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the issuance of search warrants

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THE ISSUANCE OF SEARCH WARRANTS

A Manual

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by

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FOREWORD

This manual is concerned with the present legal standards governing the issuance of search warrants. Issuance, of course, only initiates the sequence of procedures which may ultimately relate to the warrant. The subsequent execution of the search, the disposition of the items seized, the resort to an application to quash and the idiosyncratic procedural wrinkles of the various special warrant provisions must all be taken into account if one is to have a comprehensive understanding of the area.

The issuance stage, however, is particularly important in two respects. Firstly, it may be seen that at the issuance stage a number of significant decisions are made which, practically speaking, influence the course of subsequent proceedings. The execution of the warrant, for example, is at least primarily linked to its contents. So too, the decision to resort to an application to quash is influenced by the prospective applicant's assessment of the validity of both the warrant and the written application prepared to obtain it. But secondly, quite apart from its practical implications, the issuance of the warrant is conceptually significant. It represents the one point at which, at least in theory, a judicial decision is made as to whether the requested search, and the invasion of individual privacy inherent in it, ought to be allowed to proceed. The warrant provisions discussed in the manual, whatever procedural variations they may incorporate, are drafted according to an adjudicative model. The applicant must demonstrate to a justice of the peace that the relevant legal standards have been satisfied before the justice issues the requested form of process.

This is how the issuance procedure is supposed to work. But what does it actually look like? Are the existing legal standards followed in practice? The Law Reform Commission of Canada, as part of its project on police powers of search and seizure, conducted a study to attempt to answer these questions. In the course of this study, a representative sample of sets of search warrant documents from seven Canadian cities was obtained. These sets of documents, comprising in each case the written application (either an information or report-in-writing) and the warrant itself, were distributed to a panel of judges drawn from appellate and superior Courts across Canada. This manual was prepared primarily to assist the panelists in their task of evaluating the sets of documents.

The results of the evaluations conducted by the judicial panel are being incorporated into a study paper on search with warrant which is currently being prepared for the Commission. In the meantime, the Commission has decided to release the manual as one of its series of research publications in the area. While there already exits one authority in the subject, The Law of Search and Warrants in Canada by James A. Fontana (Butterworths, Toronto, 1974), the manual has a somewhat different orientation than this established work. It focuses specifically on issuance rather than covering the whole sequence of warrant procedures, and it has been written primarily with the adjudicator, the justice of the peace, in mind.

In essence, the members of the judicial panel were asked in each case, "Should the justice of the peace have issued a search warrant? If so, is the warrant which has been issued a satisfactory one?" The manual presents a framework for the analysis of these questions on a case by case basis, following the steps of search warrant issuance from the presentation of the written application to the justice through to his conferment of the warrant upon the applicant. The sets of rules which the manual articulates are those relating to the present provisions governing those warrants which fell within the scope of the panel's examination. While certain features of the applicable rules may suggest the need for revision, the discussion in the manual is directed towards exposition of the rules, not proposals for their reform.

The scope of the panel's examination encompassed the issuance of warrants under three distinct sets of

statutory provisions: (1) the general provisions of subsection 443(1) of the Criminal Code, R.S.C. 1970, c. C-34, (2) the special provisions of subsection 181(1) of the Code covering gaming, betting and disorderly house offences, and (3) the provisions covering narcotics and drugs under subsection 10(2) of the Narcotic Control Act, R.S.C. 1970, c. N-1 and subsection 37(2) of the Food and Drugs Act, R.S.C. 1970, c. F-27 respectively. Since the overwhelming preponderance of judicial authority on search warrant issuance deals with subsection 443(1), the manual uses the general provision as its starting point. Its treatment of the other two sets of rules, while including discussions of particularly relevant caselaw, looks basically to points of comparison and contrast with subsection 443(1).

In preparing this manual, I received great help from a number of individuals at the Commission, as well as criminal lawyers both from the Crown and in defence practice. I would particularly like to thank Calvin Becker for his comments and advice, Edward Myers for his research work, and Elizabeth Cziszler and Madeleine Ippersiel for their contributions to the typing of the manuscript.

The actual draft of the manual used by the panelists has been revised slightly to take account of recent developments in the law and expand upon a few topics previously discussed in condensed form. The text describes the state of the law as of March 1, 1980.

INTRODUCTION

The Judicial Approach to Search Warrant Issuance

The jurisprudence dealing with the issuance of search warrants has suffered from both disagreements over the proper tests to be applied at the various stages of the process, and inconsistent applications of those tests upon which consensus has been reached. However, at the level of general attitude towards the issuance of search warrants, the jurisprudence has been virtually unanimous. Search of privately occupied premises has been, and still is, considered to be a serious intrusion upon individual privacy rights; the warrant permitting the search has accordingly been viewed as an extraordinary remedy which ought not to be lightly granted. As was stated recently in Re Pacific Press Ltd. and the Queen et al:

> The search warrant is a tool in the administration of criminal law, allowing officers of the law to undertake the search of a man's house or other building with a view to discovering, amongst other things, evidence which might be used in the prosecution of a criminal offence. From time immemorial common law Courts have been zealous in protecting citizens from the unwarranted use of this extraordinary remedy. As the four English Judges who sat declared more than three centuries ago, "...the house of every one is to him as his (a) castle and fortress, as well for his defence against injury and violence, as for his repose...": Semayne's Case (1604), 5 Co. Rep. 91a at p. 91b, 77 E.R. 194 at p. 195.[1]

This protective attitude has manifested itself in higher Court decisions dealing with various aspects of issuance. Firstly, as in Re McAvoy,[2] it has been at the basis of judicial reluctance to extend the application of

Criminal Code search provisions to proceedings under other statutes in the absence of clear and unambiguous wording permitting such an extension. Secondly, as in Re United Distillers Ltd.,[3] it has prompted careful scrutiny of informations to ensure that the justice issuing the warrant has indeed been given the jurisdiction to do so. Finally, as in Re Black and the Queen,[4] it has justified the invalidation of warrants that do not themselves adhere strictly to applicable standards.

But the common law attitude provides more than merely an inspiration for legal rule-making by higher Courts. It should be the starting point for the justice in evaluating the application for a search warrant that is made to him. For it is the justice who plays the critical role in the issuance process. While reviewing Courts may quash a warrant after its execution, their powers are essentially curative. It is only the justice to whom the application for the warrant is made who can effectively prevent the wrongful invasion of privacy that results from an unjustified resort to search with warrant.

Indeed, even after quashing a warrant, a reviewing Court would appear to have the discretion to allow the retention of the seized items by the Crown. In the Black[5] case, Berger J. held that he had inherent jurisdiction to order the return of items seized to the applicant; he qualified the order, however, to allow their retention by the Crown if they were required as evidence. In Bergeron et al v. Deschamps et al,[6] Laskin C.J.C. refrained from passing on the correctness of the decision in Black, holding instead that it could have no application to the factual circumstances presented to the Supreme Court. Subsequent decisions on point have followed a general trend of interpreting Bergeron as allowing orders similar to that made in Black so long as there is an offence charged to which the items relate; at least such has been the position taken by the New Brunswick Supreme Court, Appeal Division in Re Atkinson and the Queen,[7] the Quebec Court of Appeal in Regina v. Pomerleau et al,[8] and the Ontario Court of Appeal in Re Model Power and the Queen.[9] The notable exception to this trend has been the Alberta Supreme Court, Trial Division decision in Re Alder et al v. the Queen, in which Moshansky J. commented, "To allow the police to retain articles illegally seized under a defective search warrant which has itself been quashed strikes me as a mockery of the law."[10] However, given the Supreme Court

of Canada's recent refusal to grant leave to appeal in Model Power,[11] it would appear that the weight of authority is likely to remain against such an unreserved position.

In the light of this authority the onus upon the justice of the peace is particularly acute. For it is clear that following The Queen v. Wray,[12] items seized under an illegal search warrant cannot be excluded from evidence at trial unless of trifling weight, tenuous admissibility and gravely prejudicial to the accused. It may be said then, that under the present state of the law, the only protection against the use of an illegal search warrant to obtain evidence resides in the justice who is asked to issue one. Accordingly, the "zealous" attitude of the common law is one that he, first and foremost, ought to have in mind.

The office of justice of the peace, of course, has never been a purely "judicial" one; historically, the office has embraced a number of law enforcement functions. As R. Thomas Farrar notes in his article on police search and seizure,

> Far from being a neutral official, the justice of the peace historically combined criminal-investigatory, police-administrative and judicial functions, hardly an amalgamation of powers conducive to neutrality and detachment. It was not until the emergence of the modern police organization circa 1829, well after passage of the fourth amendment, that the executive and judicial functions of the magistrate were separated.[13]

Even today, with the various Canadian police organizations firmly established, the office of the justice retains vestiges of its historically mixed status. The definition of "peace officer" in section 2 of the Criminal Code, for example, still includes persons who are justices of the peace.

However, it is clear that when acting in his capacity as issuer of a search warrant, the justice of the peace exercises a judicial function. Canadian authority dates back to Rex v. Kehr, an Ontario case from the turn of the century, in which it was observed that the issuer "must exercise a judicial discretion upon the facts brought before him".[14] More recently, in Re Worrall, Porter C.J.O. summed up the duties of the participants in the process as follows:

> The police officer is not a judicial officer. It was not his function to decide whether the articles in question should be seized or not. It was the duty of the Justice, upon the evidence before him, to decide this question.[15]

It is this duty to decide, using independent judgment and careful scrutiny, that underlies the body of caselaw dealing with search warrant issuance. Only when this duty is kept in mind do the tests for issuance articulated in the relevant statutory provisions become meaningful.

PART ONE: SECTION 443 OF THE CRIMINAL CODE

I. THE THREE PART PROCESS

Subsection 443(1) provides:

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

The process envisaged by this subsection may be perceived to be divisible into three stages:

> (1) the conferment of jurisdiction upon a justice by the presentation to him of an information upon oath in Form 1, which satisfies the requirements of either paragraphs (a), (b) or (c);
>
> (2) the decision of the justice, once satisfied as to his jurisdiction, to exercise his discretion and grant the requested warrant;
>
> (3) the issuance of the warrant for the search which the justice has decided to authorize.

It may be argued that this division is artificial in the light of the actual practice involved in the issuance of a warrant. The breakdown contemplates the information being presented by the applicant to the justice, and, subsequently, the justice dispensing a warrant to the applicant if he decides to do so. In practice, as Fontana notes in The Law of Search Warrants, "both documents are often prepared in advance and presented to the justice for his consideration".[16] Whoever actually prepares the documents, however, the Code requires that the justice make an independent judicial assessment of the information before he issues the warrant. As was stated in Re Purdy et al v The Queen, "It is the justice not the informant who must be satisfied that there is a reasonable ground for believing the facts required to be established before issuing a warrant" (emphasis added).[17]

The division distinguishes between the assessment of the information by the justice in order to determine his jurisdiction, and the exercise of his discretion to issue the warrant once jurisdiction is established. In practice, as will be shown, the line between the jurisdictional and discretionary aspects of the justice's decision is an imprecise one. However, on a theoretical basis, the distinction is clear. This may be perceived, firstly, in the context of attacking the justice's decision. As Carter states in The Law Relating To Search Warrants:

> The act of the magistrate in issuing the warrant may be attacked on the following grounds:-
>
> 1. That the magistrate had no jurisdiction in that the complaint on which he acted, was incurably defective; or
>
> 2. That the magistrate did not proceed judicially in that either he did not exercise a discretion or he exercised a discretion on wrong principles.[18]

Or, viewing the matter from the perspective of the issuing justice, as Fontana notes, the justice must "determine, upon what is alleged, both his own jurisdiction to issue a search warrant, and whether or not to issue it".[19]

Once the justice has decided to exercise his discretion to issue the warrant, the step remaining for him is to ensure that the contents of the warrant comply with law. Properly analyzed, his failure to do so is a question distinct from that of his jurisdiction. As was explained in Lynn v McCuish et al:

> The warrant as already stated does not contain these allegations and it is not good on its face. Nevertheless the Magistrate was, I think, acting with respect to a subject within his jurisdiction, and his failure to set forth the crime of theft in his warrant, did not place beyond his jurisdiction the subject matter which was already brought within his jurisdiction by the taking of the information.[20]

Simply stated, the consequence of a defectively framed warrant is that despite the conferment of jurisdiction upon the justice and the fact that his discretion was exercised properly in granting the warrant, the warrant itself is unlawful, and will be quashed by a reviewing Court.

II. THE INFORMATION: DOES IT VALIDLY CONFER JURISDICTION ON THE JUSTICE?

In order to confer jurisdiction on the justice, the information must satisfy three sets of standards. Firstly, it must conform to the formal requirements set out in subsection 443(1) that it be "under oath in Form 1". Secondly, it must pass substantive tests requiring it to describe an offence, specify items to be seized and designate premises to be searched, all within certain parameters of particularity. Finally, it must provide the justice with the reasonable ground for believing that the requirements of the limiting paragraphs (a), (b), or (c) have been met, in order to justify the issuance of the warrant.

A. FORMAL REQUIREMENTS

(1) Form 1

Form 1 is set out in the Criminal Code as follows:

FORM 1

Information to obtain a search warrant (Section 443)

Canada,
Province of
(*territorial division*) ,}

This is the information of A.B., of in the said (*territorial division*), (*occupation*), hereinafter called the informant, taken before me.

The informant says that (*describe things to be searched for and offence in respect of which search is to be made*), and that he has reasonable grounds for believing that the said things, or some part of them are in the (*dwelling-house, etc.*), of C.D., of in the said (*territorial division*) (*here add the grounds of belief, whatever they may be*).

Wherefore the informant prays that a search warrant may be granted to search the said (*dwelling-house, etc.*), for the said things.

