the court of appeal.

9. Seized property shall not be disposed of within thirty days of an order relating to the disposition of seized property made under section 6 or section 7, or pending an appeal under section 8, unless a judge of the court of appeal otherwise orders on such terms and conditions as he deems necessary.

10. A restoration order made under this Part neither establishes nor extinguishes property rights in the things seized.

APPENDIX A

Our Recommendations and the *C.L.A.A.* Compared

Our Recommendations	*C.L.A.A.*

I. The Need for a Comprehensive Regime

1. A comprehensive regime of post-seizure procedures should apply in general to all things seized in crime-related investigations regardless of the mode of authorization of the seizure.

The *C.L.A.A.* scheme of post-seizure procedures is not as comprehensive as the one we propose. The *C.L.A.A.* would apply to all seizures carried out pursuant to warrant or telewarrant and to seizures carried out in the exercise of duties under the *Code* or any other federal statute. However, the *C.L.A.A.* regime is subject to other Acts of Parliament. As such, the post-seizure provisions in those Acts (e.g. *Narcotic Control Act*, ss. 10(6), (7), (8), (9), and 11; *Food and Drugs Act*, s. 23) are paramount (s. 73, enacting s. 445.1(1) of the *Code*).

II. Accountability Mechanisms

A. Inventories

2. To ensure the return of things seized before a judicial official, the following accountability mechanisms should be imposed:

(1) Inventories of *all* things seized should be prepared by the peace officers effecting seizure in all cases. A copy of the inventory should be given on request to the person who has been searched or whose place or vehicle has been searched. Where the officer who makes the search and seizure is aware of the identity of a person with a proprietary interest in the things seized, other than the person who has been searched or whose place or vehicle has been searched, the person with a proprietary interest should also be provided with an inventory on request. The inventory should describe the things seized with reasonable particularity.

The *C.L.A.A.* does not require that inventories be prepared in all cases. However, an inventory would form part of a post-seizure report (see below at Recommendation 2(3) and 2(4)).

B. Post-Seizure Reports

(2) The peace officer who makes a seizure of things pursuant to a warrant should prepare a post-seizure report either by endorsing the warrant with a report of facts and circumstances of execution, including an inventory of things seized and things returned pursuant to Recommendation 2(6), or by including that information in a separate report. An unexecuted warrant should be endorsed with the reasons why it was not executed, and that warrant should be returned to the justice who issued it.

There is no mechanism for the endorsement of warrants in the *C.L.A.A.*

(3) The peace officer who makes a seizure of things should be required to complete a post-seizure report in cases where things are seized without warrant and where objects not mentioned in the search warrant are seized after a search with warrant.

The *C.L.A.A.* requires peace officers to complete a post-seizure report if the seized things have been returned to the person lawfully entitled to them, whether or not a warrant had been issued for the seizure (s. 73, enacting s. 445.1(1)(*a*) of the *Code*). If the objects have not been returned, the *C.L.A.A.* gives the person who seized them an option to bring them before a justice or to complete a post-seizure report, whether or not the seizure was pursuant to a warrant (s. 73, enacting s. 445.1(1)(*b*) and (2) of the *Code*). However, a peace officer who has been issued a telewarrant must make a report in all cases, whether or not a seizure actually took place (s. 70, enacting s. 443.1(9) of the *Code*).

(4) The report should include the time and place of the search and seizure as well as an inventory of things seized. Where a seizure is made of property that is not specified in a warrant, or property is seized in the course of a warrantless search, reasons for the seizure should also be included in the report.

The *C.L.A.A.* provides a form for a post-seizure report (s. 73, enacting s. 445.1(3) of the *Code*; s. 184(3) providing for Form 5.2). The report is to include the place of search, the authority under which the search was executed, an inventory of seized things and a statement of the manner in which they were disposed of.

A report subsequent to the issuance of a telewarrant must also state the time and date of execution (or an explanation for not executing the telewarrant) and name the things that were seized in addition to those specified in the warrant, along with an explanation for seizing those things (s. 70, enacting s. 443.1(9) of the *Code*).

Our Recommendations (*Cont.*)	*C.L.A.A.* (*Cont.*)
(5) Either the endorsed warrant or the post-seizure report should be taken before a justice of the territorial jurisdiction in which the search and seizure was executed as soon as practicable.	A person who has seized things must return them, bring them before a justice or make a report "as soon as practicable" (s. 69(2), enacting s. 443(1)(*e*) of the *Code*; s. 73, enacting s. 445.1(1), (2) and (3) of the *Code*). A peace officer who has been issued a telewarrant must make a report "as soon as practicable but within a period not exceeding seven days after the warrant has been executed, ..." (s. 70, enacting s. 443.1(9) of the *Code*).
(6) Notwithstanding any other requirement, where a seizure has been made by a peace officer either pursuant to a warrant or without a warrant, and the peace officer deems continued detention of the seized thing unnecessary, and no post-seizure report has yet been taken before a justice, the officer in charge may return the seized thing to the person entitled to possession.	The *C.L.A.A.* contains a similar provision. A peace officer who is satisfied that there is no dispute as to the lawful possession of the seized thing and that detention is not required for an investigation or legal proceeding must return it to the person lawfully entitled to it, whether or not it was seized pursuant to a warrant (s. 73, enacting s. 445.1(1)(*a*) of the *Code*).
(7) Recommendation 2(6) is not to apply in circumstances where conflicting claims exist with respect to entitlement to possession of the seized thing.	A peace officer can only return objects where there is no dispute as to who is lawfully entitled to possession of them (s. 73, enacting s. 445.1(1)(*a*)(i) of the *Code*).

III. Custody Orders

A. Nature of the Custody Order

3. Subject to Recommendation 2(6), all things seized should be subject to judicial control.

(1) Custody orders should be made by a justice on the basis of the inventories and reports; there should be no requirement that the actual things seized be physically before the justice. This would not,	There is an option to carry the seized thing before a justice or make a report (s. 73, enacting s. 445.1(1)(*b*) of the *Code*). The justice has no express power to order production of seized objects.

however, preclude a justice from ordering production of things either at the time of making a custody order or at any time during the duration of the order.

(2) The custody order should provide for the storage and supervision of things seized.

A justice who orders detention must take reasonable care to ensure the preservation of the detained things (s. 74, amending s. 446(1)(*b*) of the *Code*).

B. Special Provisions of a Custody Order

(3) Custody orders should be made for all things seized and detained, with the exception of things which the justice determines should be promptly released. The justice should have the discretion to order that perishables be immediately released, with or without conditions, if the identity of a person demonstrating a clear entitlement to possession of them can be promptly established to his satisfaction.

A justice must order the return of seized objects to the person lawfully entitled to them unless he is satisfied that detention is required for purposes of an investigation or legal proceeding (s. 74, amending s. 446(1)(*a*) of the *Code*). There is no specific provision for perishables, but a justice who orders detention must take reasonable care to ensure preservation of the seized things (s. 74, amending s. 446(1)(*b*) of the *Code*).

(4) Where a peace officer has seized perishable goods, and there are two or more conflicting claims for entitlement to possession, the justice before whom such goods are returned, upon formulating the opinion that immediate disposal of the goods is essential in order to maintain their value, may in his discretion direct the sheriff to sell the goods and return the proceeds of the sale to the control of the court to await proper disposition.

The *C.L.A.A.* contains no specific provision for perishables, but there are provisions that appear to be appropriate to the disposition of such goods. For example, a person from whom goods have been seized may apply for return of the goods prior to the expiration of a detention order where hardship can be shown (s. 74, enacting s. 446(8) of the *Code*). Upon any application for return, a court has the power to order the forfeiture of goods to be disposed of by the Attorney General, where the lawful owner or person entitled to possession is not known (s. 74, enacting s. 446(9) of the *Code*). The lawful owner or person entitled to possession would be entitled to the proceeds of sale if he subsequently comes forward (s. 74, enacting s. 446(11) of the *Code*). A court may also dispose of goods upon a conviction, where the lawful owner or person entitled to possession is not known (s. 75, enacting s. 446.2(2)(*b*) of the *Code*).

Our Recommendations (*Cont.*)	*C.L.A.A.* (*Cont.*)
(5) Special sealing and application procedures for documents for which solicitor-client privilege is claimed, set out in the *C.L.A.A.* (s. 72, enacting s. 444.1 of the *Criminal Code*), should be augmented by two new provisions, namely, that the protection afforded by these procedures should extend to materials in possession of the client to which solicitor-client privilege is claimed and the Crown should not be permitted access to the documents at issue in the application. Upon a determination that seized documents are subject to solicitor-client privilege, they should be returned to the person from whom they were seized. If no solicitor-client privilege is found to exist, the documents should be treated in the same manner as other things seized.	The *C.L.A.A.* provides special sealing and application provisions for documents for which solicitor-client privilege is claimed, but does not incorporate all of the changes we recommend. The provisions apply only to documents in the possession of a lawyer (s. 72, enacting s. 444.1(2) of the *Code*). Also, a judge may, in certain circumstances, allow the Attorney General to inspect the document (s. 77, enacting s. 444.1(4)(*c*) of the *Code*). Once it has been determined that the document should not be disclosed, it must be returned to the lawyer claiming solicitor-client privilege or to the client (s. 72, enacting s. 444.1(4)(*d*)(i) of the *Code*). If no privilege is found to exist, the document is returned to the officer who seized it, subject to such restrictions or conditions a judge deems appropriate (s. 72, enacting s. 444.1(4)(*d*)(ii) of the *Code*).
(6) A peace officer effecting seizure of any firearms, weapons, explosives, or substances of a dangerous nature, should, as soon as possible, remove them to a place of safety where they may be detained until the custody order is granted; where there exists a substantial and imminent danger to the lives, health or safety of the public, such seized things may be destroyed.	There are no specific provisions for disposition of dangerous things in the *C.L.A.A.* However, the present provisions for weapons used in the commission of an offence and explosives are preserved (ss. 446.1 and 447 of the *Code*). A broad definition of "weapon" is provided in the Act, expanding the scope of the present section (s. 2(8), adding a definition of "weapon" to s. 2 of the *Code*). Also, the *C.L.A.A.* expands the definition of "explosive substance" to include a wide range of substances of a dangerous nature (s. 2(2), amending the definition of "explosive substance" in s. 2 of the *Code*).