Sworn before me
this day of
A.D. ,}
at .}

.....
Signature of Informant

.....
A Justice of the Peace in and for

Since the only form of information mentioned in subsection 443(1) is "Form 1", it would appear that compliance with this form is mandatory. As was stated in Purdy, "The information must be in Form 1 in the Appendix to the Criminal Code and in accord therewith must describe the thing to be searched for, and the grounds for believing they are in a named place must be disclosed therein."[21] Accordingly, courts are liable to treat omissions of various details from Form 1 quite seriously. For example, in Pacific Press, failure to name one of two places specified elsewhere in the information in the "prayer" at the conclusion of the form was held to be fatal to the warrant issued against the omitted place.[22] On the other hand, in Re Abou-Assale and Pollack and the Queen, the Court found the omission of the name of the judicial district in the space provided in the heading of the form to be a non-fatal defect, considering that the omitted location was alluded to elsewhere in the information as the locus of the offence and the place at which the information was sworn.[23]

A fundamental problem with compliance with Form 1 is the fact that strict adherence to its structure may result in failure to establish the reasonable ground for belief required by subsection 443(1). The situation is not, unfortunately, entirely clear. Farris C.J.B.C. observed in Re Regina and Johnson & Franklin Wholesale Distributors Ltd., after setting out the provisions of Form 1:

> It was not necessary that the magistrate be satisfied that there were reasonable grounds for believing that the things which were the object of the intended search were obscene. It was simply necessary that the magistrate be satisfied that there were reasonable grounds for believing that the things or some part of them were in the premises in respect of which the search warrant was sought.[24]

It is true that the "reasonable grounds for believing" set out in Form 1 relate only to the location of the items sought. However, a reading of subsection 443(1) itself would indicate that the reasonable grounds must be more comprehensive, supporting not only the location of the items, but their character, viz. the assertion that they fall within one of the limiting subparagraphs (a), (b) or (c). This was in fact pointed out by Tysoe J.A. in the earlier case of Re Regina and Johnson & Franklin Wholesale Distributors Ltd.; the justice, it was said,

must "be satisfied that there is reasonable ground to believe that there is in a building, receptacle or place any of the things set out in paras. (a), (b) or (c)" (emphasis is added).[25] To attempt to assert reasonable grounds to believe that the items sought fall within the limiting paragraphs, however, involves a mangling of the structure of Form 1.

The inadequacy of Form 1 was recognized in Regina v Colvin ex parte Merrick et al. Osler J. commented:

> It is to be observed that the use of Form 1 appears to be mandatory, although the actual form when examined leaves much to be desired.
>
> The section requires that the Justice shall be satisfied that there is reasonable ground to believe that the things to be searched for are in a particular place. In that respect the Form is satisfactory and contains the words "that he has reasonable grounds for believing that the said things, or some part of them, are in" and then follows a space to describe the place with respect to which that belief is held.
>
> However, the section also requires that the Justice must be satisfied that there is in such place something"...that there is reasonable ground to believe will afford evidence with respect to the commission of an offence..." and the Form provided does not give much assistance in this respect. In consequence, the person filling out the Form is obliged to complete a sentence commencing "The informant says that", following which he should, presumably, state that there is reasonable ground to believe that certain articles will afford evidence of a certain crime.[26]

As a result of this problem, various forms of informations have been drafted which deviate somewhat from Form 1 in order to suit more readily the requirements of subsection 443(1). For example, David Watt's Form 1-A.1 in Criminal Law Precedents presents a form which follows the structure of the subsection quite systematically:[27]

CANADA
PROVINCE OF
(territorial division)

This is the information of A B ,
(occupation) of the of , in the of , hereinafter called the informant, taken before me.

The informant says that he has reasonable and probable grounds to believe and does believe that there is [*OR* are] in a certain building, receptacle or place, namely, the

..... *(specify dwelling house, building, receptacle, or place)*
of ..... *(specify owner, occupant of dwelling house, etc.)*
at ..... *(specify address or location of dwelling house, etc.)*
in the said ..... *(specify territorial division)*
..... *(describe with particularity things to be searched for)*

[upon or in respect of which an offence against the Criminal Code has been committed, namely,] which there is reasonable ground to believe will afford evidence with respect to the commission of an offence against the Criminal Code, namely, [*OR* is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, namely]

(describe with particularity offence in respect of which search is to be made)

and that his grounds for so believing are:

(specify grounds of informant's belief)

WHEREFORE the informant prays that a search warrant may be issued to search the said *(specify dwelling house, etc.)* of *(specify owner, etc. as above)* at *(specify address or location as above)* in the said *(specify territorial division)* for the said thing(s).

SWORN BEFORE ME at
the of
in the of ,
this day of
19

....
A Justice of the Peace in and for Informant

The use of such forms raises the question of whether informations sworn upon them might be invalidated on grounds of non-compliance with Form 1. It is suggested that invalidation on such a ground would amount to a misconceived sacrifice of substance to technicality. Some support for this view is derived from Abou-Assale, in which the form of information deviated from Form 1 in favour of closer adherence to subsection 443(1). Greenberg J. noted that the information was "substantially in accordance with Form 1". Although he did not elaborate upon the point, he did not invalidate the information upon this ground.[28] Perhaps more directly relevant is Re Worrall, in which the Ontario Court of Appeal declined to invalidate an information which swore that named items "may afford evidence....", thus deviating from the statutory wording in paragraph (b) of "will afford evidence". McKay J.A. (with whom Porter C.J.O. concurred, Roach J.A. dissenting), stated:

> The form of information, Form 1, provides only that the informant shall swear that he has reasonable grounds for believing that the articles or some part of them are in the place to be searched. There is no provision in the form as to his belief that they will be evidence, so that the words to which I have referred should not have been in the information. They are surplussage and may be disregarded.[29]

If the addition of distorted statutory wording may be treated as "mere surplussage", it is suggested that the addition of correct statutory wording cannot lead to invalidation.

(2) Under Oath

Form 1 itself provides for the signature of the informant next to the signification by the justice that the contents of the information were sworn before him. The case of Rex v. La Vesque contains judicial comment that so long as the informant actually swears to the truth of the information before the justice, the information is not defective by virtue of his failure to sign it.[30] However the relevant form at the time, Form 3, did not specifically provide for the signature of the informant, and, accordingly, the case would seem to be obsolete on this point. Later cases have emphasized that the informant's sworn belief as to allegations set out in the information must be disclosed by the information itself.

For example, in Royal American Shows Incorporated v. The Queen et al, the failure of the informant to pledge his belief that certain confidential information was true was found to constitute a defect in the information.[31] While this case and similiar decisions such as Rex v. Solloway & Mills[32] do not specifically deal with the necessity of the informant's signature, they are indicative of a judicial inclination to look to the face of the information itself for proof of sworn assertions.

The matter has been specifically dealt with in the instance of informations for arrest warrants. It has been held that such an information must be signed, in some cases even where the prescribed form does not require it: Rex v. Kilmartin,[33] Campbell v. Walsh.[34] Moreover, the Courts have required that the signature be that of the person identified in the body of the document as the informant; the signature of another police officer renders the document invalid: Rex v. Woods.[35] Given the analogies between the warrant processes of search and arrest, these authorities would appear to be directly relevant.

B. SUBSTANTIVE REQUIREMENTS

The basic substantive elements of an information are the description of an offence, the specification of the items sought, and the definition of the location which the informant wishes to search. The ultimate question which the justice must answer in deciding upon his jurisdiction amounts essentially to a linking together of these three elements. In Re PSI Mind Development Institute Ltd. et al and the Queen[36] Lerner J. inquired whether "there were sufficient details therein contained to satisfy the justice as a reasonable man that in the specified premises there were the specified things that would be evidence in respect of the [specified] offence".

The question of the sufficiency of the description in the information of each of these elements is really a two-fold one. Firstly, the offence, item or location named must not belong to a class which by law is excluded from the scope of subsection 443(1). Although the determination of this question might seem to be a relatively simple one, the general issue of the scope of the subsection has been complicated by the emergence of a number of controversial questions, such as the protection afforded by solicitor-client privilege and the ambiguity of statu-

tory provisions linking the Criminal Code search warrant mechanisms to other statutes.

Secondly, the offence, item or location must be identified with sufficient particularity. The actual articulation of standards in this area has suffered, as will be demonstrated, from some inconsistency. Moreover the problems have not generally been approached in a methodical manner which relates the requirements of each description with its function: to "inform" the justice of the basis upon which the warrant is sought. Rather the tendency has been to absorb standards pertaining to the elements of search warrants into the discussion of the same elements as they appear in informations, and vice versa, without considering that the function of the search warrant, namely to guide the executor of the warrant and notify the occupier of the searched premises of the executor's authority, is quite discrete from that of the information.

This practice of interchanging standards is perhaps not surprising in light of the frequent duplication of descriptions in the two documents in the context of particular cases. However, the result has been a lack of analytical clarity. Courts which begin their consideration of an application to quash a search warrant by discussing arguments regarding the sufficiency of informations are liable to conclude by pronouncing upon defects in warrants. For example in Royal American Shows, the argument in favour of quashing the warrants involved was expressed as being based on defective informations. One particular ground of attack concerned the sufficiency of the description of the premises to be searched which was outlined in one information and carried over into a subsequent warrant. In rendering its order to quash, the Court specifically identified the warrant as being defective.[37]

As a result of such interchanging, the courts have effectively merged the substantive requirements relating to informations and search warrants, insofar as they relate to the particulars of the offence described, the items sought and the location to be searched. This manual accordingly deals with the tests for the two documents together: in detail in the following discussion pertaining to informations, and summarily in the subsequent discussion of warrants themselves.

(1) The Offence Alleged

(a) Scope of subsection 443(1)

(i) Offences under other statutes

It is established law that subsection 443(1) does not apply to an offence created by a provincial enactment in the absence of specific provisions to the contrary by the provincial Legislature: Norland Denture Clinic Ltd. v. Carter et al.[38] A measure of disagreement has arisen, however, over the applicability of the Code mechanism to other federal statutes. Essentially, the issue focuses around the effect of subsection 27(2) of the Interpretation Act which reads as follows:

> All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment except to the extent that the enactment otherwise provides.[39]

A number of courts have taken the position that by virtue of subsection 27(2), the provisions of subsection 443(1) of the Code are applicable to another federal statute, unless that statute, in the concluding words of subsection 27(2), "otherwise provides". As was observed in Re Adelphi Book Store Ltd. and the Queen, a decision of the Saskatchewan Court of Appeal,

> There is no doubt but that s. 443 of the Criminal Code is a section relating to both indictable and summary conviction offences created by the Criminal Code. Section 27(2) of the Interpretation Act, in clear and unequivocal language, makes applicable all the provisions of the Criminal Code relating to indictable offences to indictable offences created by any other enactment, and makes applicable all the provisions of the Criminal Code relating to summary conviction offences to summary conviction offences created by any other enactment, except where the other enactment otherwise provides (the italics are mine). Therefore, if the provisions of the Criminal Code relating to such offences are not to apply to offences created by another enactment, as provided for in s. 27(2) of the Interpretation Act, such restriction must be found in the other

> enactment creating the offence or offences. If there is no such restriction in the other enactment creating the offence or offences, then full effect must be given to s. 27(2) of the Interpretation Act.[40]

The Court went on to state that the restriction could arise "either in express language or by reasonable implication". Since the Copyright Act[41] evinced no such restriction, subsection 443(1) was held to be applicable. Similarly in Re Krassman v. the Queen[42] the Alberta Supreme Court, Appellate Division, held that a search warrant under this subsection could be issued for an offence under the Small Loans Act.[43]

Using the same basic approach, a number of Courts have arrived at the opposite conclusion in the light of the particular statute at issue. For example, in Re Goodbaum and the Queen[44] the Ontario Court of Appeal found that since section 10 of the Narcotic Control Act[45] provided its own code for search, seizure and forfeiture, the act fell within the exclusionary words of subsection 27(2). A similiar conclusion was reached by the Quebec Superior Court in Abou-Assale,[46] in connection with the Customs Act.[47]

The argument against this approach subordinates the operation of subsection 27(2) to the specific provisions of subsection 443(1) itself. The position was summarized by Limerick J.A. of the New Brunswick Supreme Court, Appeal Division in Purdy, as follows:

> Subsection (2) of s. 27 does not incorporate in its wording the expression "mutatis mutandis".
>
> Provisions of the Criminal Code made applicable to other enactments by virtue of said s-s. (2) must be read as they are found in the Code. They cannot be applied "mutatis mutandis" with such changes as are necessary to fit them to the purpose of the other enactment.
>
> As s. 443 of the Criminal Code must be read without change, the phrase "against this Act" cannot be eliminated or ignored in deciding the applicability of that section to the Broadcasting Act. The absence of such wording as "mutatis mutandis" results in s. 443 having specific application to the Criminal Code and is therefore incapable of being read to apply to any other Act.[48]

A similar position was adopted in McAvoy,[49] in which the Northwest Territories Territorial Court refused to apply subsection 443(1) to an offence under the Aeronautics Act[50]

Recent decisions in both Quebec and Ontario have rejected the Purdy/McAvoy reasoning in favour of a more expansive approach. Both La Maison du Fleuriste du Québec Ltée, et al v. Dumontier et al[51] and Leone Doer and the Queen[52] dealt with the Customs Act; the gist of both decisions is that while subsection 443(1) may not be employed to search for "goods", which are seizable under the Customs Act, it is applicable when the items sought are documents, which are not. Abou-Assale was distinguished in both cases as a decision principally concerned with the seizure of goods. However, in that Greenberg J.'s decision in Abou-Assale was based on the conclusion that Customs Act provisions constituted a complete code of search procedure, the Doer and Maison du Fleuriste decisions compromise the reasoning in the earlier case. In essence, the question of the application of subsection 443(1) ceases to be determined by the existence of express or implied restrictions in the relevant statute; rather it becomes tied to the facts of each case.