[Access to Custody Orders]

This Report makes no recommendations concerning publication of the contents of custody orders. This subject will be fully dealt with in our forthcoming Working Paper on Media Coverage of Legal Proceedings.	There is no declaration in the *C.L.A.A.* that custody orders and supporting documents are public. This, however, is the likely result of *A.-G. of Nova Scotia* v. *MacIntyre*, [1982] 1 S.C.R. 175.

The *C.L.A.A.* enacts a publication ban on the location of a search and the identity of the occupants and suspects in the investigation. The ban takes effect upon the issuance of a warrant or telewarrant (s. 70, enacting s. 443.2(1) of the *Code*). The ban would appear to apply to the publication of this information, whether it was obtained from the warrant itself or from a detention order, post-seizure report or elsewhere. The ban terminates upon the laying of a charge in respect of the suspected offence for which the warrant was issued (s. 70, enacting s. 443.2(1) of the *Code*).

The *C.L.A.A.* ban does not apply where the occupants and suspects consent to publication (s. 70, enacting s. 443.2(1) of the *Code*).

IV. Access

4. (1) With respect to access to the things seized, the following rules should apply: Where access to the things seized is denied, a justice should have the discretion to order that an applicant be permitted to examine anything seized and detained if:

(a) the applicant establishes an interest in the things seized and detained; and

(b) the applicant has given three clear days notice to the Attorney General or his agent.

The *C.L.A.A.* permits a person who has an interest in what is detained to apply for access to the property for purposes of examination after three clear days notice to the Attorney General (s. 74, enacting s. 446(15) of the *Code*).

Where access to seized documents has been granted, a justice may, upon application, order that the applicant receive photocopies either upon payment of a reasonable fee determined in accordance with the tariff of fees fixed or approved by the Attorney General of the province, or without charge.

Where documents are seized, a person asserting a solicitor-client privilege may be authorized to examine or photocopy the document (s. 72, enacting s. 444.1(9) of the *Code*).

(2) A person who considers himself aggrieved by an order made under Recommendation 4(1) should have a right of appeal from the order to a judge of the "court of appeal" as defined in section 2 of the *Criminal Code*.

A right of appeal is provided for restoration orders generally, but not from orders respecting the examination of property or documents (s. 74, enacting s. 446(17) of the *Code*).

Our Recommendations (*Cont.*)	*C.L.A.A.* (*Cont.*)

V. Duration of Custody Orders

5. (1) Where no criminal proceedings have been instituted the custody order should terminate at the earliest of the following:

(a) when three months have passed from the date of seizure;

(b) when the prosecution finds no need for detaining the things; or

(c) when another order respecting the thing seized is made by a court of competent jurisdiction.

(2) Before the expiration of the three-month period or of an extension granted herein, the issuing official should be empowered, upon application by the prosecution, who has given notice of his application to the person(s) entitled to an inventory under Recommendation 2(1), to extend the custody order for a period not exceeding three months where he is satisfied that having regard to the nature of the investigation, the further detention of the things is reasonably necessary.

(3) Where criminal proceedings have been instituted and the thing is detained for use as evidence, the custody order should terminate at the earliest of the following:

(a) when another order respecting the seized thing is made by a court of competent jurisdiction;

(b) thirty days after criminal proceedings are completed; or

(c) when the prosecution finds no need for detaining the thing in custody for evidentiary purposes.

Under the *C.L.A.A.*, detention orders last three months unless a justice orders otherwise, or proceedings are instituted in which the objects may be required (s. 74, amending s. 446(2) of the *Code*). A prosecutor must apply for return of the objects if proceedings have not been instituted at the expiration of a detention order (s. 74, amending s. 446(6) of the *Code*). If the prosecutor determines before the expiration of a detention order that the objects are no longer required, he must apply for return of the objects (s. 74, amending s. 446(5) of the *Code*).

Orders may be extended for a specified period if warranted by the nature of the investigation. They may be extended indefinitely if proceedings have been instituted in which the things may be required. In either case, an application for extention must be made before expiration of the initial order (s. 74, amending s. 446(2) of the *Code*). Orders lasting beyond a cumulative total of one year may be made in situations where the investigation is complex or proceedings have been instituted (s. 74, amending s. 446(3) of the *Code*).

Detention orders may be terminated where the objects are no longer needed for an investigation or legal proceeding upon an application by the prosecutor (s. 74, amending s. 446(5) of the *Code*).

If a court determines that an offence has been committed and that the objects are takings of the offence, they must be returned to the person entitled to possession of them (if known) or forfeited to the Crown. However, the objects would continue to be detained if required for other proceedings (s. 75, enacting s. 446.2(1) and (2) of the *Code*).

VI. Disposition

A. Upon Termination of the Custody Order

6. (1) Where a custody order terminates in accordance with Recommendation 5(1)(c), by an order of a court of competent jurisdiction, the disposition of the thing should be in accordance with the terms of the order.

(2) Where a custody order terminates in accordance with Recommendation 5 and no restoration order has been made, the disposition of seized things should be as follows:

(a) if civil proceedings are pending regarding claims to ownership or possession of the things seized, the things should be transferred to the custody of the court before which the civil proceedings are pending, to be disposed of as that court orders;

(b) if there are no conflicting claims to ownership or possession of the things seized, the things should be restored to the person demonstrating a lawful proprietary interest in the things;

(c) if there are conflicting claims to ownership or possession of the things seized but no civil proceedings are pending, the things should be ordered returned to the person from whom they were seized provided that possession of the things by that person is lawful;

(d) if there are no claims to the things seized, they should be transferred to the custody of provincial authorities to be dealt with according to the terms of applicable provincial legislation.

Detention orders under the *C.L.A.A.* generally terminate by judicial order upon the application of a prosecutor, the person from whom objects were seized, or the lawful owner or person entitled to possession (s. 74, amending s. 446(5), (6) and (7) and enacting s. 446(8), (9), (10) and (11) of the *Code*).

Where a judge or justice is satisfied upon an application for return that detention of seized things should cease, he must order that they be returned to the person from whom they were seized, if possession by that person is lawful. If possession by that person is not lawful, the seized things must be returned to the lawful owner (if known) or be forfeited to the Crown (s. 74, enacting s. 446(9)(*a*) and (*b*) of the *Code*). Where a prosecutor applies for termination of a detention order on the basis that the seized things are no longer required, an opportunity must be given to the person from whom they were seized or a person claiming lawful ownership or possession to establish an entitlement to them (s. 74, amending s. 446(5) of the *Code*). Where a person claiming a proprietary interest applies for return of seized things, a judge or justice must be satisfied that the applicant is the lawful owner or is lawfully entitled to possession (s. 74, enacting s. 446(11) of the *Code*). No order can be made in respect of property obtained in the commission of an offence if there is a dispute over ownership or possession of it (s. 75, enacting s. 446.2(3)(*b*)(iv) of the *Code*).

Our Recommendations (*Cont.*)	*C.L.A.A.* (*Cont.*)
B. Of Contraband	
(3) Where a custody order terminates in accordance with Recommendation 5, contraband (things, funds and information possessed in circumstances constituting an offence) should be forfeited to the state to enforce the prohibition against possession if it has not been restored in accordance with Recommendation 6(2).	There is no specific reference to contraband in the *C.L.A.A.* However, the general powers to make restoration orders appear to cover situations where contraband is involved. These powers apply only where possession of the seized thing by the person from whom it was seized is lawful, or the lawful owner or person entitled to possession is known (s. 74, enacting s. 446(9)(*c*) and (*d*) and s. 446(1)(*a*) of the *Code*; s. 75, enacting s. 446.2(2) of the *Code*). Otherwise, the property is forfeited to the Crown (s. 74, enacting s. 446(9)(*d*) of the *Code*; s. 75, enacting s. 446.2(2)(*b*) of the *Code*).
VII. Restoration Application	
7. A person from whom things have been seized or from whose place or vehicle things have been seized, or any person asserting a claim to possession of the things seized, should have the right to apply to a judge to have the things restored to him or her.	An application for return of seized goods may be made by a person from whom they have been seized (s. 74, amending s. 446(7) of the *Code*) or a person claiming to be the lawful owner or to have lawful entitlement to possession of seized things (s. 74, enacting s. 446(10) of the *Code*).
VIII. Notice of Restoration Application	
8. The judge should be empowered to hear an application under Recommendation 7 after being satisfied that eight days written notice has been given by the applicant to: (a) the prosecution; (b) any person who has brought a competing application for restoration of the things seized; (c) any person with a proprietary interest of which the applicant is aware; and	A person from whom things have been seized may apply for return of those things upon three clear days notice to the Attorney General (s. 74, amending s. 446(7) of the *Code*). A person claiming lawful ownership or possession of seized things may apply for return on three clear days notice to the Attorney General and the person from whom the things were seized (s. 74, enacting s. 446(10) of the *Code*).

(d) the accused.

This notice period may be abridged with the consent of all the parties listed above or by order of the court.