It is suggested that the Purdy/McAvoy approach is the preferable one. It is founded on the fundamental judicial regard of the search warrant as an extraordinary remedy which ought not to be granted in the absence of clear and unambiguous language. Moreover, if subsection 443(1) is viewed in the light of its legislative history, it would seem that as presently framed it evinces Parliamentary intention to confine the powers of search under the Code. In Norland Denture Clinic,[53] Tucker J. took note of the following comment in the 1955 edition of Martin's Criminal Code, discussing the present subsection 443(1) (then subsection 429(1)):

> As presented in the draft Bill, paragraphs (1)(a) and (b) read 'against this Act or any other Act of the Parliament of Canada'. However, during the course of the Bill through Parliament the words 'or any other Act of the Parliament of Canada' were struck out on the ground that their inclusion would extend the right of search to Acts not yet passed.[54]

In this connection it is significant that section 58 of the Criminal Law Amendment Act, 1978, Bill C-21, would

have amended paragraphs (a) and (b) of section 443 to include "any other Act of Parliament" within their ambit. Until such an amendment is made, the approach advocated in Purdy and McAvoy would seem to be prudent and sound.

(ii) Offences committed in other provinces:

In Solloway & Mills, the Ontario Supreme Court, Appellate Division, put to rest any question as to the permissability of issuing a search warrant in one province to aid in a prosecution in another. It was held unequivocally by the Court that this practice was valid, taking into account the will of Her Majesty regarding the duty of justices as expressed in the antecedent provisions to the present subsection 443(1). Riddell J.A. stated,

> She did not limit that duty to cases in which there was an offence against the Act having been committed or suspected of having been committed within the county, district, or Province, in which the justice had received the Royal commission; nor has either of her Royal successors done so. Neither is there anything in the duty thus imposed upon the King's officer in the least indicating that the duty is to be performed only if the alleged crime was charged as having been committed within the territorial district within which the ordinary duties of the justice is confined by law, evidenced by constant and invariable practice for centuries.[55]

(b) Standards of Particularity

The information must describe the offence in regard to which the search warrant is sought. The absence of this element from both the information and the warrant was held to be a ground for quashing the warrant in Rex v. Frain.[56] A similar conclusion was reached in La Vesque.[57]

The question of the exact construction which must be used in identifying the offence was raised in Rex v. Munn (No.1). The information in that case stated that a pair of doors "are being sought on the ground that they will afford evidence" of the commission of the offence of willfully obstructing a peace officer in the execution of his duties. The Court found that the information was

insufficient in that "[it] does not charge that an offence against the Criminal Code has been committed", but merely that the doors would "afford evidence ...".[58]

The case is cited as authority on this point in Fontana,[59] but there is reason to question its soundness. The function of a search warrant information is not to charge an accused with an offence; this function is accomplished, rather, by an information laid pursuant to section 455 of the Code. The significance of an allegation of an offence in the context of subsection 443(1) is simply that the information must satisfy one of the limiting paragraphs (a), (b) or (c), each of which requires a particular association between an item sought and an offence. The "evidentiary" relationship set out in the information in Munn is precisely the association contemplated by paragraph (b); in fact, as will be discussed later, this "evidentiary" relationship has been emphasized in the bulk of the caselaw as the underlying purpose of search warrants, at the expense of the associations mentioned in subparagraphs (a) and (c). Moreover, a "description" of the offence, as opposed to a "charge", complies exactly with the instructions set out on Form 1 to "describe things to be searched for and offence in respect of which search is to be made". Although no reported decision has actually overruled Munn on this exact point, it is worth noting that a number of cases have considered and approved informations which set out the offence in similar "evidentiary" constructions.[60]

The final refutation of the position advanced in Munn lies in the caselaw which has firmly held that an accused need not be named in the information. In Re Lubell and the Queen, Zuber J. stated:

> There is nothing in the Criminal Code in outlining the procedure to obtain a search warrant that obliges the applicant for a search warrant to name any particular accused and I know of no case in which it has been held that there is an obligation to name a specific accused at this early stage in a criminal procedure.[61]

However, as will be discussed, the failure to name an accused may be a factor in a Court's consideration of the general sufficiency of the description of the circumstances of the offence in the information.

What, then, is the extent of detail required to sufficiently "describe" the offence? The beginning of wisdom in this area, and perhaps the only statement with which no authority would disagree, is Brossard J.'s comment in Regina v. Trottier et al that "each case must be decided on its merits and according to its own facts".[62] As a rationalization of the conflicting decisions on point, though, the proposition fails to account for the degree of conflict which pertains, not merely to the application of standards, but to their formulation.

The most basic disagreement among the courts has been over the relevance of the standards of particularity for indictments. The position in favour of the application of these standards was expressed by Kirby J. in Regina v. Read, ex parte Bird Construction Ltd.[63] Kirby J. did not, however, explain why the standards set out in the present section 510 (then section 492) should be applicable to search warrant informations, and the case which he cited as authority for this proposition, Regina v. Harrison and Burdeyneu, dealt with an information for a warrant for arrest, not search.[64] Subsequent decisions have disagreed with Bird; in PSI Mind, Lerner J. stated,

> I prefer the conclusion reached by Cavanagh, J., in Royal American Shows Inc. v. The Queen, ex rel. Hahn et al., [1975] 6 W.W.R. 571 at p. 573 (Alta. S.C.), where he said that it was not necessary to state the alleged offence with the same precision in the search warrant as it must be in an indictment, so long as the "statement of the offence as stated in the warrant is... enough to apprise anyone concerned with the nature of the offence for which evidence is being sought".[65]

It is suggested, that, in light of the "descriptive" as opposed to "charging" function of the search warrant information, the caselaw disapproving of Read is correct. How, after all, can an information be required to comply with section 510 if the naming of an accused is not an essential element in it?

There are a number of specific factors which have been discussed by the courts in assessing the sufficiency of the descriptions of offences in individual informations:

(i) The recitation of the section number of the offence

The caselaw indicates that, while this may be of some use in identifying the offence, it is not really a determinative factor. In Moshansky J.'s decision in Alder, the situation was summed up as follows:

> There is apparently no magic in the presence of the Code section numbers on the warrant... Nor is it fatal to the warrant if no Code section numbers appear so long as the offence referred to is otherwise well described.[66]

Moreover, a reference to the punitive section of the Code rather than the section defining the offence is sufficient: Trottier.[67]

EXAMPLES:

> Marlboro Manufacturing Ltd. v. the Queen,
> The information stated that "an indictable offence was committed", namely fraud, "contrary to the provisions of the Criminal Code". It was held to be sufficient.[68]

> Regency Realties Inc. v. Loranger,
> The information stated that "in the City of Montreal...on the 8th day of February, 1960 and the 14th day of March, 1961, a violation of sections 269, 323, 309, 311 of the Criminal Code was committed". The description of the offence was held to be insufficient.[69]

(ii) The identification of the victim of the offence:

This in itself may not be absolutely requisite to sufficiency; however, it should weigh upon the court's deliberation of the question. In PSI Mind, it was stated that "it is not necessary to designate in the search warrant the specific persons alleged to be defrauded".[70] However, the offence of fraud itself as defined in section 338 may pertain to "the public" as well as "any person", and it would be prudent therefore not to generalize from the PSI Mind case. In Regency Realties, the Court listed the failure of the information to indicate "against whom" the alleged offences were committed as a factor in its criticism and ultimate invalidation of the

information.[71] If the victim is not specified in the actual description of the offence, it would appear that the court, as indicated in Trottier, below, ought to look to the context of the whole information to see if it discloses this factor.

EXAMPLES:

> Trottier,
> The information stated that the accused "did unlawfully and without colour of right falsify expense accounts or directed that they be falsified for the purpose of committing the crime of theft of monies..." The absence of the name of the victim in this description did not constitute a ground for invalidation as the victim could be inferred from the context of the rest of the information.[72]
>
> Worrall,
> The information and search warrant stated that "the public in the province of Ontario" had been defrauded by the sale of certain paintings. The description of the offence was held to be sufficient.[73]

(iii) The naming of an accused

In Regency Realties, the failure of the information to indicate "by whom" the alleged offence was committed was included in the list of factors which prompted the Court to declare the information and warrant invalid.[74] However, the rule articulated in Lubell is fairly entrenched.[75] The most recent judgment on point is Re Liberal Party of Quebec and Mierzwinski in which Barrette-Joncas J. stated, "The case authority recognizes that the name of the accused or of an eventual accused is not necessary to obtain a search warrant".[76]

EXAMPLES:

> Abou-Assale,
> The information and search warrant stated that an offence contrary to section 205 of the Customs Act had been committed, "to wit: having in his possession... goods unlawfully imported into Canada". No accused was named, but the Court found this did not constitute a defect in either document.[77]

Marlboro Manufacturing,
The information stated that "by deceit, falsehood or other fraudulant means, the Manitoba Development Corporation was defrauded of thousands of dollars in money..." The court, holding that the naming of an accused was not requisite, found the information to be valid.[78]

(iv) The general circumstances of the offence:

In Alder, Moshansky J. recited the shortcomings of the documents before him:

> In the case at bar neither the informations nor the search warrants disclose how the alleged offence of fraud took place. These documents are silent as to the manner in which the offence is alleged to have been perpetrated, no reference to the alternate means of commission, that is to say whether by "deceit, falsehood or other fraudulent means" as outlined in subsection 338(1) of the Code, is to be found in the informations or warrants.
>
> Additionally, the informations and warrants are conspicuously devoid of any indication whatsoever as to what the named parties are alleged to have been defrauded of. Section 338(1), which creates the offence, specifically speaks of defrauding the public or any person of any "property, money or valuable security". Here the warrants only and baldly allege that the named persons "did conspire...to defraud...". There is not the slightest indication that the alleged victims were defrauded of property, money or valuable security nor is there any hint of the value of the property or securities or the amount of money involved, if any. In my view, therefore, the warrants herein are manifestly and markedly deficient in the particularization of the supposed offence and they should be completely quashed on this ground. Neither the person whose premises are being searched nor the seizing officer could reasonably know, from the wording of the warrants, the offence in relation to which the search was being made.[79]

This passage, while not exhaustive, illustrates the kind of circumstantial detail that courts have looked for in deciding the question of sufficiency. Although it may sound trite, perhaps the most accurate explanation of the

tests applied to the description of offences in informations and warrants is that it is essentially in the accumulation of such detail that the information reaches the standard at which it is deemed to be particular enough.

EXAMPLES:

Re Flanagan et al and Morand et al,
The information alleged that "between the 1st of January 1976 and November 23, 1977 Michel Flanagan, Roger Flanagan and other persons presently unknown, illegally conspired with one another to commit a criminal offence, that is, by deceit, falsehood or other fraudulent means to defraud the public in general of an undetermined sum of money, thereby committing a criminal offence as prescribed in section 423(D) of the Criminal Code". It was held to be sufficient in its description of the offence.[80]

Re Pink Triangle Press and the Queen,
The information and warrant referred to the offence of "mailing immoral literature, contrary to the provisions of the Criminal Code, section 164". The warrant was held to be valid. (The validity of the information was not separately discussed).[81]

Royal American Shows,
The information and warrant referred to a "conspiracy to defraud the Government of Canada by destroying, mutilating, altering, falsifying or making false entries in a book, paper, writing, valuable security or document, contrary to the Criminal Code." The Court found that "the statement of the offence...is enough to apprise anyone concerned of the nature of the offence...".[82]

United Distillers,
The information referred to "the commission of an offence against the Criminal Code of Canada, to wit: the offence of perjury [by a named person]". The description of the offence in the subsequently issued warrant was held to be insufficient.[83]

Weins,
The information referred to "the commission of an offence of fraud, contrary to the provisions of the Criminal Code." The grounds for belief set out

subsequently disclosed that a certain bank made loans based on false representations. The information was held to be valid.[84]

(2) The Items to be Seized

(a) The Scope of Subsection 443(1)

(i) Realty, fixtures and immovables

In Munn, it was held that doors affixed to a house could not be validly seized under a search warrant. Such fixtures or immovable property could not be seized "since warrants are only applicable to personal property".[85] Fontana, citing the Munn case, notes that the rule "is not one enunciated in the Criminal Code, but is one based on the common law."[86] While Munn would thus appear to define the law at the present time, it is worth commenting that, at least insofar as the rule applies to fixtures, it may be open to challenge in the future. In the subsequent decision in Re Bell Telephone Company of Canada,[87] the question of whether fixtures could ever be seized under a search warrant was purposefully left undecided.

(ii) Items covered by solicitor-client privilege

A number of cases have raised the issue as to whether items covered by solicitor-client privilege are protected from investigatory searches. The issue, for the purposes of this study, resolves itself into two questions. Firstly, is the privilege just an evidentiary rule or may it be applicable at the investigatory stage of criminal procedure? Secondly, if the privilege is applicable, is it an issue relevant to the justice determining the sufficiency of the information which confers jurisdiction upon him?