IX. Grounds for Granting Restoration Order

9. (1) Upon application by a person specified in Recommendation 7, a judge should be empowered to make a restoration order as provided in Recommendation 10 if he is satisfied that the applicant has established that he or she is clearly entitled to possession, unless the prosecution shows that the things seized are reasonably required to be detained for evidentiary or investigative purposes. The judge should have regard to:

(a) the nature of the things;

(b) any alternatives to detaining the things for use as evidence;

(c) any representations on behalf of the defence regarding the need for the continued detention of the things for evidentiary or investigative purposes; and

(d) any other consideration relevant to the disposition of the seized things.

An order may be made upon an application returning things to the person from whom they were seized, if possession by that person is lawful (s. 74, enacting s. 446(9) of the *Code*). Seized things may be returned to persons claiming lawful ownership or possession after a determination to that effect has been made (s. 74, amending s. 446(5) and enacting s. 446(9) and (11) and s. 446.2(2) of the *Code*).

In determining whether or not to order the return of seized objects, a justice or judge must consider whether detention is required for the purposes of an investigation or any legal proceeding (s. 74, enacting s. 446(9) and (11) of the *Code*).

(2) In determining whether an applicant is clearly entitled to possession of the seized things, the judge should be required to consider evidence of the applicant's entitlement to possession of the things seized and any conflicting claims shown to exist with respect to the things.

There is no specific obligation in the *C.L.A.A.* to consider specific kinds of evidence prior to ordering the return of seized things.

(3) Restoration orders may be made for contraband where the applicant can demonstrate that possession of the seized property is no longer unlawful or where the interests of justice so require.

There is no specific reference to contraband in the *C.L.A.A.* However, the general powers to make restoration orders apply only where possession of the seized thing by the person from whom it was seized is lawful, or the lawful owner or person entitled to possession is known (s. 74, enacting s. 446(9)(*c*) and (*d*), and s. 446(11)(*a*) of the *Code*; s. 75, enacting s. 446.2(2) of the *Code*).

Our Recommendations (*Cont.*)	*C.L.A.A.* (*Cont.*)
X. Restoration Order	
10. (1) Where he is satisfied that the applicant or another person is clearly entitled to possession of the things seized and that the grounds set out in Recommendation 9 have been met, the judge should be required to order that the things be restored to that person.	Under the *C.L.A.A.*, a judge or justice must return seized objects to the person from whom they were seized (if possession by him is lawful), the lawful owner, or the person entitled to possess them once it has been shown that the period of detention has expired or that detention is no longer justified (s. 74, enacting s. 446(9) and (11) of the *Code*).
(2) Restoration under such an order should be made as soon as reasonably possible.	There is no time requirement in the *C.L.A.A.* for restoration orders. No restoration may be made, however, pending the appeal of an order or within thirty days after an order was made (s. 74, enacting s. 446(12) of the *Code*).
(3) A judge making an order under Recommendation 10(1) should be empowered to stipulate that such order be absolute or made subject to specified conditions and on such terms as appear to the judge necessary or advisable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.	There is no power to impose conditions in restoration orders. Restoration is usually available only after all proceedings in respect of the seized things have terminated (s. 74, enacting s. 446(9) of the *Code*).
XI. Alternative Evidence	
11. Where an order for restoration of things seized is made under Recommendation 10(1), the judge, after comparing the thing seized with any copy or reproduction thereof, should be empowered to certify as an accurate record of the things seized, a photograph, videotape or other form of reproduction or duplication, and in any subsequent proceedings: (a) such certified record shall be admissible in place of the original; and (b) no weight may be attached to the absence of the original.	There is a provision in the *C.L.A.A.* permitting the Attorney General to make copies of documents prior to their return or forfeiture under the Act (s. 74, enacting s. 446(13) of the *Code*). Such copies are admissible in evidence and have the same probative force as the original if certified as true copies by the Attorney General (s. 74, enacting s. 446(14) of the *Code*). There is no similar provision for things other than documents.

XII. No Restoration Order Where Competing Claims Exist

12. The judge should not be empowered to make a restoration order where it appears that the thing should be restored but there is a substantial question as to whether it should be restored to the person from whom it was seized, or substantial question as to who among several claimants is entitled to possession.

The *C.L.A.A.* does not permit objects to be returned to persons claiming ownership or possession of seized things unless it has been determined that the applicant is the lawful owner or is lawfully entitled to possession (s. 74, enacting s. 446(11) of the *Code*). Things may only be returned to persons from whom they were seized if possession by them is lawful (s. 74, enacting s. 446(9) of the *Code*). If a court finds that an offence has been committed, no order may be made in respect of objects obtained in the commission of the offence if there is a dispute as to ownership or possession of them (s. 75, enacting s. 446.2(3)(*b*)(iv) of the *Code*).

XIII. Property Rights Unaffected by Restoration Order

13. An order for restoration to a person from whom things were seized or to a person with a claim to possession should neither establish nor extinguish any property rights in the things that would not have existed but for the order.

There is no comparable provision in the *C.L.A.A.*

XIV. Appeals

14. (1) A person who considers himself aggrieved by an order relating to the disposition of things seized should have a right of appeal from the order to a judge of the "court of appeal" as defined in section 2 of the *Criminal Code*.

A person who considers himself aggrieved by any order arising out of an application for return of seized things has a right of appeal (s. 74, enacting s. 446(17) of the *Code*).

(2) Seized property should not be disposed of pending an appeal from an order relating to the disposition of the property, or within thirty days of such an order, unless a judge of the court of appeal orders otherwise.

No return or forfeiture of seized things may be carried out pending an appeal, or within thirty days, of an order (s. 74, enacting s. 446(12) of the *Code*).

APPENDIX B

Criminal Code Provisions relating to Disposition of Seized Property[69]

443. (1) **[Information for search warrant]** A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(*a*) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

(*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament, or

(*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

(*d*) to search the building, receptacle or place for any such thing and to seize it, and

(*e*) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 445.1.

(2) **[Endorsement of search warrant]** Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be in some other territorial division, the justice may issue his warrant in like form modified according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 25, by a justice having jurisdiction in that territorial division.

(3) **[Form]** A search warrant issued under this section may be in the form set out as Form 5 in Part XXV, varied to suit the case.

(4) **[Effect of endorsement]** An endorsement that is made on a warrant as provided for in subsection (2) is sufficient authority to the peace officers or such persons to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to deal with the things seized in accordance with section 445.1 or as otherwise provided by law.

69. As amended by the *C.L.A.A.*

443.1 (1) **[Telewarrants]** Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 240 or 443, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

(2) **[Information on oath and record]** 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, cause to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution the record or a transcription thereof, certified by the justice as to time, date and contents.

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

(4) **[Contents of information]** 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 a justice;

(*b*) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;

(*c*) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and

(*d*) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

(5) **[Issuing warrant]** A justice referred to in subsection (1) who is satisfied that an information on oath submitted by telephone or other means of telecommunication

(*a*) is in respect of an indictable offence and conforms to the requirements of subsection (4),

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

(*c*) discloses reasonable grounds, in accordance with paragraph 443(1)(*a*), (*b*) or (*c*) or subsection 240(1), as the case may be, for the issuance of a warrant in respect of an indictable offence,

may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace officer appears personally pursuant to subsection 240(1) or 443(1), as the case may be, and may require that the warrant be executed within such time period as the justice may order.

(6) **[Formalities respecting warrant and facsimiles]** Where a justice issues a warrant by telephone or other means of telecommunication,

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

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

(*c*) the justice shall, as soon as practicable after the warrant has been issued, 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) **[Providing facsimile]** A peace officer who executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 240(1), shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

(8) **[Affixing facsimile]** A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 240(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

(9) **[Report of peace officer]** A peace officer to whom a warrant is issued by telephone or other means of telecommunication shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution as soon as practicable but within a period not exceeding seven days after the warrant has been executed, which report shall include

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

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

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

(10) **[Bringing before justice]** The clerk of the court with whom a written report is filed pursuant to subsection (9) shall, as soon as practicable, 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 respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

(11) **[Proof of authorization]** 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 on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication.

443.2 (1) **[Restriction on publicity]** Where a search warrant is issued under section 443 or 443.1 or a search is made under such a warrant, every one who publishes in any newspaper or broadcasts any information with respect to

(*a*) the location of the place searched or to be searched, or

(*b*) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,

without the consent of every person referred to in paragraph (*b*) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.

(2) **[Definition of "newspaper"]** In this section, "newspaper" has the same meaning as in section 261.

444. **[Execution of search warrant]** A warrant issued under section 443 or 443.1 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night. 1953-54, c. 51, s. 430.

444.1 (1) **[Definitions]** In this section,

["custodian"] "custodian" means a person in whose custody a package is placed pursuant to subsection (2);

["document"] "document", for the purposes of this section, has the same meaning as in section 282 of this Act;

["judge"] "judge" means a judge of a superior court of criminal jurisdiction of the province where the seizure was made;

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

["officer"] "officer" means a peace officer or public officer.

(2) **[Examination or seizure of certain documents where privilege claimed]** Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(*a*) seize the document and place it in a package and suitably seal and identify the package; and

(*b*) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) **[Application to judge]** Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(*a*) within fourteen days from the day the document was so placed in custody, apply on two days notice of motion to all other persons entitled to make application, to a judge for an order

(i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(*b*) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(*c*) if he has proceeded as authorized by paragraph (*b*), apply, at the appointed time and place, for an order determining the question.

(4) **[Disposition of application]** On an application under paragraph (3)(*c*), the judge

(*a*) may, if he considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(*b*) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect the document;

(*c*) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(*d*) shall determine the question summarily and,

(i) if he is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who claimed the solicitor-client privilege or to his client, or

(ii) if he is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as he deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) **[Privilege continues]** Where the judge determines pursuant to paragraph (4)(*d*) that a solicitor-client privilege exists in respect of a document, whether or not he has, pursuant to paragraph (4)(*b*), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) **[Order to custodian to deliver]** Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(*a*) or that following such an application no further application has been made under paragraph (3)(*c*), he shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

(7) **[Application to another judge]** Where the judge to whom an application has been made under paragraph (3)(*c*) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.