The answer to the first question is not yet entirely clear. The caselaw on point is divided. In the Colvin case,[88] for example, the Court was of the view that the privilege was restricted to the evidentiary stage of proceedings. However, the trend in the caselaw seems to be towards the opposite position. In B.X. Development Inc et al and the Queen, Bull J.A., with whom the other members of the British Columbia Court of Appeal concurred, referred to Osler J.'s decision in Colvin, and continued,

> The appellants referred us to several authorities, such as Re Director of Investigation and Research and Shell Canada Ltd., (1975), 22 C.C.C. (2d) 70, 55 D.L.R. (3d) 713, 18 C.P.R. (2d) 155, a decision of the Federal Court of Appeal, Re Borden & Elliot and the Queen (an unreported decision dated October 31, 1975, of a single Judge of the Ontario High Court, affirmed on appeal, but on other grounds) [since reported 3 C.C.C. (2d) 337], Re Director of Investigation and Research and Canada Safeway Ltd. (1972), 26 D.L.R. (3d) 745, 6 C.P.R. (2d) 41, [1972] 3 W.W.R. 547, a decision of Munroe J., of our Supreme Court.
>
> I think it fair to say that those cases, although some of them were dealing with proceedings under other statutes containing investigation and search rights, did not accept Osler J.'s view as indicated above. They are, in my view, authority for the proposition that, difficult as the procedure might be to resolve the situation, a warrant can be quashed when it seizes documents which are plainly subject to the solicitor-client privilege.[89]

The Ontario Court of Appeal refused to deal with the issue, however, in Re Borden & Elliot and the Queen,[90] and in Alder, Moshansky J., commenting that the state of the law was "uncertain", similarly found it unnecessary to determine the question.[91]

Even assuming that the B.X. Development case represents the present law, though, it is doubtful that the question of privilege is one that must concern a justice in determining his jurisdiction. Logically, the argument may be made that if the items specified in the information are privileged, they cannot afford evidence and hence cannot fit within the requirements of section 443. However, the difficulties mentioned by Bull J.A. in B.X. Development are in fact particularly acute for the justice himself who has only the information on which to base his decision as to his jurisdiction. It is safe to say that if the privilege affords protection at the investigatory stage, it is properly raised at a later time than the issuing of the warrant itself. Appropriate opportunities would include an application under subsection 446(3) for the return of items seized (as in Re Steel).[92]

The above comments should be read in the light of section 59 of the Criminal Law Amendment Act (Bill C-21), which would have established a procedure for determining the validity of a claim of solicitor-client privilege. It is to be noted that under the proposed subsection 444.1(2) the procedure would have been initiated at the stage of the execution of the warrant in the premises of the lawyer and not at the earlier stage of application for the warrant. Moreover, under the proposed subsection 444.1(4), the consequence of a determination in favour of the claim of privilege would not have been an invalidation of the information or warrant; rather the protected items would have been ordered returned to the solicitor, and the warrant left intact.

(iii) Bank Records

The applicability of subsection 443(1) to bank records is now settled. It was held in Regina v. Mowat ex parte Toronto Dominion Bank[93] that if a bank was not a suspect in, or a party to, the commission of an offence, then its records were not subject to seizure under a warrant; rather, the records were governed exclusively by the production rules set out in section 29 of the Evidence Act.[94] By virtue of the enactment of the present subsection 29(7),[95] however, the authority of the Mowat case has been overridden. Subsection 29(7) provides:

> (7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of the Parliament of Canada, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything therein shall, as regards the books or records of such institution, be construed as limited to the searching of such premises for the purpose of inspecting and taking copies of the entries in such books or records.

(b) Standards of Particularity

The items to be seized must be described in the information and, subsequently, the search warrant, with enough specificity to distinguish and identify them for

the purposes of the search. In Abou-Assale, it was stated:

> The test is whether such description is sufficient to permit the officers responsible to execute the search warrant to identify such objects and to link them to the offence described in the information and the search warrant.[96]

To put essentially the same test in a different way, the description must not be so vague as to leave the peace officers who execute it with discretion as to what items on the premises are to be seized.[97]

The test is essentially a compromise between a demand for rigorous specificity and an allowance for the exigencies of police investigation. As was stated in Lubell, "a search warrant is not intended to be a carte blanche, but at the same time, the applicants must be afforded a reasonable latitude in describing the things that they have reasonable ground to believe they might find".[98] Consequently it is not for the justice to "go through the whole investigation and dictate a list of specific things to be seized": Royal American Shows.[99]

There are two factors which often determine the sufficiency of the description:

(i) The categorization of the objects of the search

In Dare to be Great of Canada (1971) Ltd. v. Attorney General for Alberta et al, it was recognized that where a multiplicity of materials exists upon premises to be searched, it is impractical to demand that the information and warrant describe the items to be seized with precision. Riley J. stated:

> In this day and age, with the tremendous volume of correspondence and literature made possible by modern technological and merchandising methods, one could hardly be expected to be able to follow such a test and the most one can do is categorize in a summary fashion.[100]

EXAMPLES:

Alder,
The information described "...originals or copies of Listing Agreements, Interim Agreements, Offers to Purchase, Mortgage Documents, Land Transfers, Closing Documents, Trade Record Sheets, Financial Statements, Cancelled Cheques, Receipts, Land Titles Documentation, Appraisals, Banking Documents and Correspondence concerning or touching upon the sale, or proposed sale or interim agreements for sale, mortgage applications and for mortgage of the following properties..." It was held to be sufficient in this respect.[101]

Lubell,
The information described "'company records, Minute Books, Financial Statements, Books of Account' and so forth". It was held to be valid in that it gave a fairly accurate delineation of the class.[102]

On the other hand, descriptions which leave a class of items undelineated or open-ended are likely to offend the rule.

EXAMPLES:

PSI Mind,
The warrant after describing specified items, included "other materials of every nature". It was held that this part of the warrant was invalid, as it was too indefinite for a peace officer to act upon.[103]

Regency Realties,
The information and warrant described "purchase invoices, sales invoices, cheques paid or others, bank statements, account books, cashier's returns, inventory lists, contracts, minute books and all other documents related to the operation of Regency Realties Inc." They were held to be invalid, the words "all other documents related to the operation of Regency Realties Inc." being singled out for particular criticism.[104]

(ii) The limitation of the items to be seized to those relating to the alleged offence

In the earlier Johnson and Franklin Wholesale Distributors case, Tysoe J.A. commented on the necessity to relate the specified items to the offence:

> It is singular that the words "pertaining to the distribution of said books" which appear in the information after the word "invoices" were omitted from the warrant. In the warrant the company records including invoices are left unconnected with the obscene books. In my respectful opinion the omission of the words "pertaining to the distribution of said books" or of similar words is fatal to the validity of the warrant in so far as it relates to the second category. What is omitted was indispensable. To authorize a search for and seizure of "company records, including invoices" without limitation was to leave the peace officers a wide open discretion as to what books and invoices they were to seize and without regard to whether they related in any way to the offence under s. 150(1). The authorities set out, supra, show that that is not permissible. I must hold that the description of the things in the second category was insufficient.[105]

It would appear, though, that so long as the connection of a specified item or class of items to the alleged offence is otherwise apparent on the face of the information of warrant, restrictive words such as "pertaining to" need not be used. In McAvoy, for example, the warrant described "aircraft log books, engine log books, charter records, contract records, cancelled cheques, invoices, accounts, cash records, and other documents..." It was held that the warrant was offensive in respect of all items from "contract records" on, since there was nothing to relate them to the alleged offence. Although there was no explicit discussion of the point, it may be surmised that the connection of the three valid items to the offence was apparent in that the infraction was under the Aeronautics Act and the items were obviously documentation of the operation of airplanes.[106]

EXAMPLES:

> Merzwinski,
> The information and warrant described numerous items, "all of which relating to payments effected to the Liberal Party" by named companies. They were held to be valid.[107]

Pink Triangle Press,
The information and warrant described "documents pertaining to the business operations of a publication known as The Body Politic". The alleged offence was the mailing of obscene matter. It was held that the warrant was valid (the validity of the information was not discussed), since "the police were clearly seeking proof of mailing and commercial activity".[108]

Shumiatcher v. Attorney-General of Saskatchewan et al,
The warrant described a number of items relating to a group of persons including the alleged offender's wife and "any person employed by" or "associated with" the alleged offender in his law practice. It was held that the warrants were invalid; the naming of these persons opened up "wholly speculative" areas.[109]

Weins,
The information described a list of items "pertaining or relating to the business affairs" of eight named corporations. The connection of the corporations to the alleged offence was set out in the informant's grounds for belief. It was held that the information was valid.[110]

(3) The Location to be Searched

(a) The Scope of Subsection 443(1)

There would appear to be no restriction imposed upon the range of premises contemplated by the words "building, receptacle or place", except that articulated in the somewhat unusual case of Laporte v. Laganiere. The search warrant in that instance purported to authorize a search for bullets in the body of the petitioner. Hugessen J., in quashing the warrant, held that the word "place" referred to a "geographic and not an anatomical location".[111]

The location to be searched may be anywhere in Canada. This proposition complements the rule enunciated in the Ontario Supreme Court, Appellate Division, decision in Solloway & Mills,[112] that a search warrant may be issued in one province to aid in a prosecution in another. In fact, the leading case on point is another decision pertaining to the same investigation, Solloway

Mills & Co v. A.G. Alta. The issue in the case particularly concerned the interpretation of the present subsection 443(2) which reads as follows:

> Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be is 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.

It was held that a British Columbia justice could validly endorse a warrant issued by an Alberta justice.[113]

(b) Standards of Particularity

The authority dealing with standards of particularity pertaining to the location to be searched is not as substantial as that dealing with items or offences. Interestingly, there is far more caselaw dealing with this point in connection with historic liquor statutes than in connection with subsection 443(1) and its predecessors. The discussion of standards in both instances, though, has tended to emphasize similar themes to those articulated in regard to offences and items: the avoidance of delegation, the need for certainty on the face of the document. In McLeod v. Campbell, for example, the Court quashed a warrant which authorized peace officers to enter certain specified premises "or any other house at Little Glace Bay if there is any suspicion that [certain] goods and wares be in such house", as it clearly delegated judicial authority to the executor of the warrant.[114] Rex v. Gibson involved provisions under bygone Alberta liquor legislation for searching a "house or place".[115] The Court stated:

> An entry and search under s. 79 of the Liquor Act can only be made upon and in the premises mentioned in it, and it should, I think, describe them with sufficient accuracy to enable one from the mere reading of it, to know of what premises it authorizes the search.[116]

The problem of knowing what location is to be searched may be perceived to have two distinct aspects:

(i) The definition of the geographical location

Fontana suggests guidelines to be followed in both informations and search warrants:

> Accordingly, the description should be appropriate to the nature of the locus in question. A single-family dwelling may properly be described by its municipal address, including number, street, town or city and province. Where the dwelling is in an unorganized area the best description is a legal description by lot or part lot, concession, township, district and province.[117]

However, limitations on the specificity of the required description were recognized in Sleeth v. Hurlbert. The Supreme Court of Canada, dealing with temperance legislation which allowed for the search of "dwelling house, store, shop, warehouse, outhouse, garden, yard, croft, vessel or other place or places",[118] held that the issuing magistrate was not required "to describe, as is ordinarily done in a conveyance, the boundaries of the suspected premises". Indeed, in Sleeth itself, the Court found the designation of premises in a warrant as those "of J. Henry Hurlbert, hotel keeper of Yarmouth, in the said county of Yarmouth", to be a sufficient description.[119]

EXAMPLE:

> McAvoy,
> The search warrant referred to the "premises and/or aircraft leased or owned by James L. McAvoy at Yellowknife". The Court, commenting that a better description, such as street or avenue number for the premises or a registration number for the aircraft may have been desirable, nonetheless found the description sufficient.[120]

(ii) The isolation of the particular building, receptacle or place to be searched

Even if a geographical location is sufficiently defined, it may be that the location itself comprises a number of distinct units. Subsection 443(1) would seem to contemplate both the information and warrant being directed to a single unit, viz. "a building, receptacle or place". This distinguishes it from, for example, the liquor warrant provisions discussed in Sleeth, which pro-

vided for the search of "places". In Purdy, the Court adopted this position, stating that a "particular building", not "one of several buildings" must be described as containing the specified items in order to justify the issuance of a warrant.[121] However, McAvoy, in which a warrant referring to "premises and or aircraft" belonging to an individual was upheld as valid, indicates that this rule is not always strictly followed.[122]

EXAMPLES:

> Gibson,
> The warrant authorized a search of a "house, room or place situated at the top floor of the Cristal Block, 10141 Jasper Avenue, Edmonton". It was held to be invalid as the floor itself contained more than one house, room, or place.[123]
>
> Royal American Shows,
> The information and warrant referred to "buildings, trailers, tents, receptacles or other places located on the grounds of the Edmonton Exhibition Association". The description was held to be too broad, the Court taking judicial notice that different persons occupied buildings and other quarters on the grounds.[124]

C. THE DISCLOSURE OF "REASONABLE GROUND TO BELIEVE..."

As was mentioned earlier, in the discussion of formal requirements, Form 1 itself by its construction would seem to confine the setting out of "reasonable grounds" to the issue of the location of the items sought. However, other caselaw has quite explicitly required that reasonable grounds must also support the assertion that the items fall within one of the limiting paragraphs (a), (b) or (c). The earlier Johnson & Franklin Wholesale Distributors decision,[125] has been mentioned as supporting this proposition; another leading authority is the Bell Telephone case, in which McRuer J. set out the following guidelines:

> Before a Justice may issue a search warrant, it is necessary that there be a sworn information that contains such a statement of facts as satisfies the Justice that there are reasonable grounds for believing any of the things set out in s. 629 [now s. 443]. It is not sufficient that the Justice

> should be satisfied - he must be satisfied on reasonable grounds; that is, the grounds of belief set out in the information must be such as would satisfy a reasonable man. If there are not such grounds shown the Justice cannot be taken to have been satisfied on reasonable grounds.[126]

Quite simply, then, the "reasonable grounds to believe" must both link the items sought to the location to be searched and, within the ambit of paragraphs (a), (b) and (c), connect the items sought to a particular offence.

In this connection, it is relevant to advert to a practice which appears to have been followed in a number of provinces, notably Manitoba and British Columbia. The practice has arisen in situations, most likely involving commercial crime or conspiracy, in which applications for warrants to search a number of different premises are made simultaneously. For reasons of expediency, an identical long list of items to be seized is included in both the information and warrant relating to each place. The problem is that it may not be reasonable to believe that any more than one or two of the listed items is in one particular set or premises. For example, a courier service might be believed to have delivered certain documents, in the course of its business, to a party to an alleged fraud. The invoice for the delivery would clearly be relevant to police investigation. However, the documents prepared by the applicant for the warrant might well include the invoice in a long list of cheques, contracts, receipts and other documents believed to be in the possession of other parties whose premises the applicant also wishes to search. Is this practice proper?