(8) **[Prohibition]** No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9) **[Authority to make copies]** At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and that the package is resealed without alteration or damage.

(10) **[Hearing in private]** An application under paragraph (3)(*c*) shall be heard in private.

(11) **[Exception]** This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*.

445. **[Seizure of things not specified]** Every person who executes a warrant issued under section 443 or 443.1 may seize, in addition to the things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence.

445.1 (1) **[Restitution of property or report by peace officer]** Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued pursuant to section 240 or 443 or 443.1 or under section 445 or otherwise in the execution of his duties under this or any other Act of Parliament, he shall, as soon as practicable,

(*a*) where he is satisfied

(i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and

(ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,

return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or

(*b*) where he is not satisfied as described in subparagraph (*a*)(i) and (ii),

(i) bring the thing seized before the justice referred to in paragraph (*a*), or

(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained

to be dealt with by the justice in accordance with subsection 446(1).

(2) **[Idem]** Subject to this or any other Act of Parliament, where a person, other than a peace officer, has seized anything under a warrant issued pursuant to section 443 or under section 445 or otherwise in the execution of his duties under this or any other Act of Parliament, he shall, as soon as practicable,

(*a*) bring the thing seized before the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, before a justice having jurisdiction in respect of the matter, or

(*b*) report to the justice referred to in paragraph (*a*) that he has seized the thing and is detaining it or causing it to be detained,

to be dealt with by the justice in accordance with subsection 446(1).

(3) **[Form]** A report to a justice under this section shall be in the form set out as Form 5.2 in Part XXV, varied to suit the case and shall include, in the case of a report in respect of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 443.1(9).

446. (1) **[Detention of things seized]** Subject to this or any other Act of Parliament, where, pursuant to paragraph 445.1(1)(*b*) or subsection 445.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, he shall,

(*a*) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to him, unless the prosecutor satisfies the justice that the detention of the thing seized is required for the pruposes of any investigation or a preliminary inquiry, trial or other proceeding; or

(*b*) where the prosecutor satisfies the justice that the thing seized should be detained for a reason set out in paragraph (*a*), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

(2) **[Further detention]** Nothing shall be detained under the authority of paragraph (1)(*b*) for a period of more than three months after the day of the seizure unless, before the expiration of that period,

(*a*) a justice, on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and he so orders; or

(*b*) proceedings are instituted in which the thing detained may be required.

(3) **[Idem]** More than one order for further detention may be made under paragraph (2)(*a*) but the cumulative period of detention shall not exceed one year from the day of the seizure unless, before the expiration of that year,

(*a*) a judge of a superior court of criminal jurisdiction or a judge as defined in section 482, on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and he so orders; or

(*b*) proceedings are instituted in which the thing detained may be required.

(4) **[When accused ordered to stand trial]** When an accused has been ordered to stand trial the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by him and disposed of as the court directs.

(5) **[Where continued detention no longer required]** Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), he shall apply to

(*a*) a judge of a superior court of criminal jurisdiction or a judge as defined in section 482, where a judge ordered its detention under subsection (3), or

(*b*) a justice, in any other case,

who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

(6) **[Idem]** Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor shall apply to a judge or justice referred to in paragraph (5)(*a*) or (*b*) in the circumstances set out therein, for an order in respect of the property under subsection (9).

(7) **[Application for order of return]** A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days notice to the Attorney General, apply summarily to

(*a*) a judge of a superior court of criminal jurisdiction or a judge as defined in section 482, where a judge ordered the detention of the thing seized under subsection (3), or

(*b*) a justice, in any other case,

for an order under paragraph (9)(*c*) that the thing seized be returned to the applicant.

(8) **[Exception]** A judge of a superior court of criminal jurisdiction or a judge as defined in section 482, where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless such application is so allowed.

(9) **[Disposal of things seized]** Subject to this or any other Act of Parliament, if

(*a*) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or

(*b*) a justice, in any other case,

is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

(*c*) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person; or

(*d*) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,

and he may, if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

(10) **[Application by lawful owner]** Subject to this or any other Act of Parliament, a person, other than a person who may make an application under subsection (7), who claims to be the lawful owner or person lawfully entitled to possession of anything seized and brought before or reported to a justice under section 445.1 may, at any time, on three clear days notice to the Attorney General and the person from whom the thing was seized, apply summarily to

(*a*) a judge referred to in subsection (7), where a judge ordered the detention of the thing seized under subsection (3), or

(*b*) a justice, in any other case,

for an order that the thing detained be returned to the applicant.

(11) **[Order]** Subject to this or any other Act of Parliament, on an application under subsection (10), where a judge or justice is satisfied that

(*a*) the applicant is the lawful owner or lawfully entitled to possession of the thing seized, and

(*b*) the periods of detention provided for or ordered under subsections (1) to (3) in respect of the thing seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4),

he shall order that

(*c*) the thing seized be returned to the applicant; or

(*d*) except as otherwise provided by law, where, pursuant to subsection (9), the thing seized was forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant, the applicant be paid the proceeds of sale or the value of the thing seized.