A strict reading of subsection 443(1) would indicate that each "thing" covered by a warrant to search "a building receptacle or place", must be believed to be in that particular building, receptacle or place. On the other hand, Form 1 merely requires that the applicant believe that the "said things, or some part of them" (emphasis added) are in the named premises." No case has directly resolved the issue of this discrepancy. It is noteworthy, though, that in Purdy, the Court was severely critical of an information which stated that certain documents "are or may be situate in any one of [a list of different premises]". Limerick J.A. stated:

> It is possible the informant believed or had reasonable grounds to believe the opinions

> expressed by him in the informations. On the other hand it is a fair inference to be drawn from the indefinite wording of the information that he had no belief that any particular document or evidence was in any particular building or would be evidence of an offence against the Act, otherwise why does he list the documents in such general terms and state they may be in one of several places and may afford evidence and further fail to disclose the substance of the alleged admissions?[127]

However, a more lenient view was taken in both Wiens[128] and B.X. Development,[129]. In each case, the documents listed in the information were expressed as being on the premises of a number of different parties, and in each case, the Court evaluated the reasonable grounds from a somewhat global perspective, in effect seeking a link between the list of premises as a whole and the list of documents as a whole.

While the lenient view does respect demands of expediency, it remains in conflict with the singular emphasis of subsection 443(1). Analogizing from the decisions in Colvin[130] and the earlier Johnson and Franklin Wholesale Distributors case,[131] it may be argued that Form 1 is subordinate to the statutory wording and, therefore, it is not lawful to issue any warrant to search for things not reasonably believed to be on the particular premises named in it. If this proposition is accepted, it becomes the duty of the justice to limit the description of items in each warrant accordingly.

(1) Features of the "Reasonable Ground to Believe" Test

The test outlined in Bell Telephone is an objective one; it restricts the justice in his determination as to whether he is "satisfied" by the information. However, the "reasonable grounds" required do afford the justice some latitude. The test does not require him to be convinced beyond a reasonable doubt: Re Newfoundland & Labrador Corp. Ltd.[132] As was observed in Weins:

> It is not necessary for the magistrate to satisfy himself that the documents ought to be searched in the case before this Court can prove the fraud alleged to have been committed. He need not adjudicate upon the question whether the offence was committed at the time he issued the search warrant, nor does he need to adjudicate on the

> question whether the documents sought can in fact assist in establishing the commission of the offence. He need only satisfy himself that there were reasonable grounds for believing that such documents could be of assistance in establishing the commission of the offence and that they were in the premises in respect of which the search warrant is sought.[133]

The citation from Weins illustrates another feature of judicial interpretation of subsection 443(1): its emphasis on an evidentiary link between the items sought and the offence described. This emphasis was perhaps more directly articulated in Bell Telephone:

> As I view it, the object and purpose of these sections is to assist the administration of justice by enabling the constable or other properly designated person to go upon the premises indicated for the purpose of procuring things that will in some degree afford evidence of the commission of an alleged crime. It is not necessary that the thing in itself should be evidence of the crime, but it must be something either taken by itself or in relation to other things, that could be reasonably believed to be evidence of the commission of the crime.[134]

Accordingly, McRuer J. in that case invalidated a warrant to search for telephone apparatus which in itself could not afford evidence of an offence but which if left in place and observed might have allowed the executors of the warrant to obtain such evidence. Other cases which have stressed this evidentiary link include Purdy,[135] and Borden & Elliot, where it was stated:

> The issue of a search warrant is not a perfunctory matter. A Justice who issues it must be satisfied that there are reasonable grounds for believing that an offence has been committed and that the documents sought to be seized will afford evidence with respect to its commission. The information put before the Justice must contain sufficient details to enable him to be so satisfied.[136]

What precisely is meant by "evidence" of the commission of an offence? As indicated above, the information does not have to satisfy the justice beyond a reasonable doubt that the offence was committed. The

caselaw supports the further proposition that the justice need not decide whether the items themselves, if tendered in evidence, could establish the commission of the offence. This proposition is articulated in the cited passage from Weins; it was further detailed in Worrall, in which Porter C.J.O. discussed the justice's duties as follows:

> He must determine whether there are reasonable grounds to believe that the articles in question will afford evidence with respect to the offence alleged. This does not mean that the articles will afford evidence sufficient to result in a conviction. It means, I think, that the Justice must consider whether the production of the articles will afford evidence which would be relevant to the issue, and would be properly tendered as evidence in a prosecution in which the alleged fraud is in issue.[137]

In other words, the justice must apply his mind not to the question of proof, but to the question of relevance. (Although the "proper tendering" of evidence involves more than a determination of its relevance, there has been no caselaw which has suggested that a justice should consider the applicability of exclusionary rules to the items sought. As was mentioned in the specific context of the earlier discussion of solicitor-client privilege, the practical difficulties facing a justice who attempted to do so would be prohibitive.)[138]

The evidentiary link between the items sought and the offence described is precisely the association contemplated by paragraph (b); the general statements which describe the "purpose" of subsection 443(1) or the function of the justice in terms of this evidentiary link would accordingly seem to raise the question as to the independent effect of paragraphs (a) and (c). Must an information framed so as to comply with the requirements of these paragraphs also comply with the judicially emphasized "evidence" test?

It is important to view the caselaw on point in context. It would appear that of the three paragraphs in subsection 443(1), it is paragraph (b) which is most often coming to the attention of Canadian courts. Of the relevant cases surveyed in the preparation of this manual, over 80% dealt with informations in which paragraph (b) was exclusively relied upon by the informant.[139] On the other hand, in Hicks v. McCune,[140] the

question of compliance with the present subsection 443(1) (then subsection 629(1)) focused entirely on the requirements of paragraph (a); the Court concluded that the justice acted without jurisdiction, since no reasonable grounds were disclosed for believing that there was in any building "anything upon or in respect of which an offence against the act had been or was suspected to be committed". There was no discussion of the evidentiary potential of the items sought, and a reading of subsection 443(1) as a whole would suggest that the question was simply not relevant. As was observed in the earlier decision in Johnson and Franklin Wholesale Distributors, the justice may be satisfied on the basis of "any of the things set out in paras (a), (b) or (c)";[141] where the information purports to invoke either of the other two paragraphs, there is no reason why a requirement pertaining to paragraph (b) should be in issue.

The question of the independent effect of paragraph (a) is largely academic, of course; by its very nature, an item "upon or in respect of which an offence has been committed" would have apparent evidentiary potential in proceedings related to that offence. However, the same cannot be said of items falling within paragraph (c); indeed, an item "intended to be used for the purpose of committing" an offence within the specified class could not possibly constitute evidence unless and until that offence is committed. Unfortunately, there is no reported Canadian case which has specifically dealt with the validity of an information under paragraph (c). However, the distinct status of the provision was given some recognition in Goodbaum, in the context of a discussion of the comparitive provisions of section 443 and section 10 of the Narcotic Control Act. "It is most important to note", it was stated, "that section 10 of the Narcotic Control Act contains no provision like that in section 443 of the Criminal Code authorizing the issue of a warrant to search for anything sought in respect of the intended commission of an offence."[142]

(2) Standards of Particularity

It is clear that the informant's "grounds of suspicion" must be set out in the information. A failure to do so will deprive the justice of jurisdiction: Hicks v. McCune.[143] For it is the articulation of these grounds in the information that provide the justice with the basis upon which he may make his independent assess-

ment of whether the issuance of the warrant is justified. As was observed in the leading case of Rex v. Kehr:

> It is not stated upon what the belief is founded, and the magistrate has to go entirely upon the belief of the detective that there is ground for believing. Belief at two removes is not sufficient, I should think, upon which to base proceedings of so serious a character as that of searching a man's office and carrying away the documents and papers relating to his business.[144]

Once it is established that the information before the justice contains a disclosure of grounds of suspicion, the issue becomes one of their "reasonableness". While it is virtually impossible to lay down fixed rules as to grounds which are, or are not, reasonable in particular instances, it is possible to discuss this issue in the contexts of both the level of disclosure generally, and the particular problem of revealing confidential sources.

(a) The General Level of Disclosure

It is useful to consider the extent of disclosure in terms of a continuum. At one extreme may be found informations such as the one considered in Kehr, in which no grounds for suspicion at all are articulated and which are patently insufficient. At the other extreme may be found cases such as Wiens, in which the grounds for belief comprised four substantial paragraphs detailing various transactions linking the owner of the premises to be searched to documents relating to alleged frauds involving named companies and specified misrepresentations.[145] Presented in such detail, the grounds of belief provide the justice with a substantial basis upon which to evaluate their "reasonableness". It should be remembered, however, that the accumulation of detail does not in itself ensure that the justice will be, or ought to be, satisfied by the information. For example, in Borden & Elliot, the grounds of belief comprised nine paragraphs; however, the Ontario Court of Appeal found that the information did not set out "a factual link" between the alleged offence and the occupier of the premises to be searched.[146] However, it was significant that the occupier in that case happened to be a firm of solicitors not implicated in the described offence.

Between the extremes of the continuum lies an intermediate area; an information may, for example, disclose some grounds, perhaps in a terse fashion, but fail to detail the exact connection between the items sought, the offence described and the location to be searched. Lubell specifically dealt with this kind of situation as follows:

> In my opinion, no fault whatever can be found with the information of Constable Murden with respect to spelling out reasonable grounds. I perhaps should add that he does not detail exactly how these documents are to be related to the commission of the offence. It obviously is not a part of the Crown's case that the documents themselves are obscene; their very nature suggests to anyone with common sense that this cannot be so. Obviously they have to be related to distribution. The ordinary inference to be drawn, and one that a Justice of the Peace could easily draw, is that these financial documents contain evidence of distribution. It may be that in a given case where it would be extremely difficult to envisage why certain things should be searched for, it might be necessary to spell out the reasons but, in my opinion, where the connection between the items sought and the offence is one that might be gathered easily by inference from the very nature of the offence and the material sought, the informant is not obliged to underline the obvious.[147]

The above passage indicates that the "reasonable ground to believe" is to be sought, not merely from the assertions specified in the information under "grounds for belief", but in the context of the information as a whole. This complements the position taken in Trottier, that the adequacy of the description of the offence is to be judged in this broad context as well.[148] The position is a sensible one; so long as the requisite grounds are disclosed by the information, it ought not to matter where precisely on the face of the document they are found.

EXAMPLES:

> Abou-Assale,
> The grounds for belief were "investigation conducted by the Royal Canadian Mounted Police". The

informant was a member of the R.C.M.P. The information was held to provide sufficient facts to permit the justice to satisfy himself that reasonable grounds existed.[149]

Alder,
The informant's grounds for belief "resulted from information received from confidential sources, interviews, land titles searches and other investigative aids, the results of which indicate an offence against the Criminal Code". The grounds were held to be sufficient.[150]

Imperial Tobacco Sales Co. v. A.G. Alta et al,
The informant's grounds of belief were "information which he verily believes and which has been given to him by the agent of the Attorney-General of the Province of Alberta". They were held to be insufficient.[151]

Poliquin v. Decarie,
The informant's grounds for belief were "les instructions du Procureur de la Couronne". They were held to be insufficient.[152]

Worrall,
The grounds for belief were "that spurious oil paintings sold to members of the public as genuine paintings by known Canadian artists" were traceable to men for whom Worrall did "restoration and framing work". They were held to be sufficient.[153]

(b) The Confidential Source

There is a degree of conflict in the caselaw on the question of how a justice should regard confidential sources supplying facts to the informant. One line of cases has taken the position that public policy dictates that the identity of the informer be protected. As was stated in Lubell:

> Turning to the information of Detective Sergeant Mitchell. He states that his grounds for believing that the material sought would afford evidence that an offence has been committed are of information received from a reliable source. The cases seem to approve of this type of language. It is trite law that the Crown enjoys a privilege with respect to the disclosure of the name of informants and obviously this is the reason for taking refuge in this type of language.[154]

A similiar protective position was taken in Newfoundland & Labrador Corp. Ltd., in the Supreme Court judgment which was approved in the Court of Appeal.[155]

Other cases have adopted the position, however, that a mere allusion to information obtained from a confidential source cannot satisfy the requirement of "reasonable ground for believing" set out in subsection 443(1). In the Ontario Supreme Court decision in Solloway & Mills, the informant's grounds of belief were that "he has been so informed by a reliable informant, whose name, for reasons of public policy, he is not at liberty to disclose". The Court, found that the justice should not have been satisfied as to the existence of ground for believing" on this basis.[156] The reasoning in Solloway & Mills was approved in both Imperial Tobacco Sales,[157] and Royal American Shows.[158]

It is suggested that while the public policy position stated in Lubell has its merits, it should not be taken so far as to impair the proper exercise of the independent judicial function of the justice. There is a distinction between protecting the name of the source from disclosure and protecting the grounds of belief yielded by the source from scrutiny. This distinction was recognized in the Newfoundland Court of Appeal's decision in Newfoundland & Labrador Corp. "Surely", held the Court, "information in Form 1 in which the informant deposes to specific facts, knowledge of which he obtained [from a confidential source] is information upon which the justice could be satisfied that reasonable grounds to so believe existed".[159] In other words, it is the assertion of specific facts necessary to furnish reasonable grounds, not the identity of the source of those facts, which should concern the justice.

EXAMPLES:

> Regency Realties Inc.,
> The informant's grounds for belief were "information from a trustworthy person". The information was held to be invalid, the court commenting that it contained "no serious enlightenment on the reasonable grounds of the informant...".[160]
>
> Royal American Shows,
> The informant's grounds for belief were based "on confidential information received to the effect that documents are being destroyed, altered and

falsified". These grounds were held to be invalid.[161]

Trottier,
The informant's grounds for belief were "that he has been actively engaged in investigating and from the investigators of other members of the Royal Canadian Mounted Police similarly engaged, has obtained information from persons whose names cannot be disclosed for reasons of public policy that the things and documents to be searched for are in the premises above described". Elsewhere, the information connected these premises to arrangements made to further a theft. The information was held to be valid.[162]

Wiens,
The information detailed four paragraphs of grounds for belief, which were supported by "confidential sources". The information was held to be valid.[163]

D. THE INNOCENT OWNER-OCCUPIER: VARIATIONS IN JURISDICTIONAL STANDARDS

Subsection 443(1) is directed simply to the search of a "building, receptacle or place". The absence of any reference to persons who might own or occupy these defined locations might suggest that the questions of ownership and occupation are irrelevant to the justice's determination of his jurisdiction. However, the caselaw has adopted a special outlook on the situation in which the information asserts that the named items are to be found in premises owned or occupied by a person innocent of complicity in the described offence. Although it is not entirely clear what precise variations in the standards applied by the justice ought to result from the apprehension of such a situation, the tendency of the Courts has been to afford the innocent party an extra measure of protection to that enjoyed under the usual standards.

The question of the "innocence" of an owner-occupier, it should be emphasized, is not one which involves any adjudication by the justice. Indeed, since the justice is not bound to decide upon the actual commission of the offence described in the information before he issues the warrant, it cannot be said that the

"guilt" of any owner-occupier is ever established at the search warrant issuance stage. The question, rather, focuses upon the relationship of the owner-occupier to the circumstances of the offence disclosed by the information. As Fontana observes,

> It is a matter to be determined from the context. Clearly, where the offence alleged is one such as unlawful possession the occupier of the premises where the goods are "possessed" will be implicated unless evidence discloses otherwise. That the owner-occupier of the premises is in fact implicated either directly or indirectly is no doubt the usual situation; the usual high standard required of the informant and the executor of the search warrant will apply in that case.[164]

The additional protection afforded to an innocent owner-occupier has been discussed primarily in the context of the grounds for belief which must be established by the information. In United Distillers Ltd., a leading case on point, Farris C.J.B.C. stated:

> It would seem to me that where the premises which are to be searched are not the premises of those accused of committing the crime, no Magistrate could or should be satisfied unless the information should definitely show the nature of the documents to be searched for and how such documents will likely afford evidence as to the commission of the offence and a belief based on reasonable grounds that the owner of the premises to be searched is concealing or is likely to conceal such evidence so that it will not be available in the prosecution of the charge.
>
> Particularly would this be so where the charge is not one of conspiracy or of such nature where in the natural course of events there would likely be documents in some place likely to incriminate or be evidence against the accused if found.[165]

The line of reasoning that the impracticability of alternative means of obtaining the items sought must be shown on the information was picked up in Pacific Press, in the particular instance of a disputed warrant to search newspaper offices. While the decision referred to the special status of the owner-occupier as an organ of the

free press, it affirmed principles which seem to be of general application to innocent owner-occupiers. In particular, Nemetz C.J.B.C. stated:

> To use the words of my distinguished predecessor in United Distillers Ltd. (1948), 88 C.C.C. 338, [1947] 3 D.L.R. 900, the Justice of the Peace "should have reasonable information before him to entitle him to judicially decide whether such warrant should issue or not". In my opinion, no such reasonable information was before him since there was no material to show:
>
> 1. whether a reasonable alternative source of obtaining the information was or was not available, and
>
> 2. if available, that reasonable steps had been taken to obtain it from that alternative source.[166]

The argument against requiring the police to establish that they have exhausted available alternatives such as, for example, obtaining the items sought with the co-operation of the owner-occupier, was accepted by Lerner J. in PSI Mind:

> As part of the applicant's attempt to establish that the Crown had acted improperly, it was shown that the solicitors for Dippong and the named companies whose premises were searched had advised the Crown that they were aware of the ongoing investigations and were prepared to assist and furnish information. This offer was refused. Laudable as that might appear to be, the law enforcement agencies would be deservedly criticized for so doing if it was subsequently discovered that evidence previously available was now otherwise because they had failed to act promptly and diligently by employing the procedures and aids lawfully available to conduct their own investigations.[167]

It would appear from the report of that case, however, that the three locations to be searched were all occupied by persons or institutions connected with the commission of the described offence; accordingly it does not stand directly against the British Columbia cases on this point. PSI Mind was accepted as authority, however, in

Re Wurm et al and the Queen in which a search of a solicitor's office was in issue. While the Court declined to follow Pacific Press in regard to what it termed the "alternative source" argument, the basis for its position is not entirely clear. McClung J. commented that the newspaper itself was not an accused or contemplated accused in the proceedings to which the search related in that case, but his decision in Wurm does not explicitly reveal that the solicitor was implicated in any investigation.[168]

Even staying within the wording of subsection 443(1), it appears that courts will examine the grounds for belief outlined in the information with extraordinary strictness if an innocent owner-occupier is involved. The primary examples of this approach are the two Ontario cases dealing with warrants to search solicitor's offices, Borden & Elliot[169] and Colvin[170]. In the former case, a detailed information setting out seven paragraphs of "grounds for belief" was found to be invalid in that no evidentiary link was present between the solicitors' firm and the described offence. In the light of the statements in the information that funds involved in the alleged stock fraud were traced to the solicitors' trust account, and that a solicitor admitted administering a stock transaction on behalf of the alleged perpetrator of the fraud, the finding of the Ontario Court of Appeal apparently evinces an extremely strict standard as to grounds which may be considered reasonable in such cases. In the latter case, Osler J. held that conversations with the solicitor who incorporated a company involved in operations allegedly disclosing an offence would not be sufficient ground for the issuance of a search warrant.

There is some suggestion in the authorities that this strict approach applies not only to the determination of the existence of reasonable grounds but to standards of particularity generally. Fontana, for example, comments that where an innocent owner-occupier is involved, standards are "much higher, requiring greater accuracy of documentation".[171] To attempt to define exactly how these "higher" standards differ from "the usual high standard" he mentions earlier, however, is an exercise akin to chasing butterflies without a net. The statement in the passage from United Distillers cited above that the information should "definitely show the nature of the documents to be searched for" illustrates the problem. How, if it all, can the elements of this test be differentiated from the normal requirement

set out in Abou-Assale, that the description of items be sufficient to permit the executors of the warrant to identify them and link them to the described offence?[172] It is suggested that the semantic differences which may be drawn between such tests are of little importance. If the Courts do adopt a protective attitude in connection with standards of particularity, it is likely to be more evident in the actual decisions in favour of innocent owner-occupiers than in the wording of the tests applied.

III. JUDICIAL DISCRETION: SHOULD THE JUSTICE ISSUE THE SEARCH WARRANT ONCE IT IS ESTABLISHED THAT HE HAS JURISDICTION?

The wording of subsection 443(1) contemplates that after the justice has been satisfied that the information has conferred jurisdiction upon him, he must make a notionally separate decision as to whether or not to issue the requested warrant. As Carter observes,

> When an application for the issue of a Search Warrant is properly made to a magistrate, who has jurisdiction in respect thereto, he must decide upon the complaint made before him on oath, whether he will issue a Search Warrant or not. In other words, the issue of a Search Warrant is in the discretion of the magistrate.[173]

In effect, this means that the applicant for a search warrant might indeed satisfy the requisite jurisdictional tests and yet still be properly denied the warrant he seeks. Fontana observes,

> The wording of s.443(1), the principal Criminal Code section on search warrants, makes it clear that the main precondition or test which must be met, is the swearing of an information by the informant which has the effect of satisfying the justice that any one of the conditions of s.443(1)(a), (b) or (c) does exist. Implicit in the wording of the section through the use of the word "may" is the discretionary element of the definition. A justice presented with the information properly sworn as required, and even though being "satisfied" within the terms of the section, may still refuse to issue the search warrant. It then rests with the applicant to pursue his application by other means.[174]

Although as a general rule the use of "may" indicates Parliamentary intention to confer a discretion rather than a duty upon a statutory authority, it should be noted that this rule admits exceptions. In the Exchequer Court decision in Re Writs of Assistance for example, it was found that despite the presence of the word "may" in what was formerly section 143 of the Customs Act[175] (now section 145), a judge presented with an application for a writ of assistance under that section had no discretion to refuse to issue one once the pre-requisites set out in the provision were satisfied.[176] However, the distinction between section 143 and subsection 443(1) of the Code is clear. The former, as Jackett P. noted in his decision, conferred unlimited powers upon the recipient so that it was impossible to evaluate any basis upon which the issuance of the writ could be refused. The latter, on the other hand, contemplates a specific request for authorization to make a specific search; the justice is presented with precisely that circumstantial detail that a judge under section 143 lacked.

There is no decision directly on point in regard to subsection 443(1), but it would seem safe to say that the provision should fall within the stream of authority that has recognized that where a judicial officer is given a power to issue process in wording that is permissive, there is a discretion in the officer to refuse to do so. In Regina v Coughlan, ex parte Evans, it was stated that "mandamus cannot lie to require a Magistrate to issue a summons or warrant for such is a matter that is wholly within his discretion";[177] the summons or warrant requested in that case fell under the then subsection 440(1) (essentially brought forward into the present subsection 455.3(1)) which required the justice to compel the appearance of the accused before him, where he considered that a case for doing so was made out. In Regina v. Foster, ex parte Royal Canadian Legion Branch 177 et al., Aitkins J., dealing with an application to quash a special search warrant for a common gaming house issued under the present section 181 (then section 171), commented on the wording of that provision as follows:

> All s. 171(1) says is that "a justice who receives from a peace officer a report in writing, etc... may issue a warrant..." "May" is permissive and not mandatory and, I think, can only be taken to mean that the Justice has a discretion whether to issue a warrant or not.[178]

The limitations on the exercise of the discretionary power of the justice acting under subsection 443(1) are the administrative law rules which pertain to exercises of discretion generally. Firstly, the justice is compelled to consider an information presented to him; he must exercise the judicial function imposed upon him by subsection 443(1). Porter C.J.O. in Worrall, after defining the duty of the justice to evaluate the grounds for belief presented by the information, concluded, "I see nothing in the affidavit evidence to indicate that the justice did not properly apply his mind to the question which it was his duty to consider".[179]

Secondly, the justice must exercise his discretion according to legal principles and not as a matter of "mere caprice".[180] De Smith, in Judicial Review of Administrative Action, summarizes the restrictions upon a statutory body in this regard as follows:

> It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.[181]

An example of the application of these principles to judicial process may be found in Re Blythe and The Queen which involved an application for mandamus to compel a justice to issue a summons or warrant for arrest upon an information charging an assault. It was held that if a justice refused to issue process on the basis of an irrelevant consideration, viz. that the accused was a police officer and the informant was not, mandamus would lie to compel him to perform his legal duty.[182]

The problem with discussing the exercise of the justice's discretion under subsection 443(1) as a function distinct from that of the determination of jurisdiction is that it is difficult to distinguish factors relevant to the exercise of discretion which are not already taken into account in the jurisdictional question. Letourneau in The Prerogative Writs in Canadian Criminal Law and Procedure commented on such a practical problem in the general context of judicial review:

> [An] applicant must differentiate between a jurisdictional and a non-jurisdictional error. No satisfactory test has ever been found for that purpose notwithstanding that the importance of differentiation lies in the very scope of review.[183]

Difficulties of distinction have plagued not only the applicants for prerogative writs, but the courts issuing them as well. On occasion, a court will phrase an issue in terms of both jurisdiction and the judicial exercise of discretion. In the Newfoundland & Labrador Corp. case, for example, the Newfoundland Court of Appeal stated:

> The principle seems to be well established that, in granting a Warrant to Search, the information before the justice must be of such a nature as to permit him to consider the application judicially. Simply stated, the question is whether or not the justice had jurisdiction to issue the warrants to search upon the information placed before him.[184]

The Foster decision is illuminating in this regard. Having contrasted the wording of the present subsection 181(1) with the present subsection 443(1) and ascertained that no mention of "reasonable ground for believing" appeared in the former, the Court went on to discuss what relevance the reporter's ground for belief might have to the exercise of the justice's discretion:

> As I have said, I think it beyond doubt that the Justice must exercise the discretion given to him judicially. It seems to me that the only area in which the Justice can exercise his discretion is as to whether or not the ground of belief relied upon the reporter is a reasonable ground.[185]

If the case is correct, and the "reasonableness" of the reporter's grounds constitutes "the only area" in which the justice has a discretion under subsection 181(1), what area is left to the justice acting under subsection 443(1) who has already considered the question of reasonable grounds in determining his own jurisdiction?

Any discussion of this problem must be largely speculative. Not only does subsection 443(1) lack any set of guidelines as to the factors relevant to the exercise of discretion, but it fails to establish conclusively the evidentiary basis from which the factors bear-

ing upon the exercise of discretion may be drawn.[186] Comparitive American legislation, for example, details the powers of magistrates to go behind the face of the information and examine the affiant and any other witness under oath.[187] The situation in Canada, however, is less clear.