(12) **[Detention pending appeal, etc.]** Notwithstanding anything in this section, nothing shall be returned, forfeited or disposed of under this section pending any application made, or appeal taken, thereunder in respect of the thing or proceeding in which the right of seizure thereof is questioned or within thirty days after an order in respect of the thing is made under this section.

(13) **[Copies of documents returned]** Where any document is returned or ordered to be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11), the Attorney General may, before returning the document or complying with the order, make or cause to be made, and may retain, a copy of the document.

(14) **[Probative force]** Every copy made under subsection (13) shall, if certified as a true copy by the Attorney General, be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the original document would have if it had been proved in the ordinary way.

(15) **[Access to anything seized]** Where anything is detained pursuant to subsections (1) to (3), a judge of a superior court of criminal jurisdiction or a judge as defined in section 482 may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

(16) **[Conditions]** An order that is made under subsection (15) shall be made on such terms as appear to the judge to be necessary or desirable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

(17) **[Appeal]** A person who considers himself aggrieved by an order made under subsection (8), (9) or (11) may appeal from the order to the appeal court, as defined in section 747, and for the purposes of the appeal the provisions of sections 749 to 760 apply with such modifications as the circumstances require.

446.1 (1) **[Forfeiture of weapons]** Where it is determined by a court that a weapon was used in the commission of an offence and that weapon has been seized and detained, the weapon is, subject to subsection (2), forfeited and may be dealt with as the court that makes the determination directs.

(2) **[Return of weapons to lawful owners]** If the court by which a determination referred to in subsection (1) is made is satisfied that the lawful owner of a weapon that, but for this subsection, would be forfeited by virtue of the determination, was not a party to the offence and had no reason to believe that the weapon would or might be used in the commission of an offence, the court shall order the weapon returned to the lawful owner thereof or the proceeds of any sale thereof to be paid to him.

(3) **[Application of proceeds]** Where any weapon to which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General or, where an order is made under subsection (2), to the person who was, immediately prior to the sale, the lawful owner of the weapon. 1972, c. 13, s. 37.

NOTE: s. 2 of the *Code* now provides:

"weapon" means

(*a*) anything used or intended for use in causing death or injury to persons whether designed for such purpose or not, or

(*b*) anything used or intended for use for the purpose of threatening or intimidating any person,

and, without restricting the generality of the foregoing, includes any firearm as defined in section 82;

446.2 (1) **[Order for restitution or forfeiture of property obtained by crime]** Where an accused or defendant is tried for an offence and the court determines that an offence has been committed, whether or not the accused has been convicted or discharged under section 662.1 of the offence, and at the time of the trial any property obtained by the commission of the offence

(*a*) is before the court or has been detained so that it can be immediately dealt with, and

(*b*) will not be required as evidence in any other proceedings,

section 446 does not apply in respect of the property and the court shall make an order under subsection (2) in respect of the property.

(2) **[Idem]** In the circumstances referred to in subsection (1), the court shall order, in respect of any property,

(*a*) if the lawful owner or person lawfully entitled to possession of the property is known, that it be returned to that person; and

(*b*) if the lawful owner or person lawfully entitled to possession of the property is not known, that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(3) **[When certain orders not to be made]** An order shall not be made under subsection (2)

(*a*) in the case of proceedings against a trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for an offence under section 290, 291, 292 or 296; or

(*b*) in respect of

(i) property to which a person acting in good faith and without notice has acquired lawful title for valuable consideration,

(ii) a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it,

(iii) a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an offence had been committed, or

(iv) property in respect of which there is a dispute as to ownership or right of possession by claimants other than the accused or defendant.

(4) **[By whom order executed]** An order made under this section shall, on the direction of the court, be executed by the peace officers by whom the process of the court is ordinarily executed.

447. (1) **[Seizure of explosives]** Every person who executes a warrant issued under section 443 or 443.1 may seize any explosive substance that he suspects is intended to be used for an unlawful purpose, and shall, as soon as possible, remove to a place of safety anything that he seizes by virtue of this section and detain it until he is ordered by a judge of a superior court to deliver it to some other person or an order is made pursuant to subsection (2).

(2) **[Forfeiture]** Where an accused is convicted of an offence in respect of anything seized by virtue of subsection (1), it is forfeited and shall be dealt with as the court that makes the conviction may direct.

(3) **[Application of proceeds]** Where anything to which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General. 1953-54, c. 51, s. 433.

NOTE: s. 2 of the *Code* now provides:

"explosive substance" includes

(*a*) anything intended to be used to make an explosive substance,

(*b*) anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance, and

(*c*) an incendiary grenade, fire bomb, molotov cocktail or other similar incendiary substance or device and a delaying mechanism or other thing intended for use in connection with such a substance or device.