It would appear that a practice of orally examining the informant has developed, despite the absence of statutory authorization for it. Such an oral examination was given at least tacit approval in Dare to be Great, in that Riley J.'s decision relied at least in part on evidence of the questioning of the informant by the Justice.[188] On the other hand in Re United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada and the Queen, the British Columbia Supreme Court, considering a provision similar to subsection 443(1) in provincial legislation stated:

> Whether the question is one of admissibility of the affidavits or error on the face of the record the initial inquiry must relate to the procedure before the Justice. Is the Justice confined to the information or may he take other evidence into account? In my view the answer to that question is found in the opening words of s. 14 of the Summary Convictions Act, R.S.B.C. 1960, c. 373: "A Justice who is satisfied by information upon oath in Form 1..." The purpose of the Legislature in restricting the Justice to the "information upon oath in Form 1" is not for me to consider. I am unable to put any interpretation upon that section other than that it is the "information upon oath in Form 1" that must satisfy the Justice. It follows that the affidavit material as to other evidence placed before the Provincial Judge cannot assist the Crown.[189]

An even stronger position was adopted by Roach J.A., in Worrall:

> In the first paragraph of his reasons Mr. Justice Lieff seems to say that it would have been proper for the Justice of the Peace to issue the warrant on the basis of the facts and circumstances set forth in the information "and in conversations" and impliedly that is what the Justice of the Peace did. I need only say that mere conversations between an informant and a Justice of the Peace can

> form no part of the basis on which a search warrant may issue. If there is something lacking in the sworn information that deficiency cannot be supplied by some conversation between them.[190]

The authoritativeness of this position is thrown into doubt by virtue of the fact that Roach J.A. was dissenting; the majority, differring on a question of application of legal principles rather than their articulation, did not advert to the point.

Both the United Association case and Roach J.A.'s dissent in Worrall dealt with the question of whether conversations between the justice and the informant could cure deficiencies in the sworn information. What about the converse situation, however? Can oral or external evidence justify a decision not to issue a warrant despite the sufficiency of an information? There is no authority directly on point but in Re Den Hoy Gin, Laskin J.A. indicated his willingness to go behind the face of a sworn information to quash a search warrant. The information swore that certain documents were at premises occupied by the appellant, although they were in fact being held by the police. A previous Court of Appeal order had quashed an earlier warrant issued in relation to the same items and directed their return to the appellant. Laskin J.A. stated, "Arguments of convenience and practicality are offensive to me when they involve, as in this case, a flouting of the order of this Court and a falsehood in a sworn information".[191] It is suggested that a justice who refused to issue a warrant for similar reasons would be acting in the proper exercise of his discretion.

While there may not be a definitive resolution of the general question of what factors may properly bear upon the justice's discretion, there is recent jurisprudence directed to one specific discretionary consideration which may herald future decisions in this area. In Pacific Press, the Court accepted the argument that "when a search warrant is sought against an organ of the free press of the country, the issuing justice before exercising his judicial discretion should weigh the competing interests of the free press on the one hand, and the administration of justice on the other".[192] Given that the Court made specific reference to sections 1(f) and 2 of the Canadian Bill of Rights,[193] in so finding, the decision raises interesting possibilities as to the consideration of other freedoms enshrined in the Bill of

Rights, when applicable, by the justice acting under subsection 443(1). It should be noted that in Pink Triangle Press, however, the impact of Pacific Press was limited somewhat. "It clearly does not even remotely suggest", stated Garrett J. "that any publication has a special place in the scheme of things where the criminal offence of mailing obscene literature is alleged".[194]

IV. THE SEARCH WARRANT ISSUED: ARE ITS CONTENTS LEGALLY SUFFICIENT?

If, after the jurisdictional and discretionary stages of the process have been passed, the justice has decided to issue a warrant, it remains for him to ensure that the contents of the warrant comply with law. As with the information, the warrant must satisfy both formal and substantive standards in order to be safe from an attack on its validity. Since the warrant issues after the decision to authorize the search, however, it does not need to present assertions which justify the search. It is directed rather to guiding the executor of the warrant in the performance of his duties and notifying the occupier of the searched premises of the executor's authority.

A. FORMAL REQUIREMENTS

(1) Form 5

Form 5 is set out in the Criminal Code as follows:

FORM 5

Warrant to search (Section 443)

Canada,
Province of }
(*territorial division*) }

To the peace officers in the said (*territorial division*):

Whereas it appears on the oath of A.B., of that there are reasonable grounds for believing that (*describe things to be searched for and offence in respect of which search is to be made*) are in at , hereinafter called the premises:

This is, therefore, to authorize and require you between the hours of (*as the justice may direct*) to enter into the said premises and to search for the said things and to bring them before me or some other justice.

Dated this day of A.D.
at

.....
A Justice of the Peace in and for

The use of Form 5, unlike that of Form 1, is not expressly designated in section 443 as mandatory. Rather, subsection 443(3) provides that "a search warrant issued under this section may be in Form 5". However, the Courts have not interpreted this permissive wording as allowing a justice to ignore Form 5 completely in authorizing a search. In Rex v. Solloway Mills & Co, Hyndman J.A. stated:

> It is true the section says that it "may" be in form 2 or "to the like effect" and it is argued that this is permissive only and any form of authorization would be sufficient. But it seems to me that is not the proper interpretation to put upon it. My view is that whilst the actual form is not indispensable the substance of it must appear in some manner.[195]

The "substance" of Form 5 (then Form 2) includes the basic descriptions of offence, items and location discussed earlier in the context of informations. For example, in both Solloway Mills & Co and La Vesque,[196] the missing element, identified with reference to Form 5, was the description of an offence to which the requested search related.

(2) The Jurisdiction of the Issuing Justice

In Black, a search warrant was issued over the signature of the authorizing justice, but neither the authority nor the office of the Justice appeared underneath his signature. Berger J. ruled that this was a fatal defect, commenting:

> It was only by virtue of his office that the Judge had jurisdiction. That jurisdiction should have been made apparent on the face of the warrant...[197]

On the other hand, the warrant need not specify that the territorial jurisdiction of the justice encompasses the premises to be searched. In Sleeth v. Hurlbert, Sedgwick J. stated, "It is not by common law necessary that the warrant should state affirmatively that the place to be searched is in a place within the jurisdiction of the magistrate who issues it or the officer directed to execute it."[198] This, of course, must be so, if the rule in the British Columbia Court of Appeal decision in Solloway Mills[199] is to be effective; otherwise a justice could never issue a warrant for

premises outside of his province, or for that matter outside of his territorial division.

The strict approach followed in Black was somewhat moderated in Abou-Assale. The omission of the words "of Montreal" found after the word "district" in the heading of the warrant was held not to constitute a fatal defect as Montreal was specified elsewhere as the locus of the offence, the location of the premises to be searched and the place at which the warrant was issued.[200]

(3) The Time for Execution

Form 5 includes a clause limiting the hours of execution of the warrant "as the justice may direct". However, it is not strictly necessary for the justice to designate the time for search in the warrant unless he wishes to authorize execution of the warrant at night. This would appear to follow from section 444 which reads:

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

The leading case on point in interpreting this provision (formerly section 630) is Rex v. Plummer in which was held that the words "at any time" were sufficient, when inserted in the search warrant, to allow its execution at night.[201]

There is no requirement in subsection 443(1) that a deadline for executing the warrant be included in it. In their Police Officer's Manual, Rogers and Magone suggest that the justice may set a time limit for the execution of the warrant; otherwise it must be executed within a reasonable time.[202] The directions in Form 5, however, do not expressly contemplate the setting of a deadline. It may be argued that the provision in Form 5 for specifying the "hours" during which the search may proceed opens the door to specifying the days during which the search may proceed; conversely, the explicit mention of "hours" may exclude by implication the making of an expanded specification. At any rate, Form 5 is not mandatory; the question is essentially whether the absence of any reference in the Code to setting a deadline for execution precludes the justice from doing so. The issue, in the absence of binding authority, remains open. It was raised in Regina v. Execu-Clean Ltd., a decision which seems to support the binding authority of

a limitation as to date on the face of the warrant. However, the statements by Craig J. are somewhat qualified, and the case was ultimately decided on other grounds.[203]

(4) The Designation of Executors of the Warrant

The wording of subsection 443(1) describes the warrant as "authorizing a person named therein or a peace officer" to execute the search. As was observed in Purdy,

> The right of search is restricted to the person named, or a peace officer. This provision must be given its ordinary meaning. No other person has the right to compulsory access to the private premises to be searched and to an unrestricted access to private records and documents in the absence of a warrant directed to him.[204]

The passage from Purdy points to a certain ambiguity. It is clear that a person, other than a peace officer, who is not "named" in the warrant has no power to effect a search under subsection 443(1). The provision that "a peace officer" may be authorized to search by the warrant is somewhat problematical, however. Must the peace officer, in order to be so authorized, be included within the scope of a designation made on the warrant? Or does his position as a peace officer in itself enable him to lawfully enforce the warrant whether or not the designation explicitly includes him?

This point has not been directly addressed in the caselaw on subsection 443(1). Rather the cases have discussed how widely the justice may define the class of officers authorized to execute the warrant. Form 5 itself directs the warrant "to the peace officers in the said territorial division". In the Ontario Supreme Court-Appellate Division decision in Solloway & Mills, the Court discussed a warrant reading: "to all or any of the provincial police in the Province of Ontario, and to all or any peace officers and constables in the said province". It was held that "there is no necessity for naming the peace officer or officers to whom the warrant is directed and it would seem that the form here followed is not objectionable".[205] Solloway & Mills was followed in Re Flanagan et al and Morand et al, a Quebec Superior Court decision which appears to stand for tolerance not only of wide designations but of omitted ones. The name of the district on the warrant form was omitted both in

the heading and in the direction to the peace officers; however the "district of Montreal" was included in the description of the locus of the offence. It was held,

> No doubt it would be preferable that the form be completed by adding the words "of Montreal" to the word "District" on the first two occasions that it appears but the Court thinks that the description is sufficient because the authorization is given to peace officers and not to a named person.[206]

The Flanagan decision goes far in accommodating formal sloppiness. While it follows the spirit of the same Court's decision in Abou-Assale,[207] it allows permissiveness to dictate the position that the authorized executors of the warrant need not be apparent on its face. The basis of the Court's reasoning, that "the authorization is given to peace officers and not a named person", arguably misses the point, however. If no class of peace officers is described in the directory part of the warrant, how can it be said that any peace officer has been authorized to execute the search? It is suggested that the position taken in Solloway & Mills is correct; the absence of a requirement to "name" a police officer allows for a wide designation of executors but not a failure to make any designation al all. In Black, Berger J. commented "I do not think a citizen presented with a warrant should have to try to piece together the authority under which it was issued."[208] The same sentiments should be equally applicable to the authority under which the warrant is executed.

B. SUBSTANTIVE REQUIREMENTS

As was mentioned in the discussion of informations,[209] there has been a general tendency to absorb standards pertaining to the elements of search warrants into the discussion of the same elements as they appear in informations. Accordingly, the standards relating to search warrants were canvassed in the earlier discussion of informations. Rather than repeating the discussion, it is convenient to summarize the substantive elements which must appear on the face of the warrant. Firstly, the warrant must state an offence with enough precision "to apprise anyone concerned with the nature of the offence for which evidence is being sought".[210] Secondly, it must describe the items to be seized with

enough specifity "to permit the officers responsible to execute the search warrant to identify such objects and to link them to the offence described in the information and the search warrant".[211] Thirdly, the warrant should describe the location to be searched with sufficient accuracy to enable one from the mere reading of it to know "of what premises it authorizes the search".[212]

Although the tests applied to the substantive elements of the warrant are, to all intents and purposes, the same as those applied to the substantive elements of the information, this does not mean that once the substantive sufficiency of the information has been determined, the corresponding issue with respect to the consequent warrant has been necessarily resolved. Such may indeed be the case where the descriptions of offence, items and location are common to both documents. For example, in Flanagan, the Court stated that:

> Since the text of the offence is identical in the information and in the warrant, the same considerations apply and upon the same grounds, the Court does not accept this argument.[213]

However, despite the practice of duplicating the descriptions in the two documents, the possibility that a warrant may be issued containing descriptions which vary from their counterparts in the information must be kept in mind. Such a situation arose in the earlier Johnson and Franklin Wholesale Distributors case, while the information itemized "invoices pertaining to the distribution of said obscene books", the warrant referred merely to "company records, including invoices". The Court noted that the words "pertaining to the distribution of said books" were critical to the validity of the description of the items to be seized. While the information was not challenged as being defective, the category of company records in the warrant was found to be insufficient.[214]

C. SEVERABILITY

The issue of severability arises once it has been determined that a search warrant contains a defect that gives rise to legal consequences. This excludes those situations involving errors or omissions, typically of a clerical nature, which do not, in the eyes of the Court,

constitute significant defects. Examples of such situations include the already discussed cases of Abou-Assale, in which the omission of the name of the judicial district at the head of the document was given little weight by the Court,[215] and Worrall, in which the inclusion of "surplussage" in the phrasing on the warrant was discounted.[216] The discussion of severability assumes that there is a defect on the warrant which impugns its validity; the issue becomes one of whether the defective part of the warrant may be severed from the remainder, so as to leave the modified version legally intact.

The leading case on the severability of a search warrant is the earlier Johnson & Franklin Wholesale Distributors case. Having concluded that the one of two classes of items sought in the warrant was insufficiently defined, Tysoe J.A. stated:

> It appears to me that the doctrine of severability which was applied in R. v. Green at al., and by Martin J.A., in R. v. Cox, supra, to an order of Justices can properly be applied and should be applied to the search warrant issued by a Justice of the Peace in the present case. In my view the bad part of the warrant is clearly severable from the good. The two parts have no connection with one another. It seems to me that had the necessary connection existed and the second category been limited to records, including invoices, pertaining to the books in the first category the whole warrant would be good. So also if I could treat the second category as merely ancillary to the first, as the respondent submitted is the true situation. But I am unable to do this as I think it would require reading in words which are not there.[217]

Tysoe J.A.'s reasoning has since been accepted in PSI Mind,[218] Alder,[219] and Abou-Assale.[220]

In the caselaw so far, severance has been discussed exclusively in terms of a reviewing court excising offensive portions of search warrants, and not in terms of the justice's function when confronted with the information presented to him by the applicant for the warrant. What powers of severance does the justice himself have? In order to answer this question, it is necessary to consider the exact relationship between the information and the search warrant itself.

The information confers jurisdiction upon the justice to issue the warrant. Assuming a situation in which one of the requisite substantive elements of the information is partially defective, what consequences does this have upon the justice's power to issue a warrant? The answer would seem to be that the tainted part of the impugned element could not be validly carried over into a consequent warrant. In other words, the information would still confer jurisdiction upon the justice but the warrant which he would have jurisdiction to issue would be narrower than that envisaged by the information as originally drafted. While as a formal exercise, it might be unobjectionable for the justice to sever the offending portions from the information itself, the critical task of the justice would be to keep the descriptions in the search warrant within the bounds of permissability. In instances where the justice was presented with an information and a warrant identically worded, this task would, in effect, amount to a severance of offending portions from the warrant.

The correctness of this approach may be considered in the light of the practice adopted by higher courts in similar situations. In both Alder and Abou-Assale, the Courts were presented with informations and warrants in which the description of items to be seized were identically defective. In each instance, the Court focused upon the description in the warrant, excising the offensive portion, but allowing the remainder to stand. Nothing was done with respect to the information. In essence, the practice suggested for the justice analogizes to that adopted by the higher Courts. It is suggested that this analogy is appropriate when it is considered that subsection 443(1) envisages the justice as performing a judicial function rather than merely wielding a rubber stamp.

PART TWO: SECTION 181 OF THE CRIMINAL CODE

I. THE SPECIAL POWERS UNDER A SECTION 181 WARRANT

Section 181 is one of a number of special search warrant provisions which have survived the passage of time and process of amendment since their introduction in the 1892 Code. The same generation of survivors includes the special warrants for women in bawdy houses (section 182) and precious metals (section 353). Different histories but similar special status characterize the present provisions for seizure of firearms (section 101) obscene publications and crime comics (section 160) and hate propaganda (section 281.3). Since the only special Code warrants and informations to be examined by the panel will be those relating to section 181, however, the following discussion is limited to the powers defined by that particular subsection.

Subsection 181(1) provides:

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

The offences encompassed by this subsection include keeping, or being found in, or permitting the use of a common gaming or betting house (section 185), offences in relation to betting, pool-selling and bookmaking (section 186), placing bets on behalf of others (section 187), offences in relation to lotteries and games of chance (sections 189 and 190), and keeping, being an inmate of, being found in, or permitting the use of a common bawdy-house (section 193).

A glance at the subsection reveals that it authorizes more than merely a conventional search of premises for certain items. The warrant empowers an executing officer to take persons found in the place searched into custody, and bring him before a justice. This seemingly anomalous power becomes even more startling when it is considered in the light of subsections 183(1) and (2). These provisions read:

> (1) A justice before whom a person is taken pursuant to a warrant issued under section 181 or 182 may require that person to be examined on oath and to give evidence with respect to
>
> > (a) the purpose for which the place referred to in the warrant is or has been used, kept or occupied, and
> >
> > (b) any matter relating to the execution of the warrant.
>
> (2) A person to whom this section applies who
>
> > (a) refuses to be sworn, or
> >
> > (b) refuses to answer a question,
>
> may be dealt with in the same manner as a witness appearing before a superior court of criminal jurisdiction pursuant to a subpoena.

A justice presented with a report in writing under subsection 181(1) should have in mind not only the derogation from privacy rights which warrants effect generally, but also the infringement on the individual's protection against self incrimination which might flow from the issuance of this special warrant. In the light of these severe consequences, the caselaw has recognized the need to ensure that the opportunities afforded by this

provision are not abused. In Re Sommervill's Prohibition Application, Disberry J. stated, referring to what is now section 181:

> It immediately becomes apparent that search warrants authorized by sec. 171 are to be used by the authorities only when there are reasonable grounds to believe that a disorderly house of one of the types specified in the section is being carried on. Such warrants are not to be resorted to in order to obtain information and evidence with respect to other suspected crimes.[221]

While it is essential to restrict the warrant provisions of subsection 181(1) to instances of those offences enumerated, the converse proposition is not true. The fact that a warrant desired by a peace officer relates to a suspected offence mentioned in subsection 181(1), does not preclude the seeking and obtaining of a general search warrant under subsection 443(1). In Re MacKenzie and the Queen, an information in Form 1 was presented to a justice describing the operation of a gaming house; the justice issued a corresponding warrant in Form 5. The Court disagreed with the argument that the warrant had been issued under subsection 181(1), and proceeded to evaluate the case according to the rules applicable to subsection 443(1). Disberry J. commented,

> Section 181(1) can only be resorted to with respect to those crimes which are to be found within the ambit of the said subsections of the Criminal Code which are specified in the said subsection. Section 443(1) has general application. Each of these enactments has its own procedural requirements.[222]

While the procedural requirements of each section are discrete, however, there are areas in which the jurisprudence has overlapped. These will be demonstrated in the course of the following discussion of the requirements applicable to subsection 181(1). The discussion has been organized according to an analogous breakdown to that used in connection with the section 443 warrant:

> (1) the conferment of jurisdiction upon a justice by a report in writing disclosing the elements set out in subsection 181(1);

(2) the decision of the justice, after being satisfied as to his jurisdiction, to exercise his discretion and grant the warrant;

(3) the issuance of the warrant for the search which the justice has decided to authorize.

II. THE REPORT IN WRITING: DOES IT VALIDLY CONFER JURISDICTION UPON THE JUSTICE?

The first difference between the provisions of subsections 181(1) and 443(1) relates to the initiating document itself. Rather than an "information under oath", the applicant for the warrant is required to present a "report in writing" to the justice. It should be noted that this form of document is unique to section 181; the special Code warrants under sections 160, 182 and 353 each provide for an information under oath. Section 101, which deals with warrants to seize firearms, provides for an "application to a magistrate made by or on behalf of the Attorney General".

A. FORMAL REQUIREMENTS

Unlike subsection 443(1),[223] subsection 181(1) makes no reference to a required form, nor does Part XXV of the Code designate any form for the report in writing. The absence of such a designation has led to a certain degree of judicial disagreement over the appropriate document to be used in making the required report. In Worrall, dealing with the validity of documents in Forms 1 and 5, MacKay J.A. commented,

> It is of interest to note that the only forms, in the Code, of information and warrant authorizing a search are those to which I have referred. Section 171 [now 181] providing for the issue of search warrants in respect of offences relating to gambling, lotteries and bawdy houses, uses the words "anything found therein that may be evidence", etc. It is the same form of information and seach warrant that is authorized by the Code under both ss. 171 and 429.[224]

However, the consequence of using the general search warrant forms for a section 181 report was made clear in MacKenzie;[225] the documents were treated by the Court as being governed by subsection 443(1). In Part XXV, Form 1

is specifically identified with section 443. There is reason, therefore, to doubt the correctness of MacKay J.A.'s obiter comments.

It is suggested that the absence of any statutory requirements or example of the form of the report in writing leaves the decision as to formal presentation up to the reporter. In fact, various police departments across the country have adopted different styles of presentation. Police in Toronto, for example, use an "Application for Search Warrant" which specifically refers to s. 181. The City of Edmonton Police Department prefers a format akin to a letter addressed to a Provincial Court Judge. In Montreal, the recital of the reporter's belief is headed "Rapport en vue d'obtenir un mandat de perquisition".[226] None of these permutations offends any formal rule under subsection 181(1). So long as the form allows for the written presentation of the substantive elements required by subsection 181(1) to the justice, it would appear to be sufficient.

The report in writing does not have to be under oath. Fontana observes,

> The officer is not required here to swear an information under oath in order to obtain the warrant, but merely to submit to the justice a "report in writing" that he has reasonable ground to believe one of the enumerated offences is being committed. But unlike s. 443, the officer here must affirmatively state that as well as having grounds to believe, "he does believe" that the offence is being committed.[227]

The necessity of including the words "and that he does believe" in the report under an antecedent provision to subsection 181(1) was discussed briefly in Rex v. Miller:

> The search warrant under which the constables operated was issued under s. 641 of the Code. The material upon which it was based was defective. The warrant issues upon the report of a constable "that there are good grounds for believing and that he does believe" that the place named is kept for betting purposes. This report omits the words "and that he does believe".[228]

The Court found it unnecessary, however to decide the

issue of whether the warrant issued was accordingly invalid, since the existence of a valid warrant was not requisite to the determination of the case.

B. SUBSTANTIVE REQUIREMENTS

The specification of items sought, it may be recalled, is integral to an information in Form 1.[229] The items named in the information are the object of the search; in order to receive a warrant to obtain them, the informant must relate them to a described offence and locate them in particular premises. The report in writing envisaged by subsection 181(1), on the other hand, does not focus upon items at all. The required belief of the officer is that "an offence under section 185, 186, 187, 189, 190, or 193 is being committed at any place within the jurisdiction of the justice". The substantive elements of the report in writing therefore may be reduced to two: a described offence and a defined location.

(1) The Offence Described

As was mentioned earlier, it is essential that the offence described in the report belong to the class enumerated in subsection 181(1). Moreover, it appears from the wording of the subsection that the offence described in the report must be one which "is being committed" at the specified location. While many of the offences enumerated are obviously of an ongoing character, it is possible to conceive of situations in which, by the time the peace officer has learned of the offence, the unlawful use of the premises has ceased. In such situations, subsection 181(1) should not be invoked; the appropriate procedure is the swearing of an information under subsection 443(1).

Although there is little caselaw on point, the standards of particularity governing the description would not seem to be appreciably different from those applicable to informations under subsection 443(1). In the leading case of Plummer, the Manitoba Court of Appeal followed the rule that so long as the offence is otherwise adequately described, the absence of a section number is not a fatal defect. Accordingly, a report stating that premises "'are kept or used as a disorderly house' as defined by the Criminal Code" was held to be a sufficient description.[230] On the other hand, in MacKenzie, an information alleging the presence of a

"gaming house" was held to be defective. Although the information was identified as one governed by section 443, the Court's comments as to the insufficiency of the description are relevant in this regard. Disberry J. stated,

> So far as describing the "offence in respect of which search is to be made" all the information the informant Webb gave Morris, J.P., was that "a gaming house is present in the Cue Billiards on Main St. in Kindersley, Saskatchewan, and that cards and money are used in connection with this game as well as a book recording the names of players"; and "that the said gaming house has been detected by members of the R.C.M. Police through personal knowledge or contact". No specific section of the Criminal Code creating an offence is to be found by number or other reference in said Form 1. No light is shed on the nature or kind of "this game" referred to therein. Nor can one find set forth in Form 1 all the essential ingredients required to constitute any criminal offence known to the law.[231]

(2) The Location to be Searched

In order to obtain a search warrant under subsection 181(1), the report must indicate that it is at the defined location itself where the offence described is being committed. Once again, this sets subsection 181(1) apart from subsection 443(1); under the latter provision it is the location of the named items, not the offence, which is critical. The most relevant case on point is Regina v. Chew, which involved a challenge of an order for the forfeiture of money seized during a search of an alleged common gaming house. The validity of the order depended upon the validity of the seizure itself under section 181. In the particular context of subsection (1), the issue essentially reduced itself to the consideration of whether the location of the seizure was the same location at which the common bawdy house was found to be kept. The Court commented,

> It is clear that the moneys found and seized on the Elm Street premises of the accused were not evidence that the offence of keeping a common gaming house was being committed at that place. Chew's conviction for the offence of keeping a common gaming house related to the Dundas Street premises, and, as indicated above, a similar charge in

> respect of the Elm Street premises was dismissed. The Crown therefore cannot support the magistrate's order by reference to subsection (1).[232]

The Court went on to contrast the power of seizure under a subsection 181(1) warrant with that given to a peace officer without warrant under subsection 181(2), which reads as follows:

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

The Court concluded that the scope of subsection (2) was wider than subsection (1) in that it authorized the seizure of articles connected with a gaming house at places other than the gaming house itself.

Unlike subsection 443(1), subsection 181(1) does not allow the justice to issue the warrant if the location for which the search is requested lies outside his territorial jurisdiction; the Code provides no "backing" procedure for this special warrant similiar to that set out in subsection 443(3). Rather the report in writing must specify a "place within the jurisdiction of the justice" as the locus of the offence. Where the report in writing fails to do so, it ought to be invalid. Although there is no reported caselaw specifically dealing with subsection 181(1) on this point, the situation is analogous to that discussed in Campbell v. Walsh. This case involved the limits upon the justice's jurisdiction to issue an arrest warrant under the former section 653 of the Code (incorporated into the present section 455). The section gave the justice jurisdiction if the offence was committed either in his territorial jurisdiction or, if other conditions were met, in the province of his residence. It was held that in order to confer jurisdiction upon the justice, the information had to state where the offence was committed.[233]

The operation of subsection 181(1) is dependant upon the particular offence occurring in "any place". While the wording of the provision differs from the specification of "a building, receptacle or place" in sub-

section 443(1), it is similar in its reference to a single location. It is suggested, therefore that the standards of particularity applicable to subsection 443(1) are adaptable to subsection 181(1), particularly in connection with the requirement that the document sufficiently isolate the location to be searched from its surroundings.

III. JUDICIAL DISCRETION: SHOULD THE JUSTICE ISSUE THE SEARCH WARRANT ONCE IT IS ESTABLISHED THAT HE HAS JURISDICTION?

The wording of subsection 181(1) specifies that a justice "may" issue a warrant, when presented with the required report in writing. As was mentioned in the discussion of judicial discretion under subsection 443(1), the better view is that this reposes a discretion in the justice to refuse to issue the warrant notwithstanding the sufficiency of the document before him.[234] In the particular context of subsection 181(1), this view is supported by the comments of Aitkins J. in Foster, as to the "permissive" character of the justice's power.[235] However, as was made clear in Foster, this discretion must be exercised judicially. The discussion of the tasks entailed by this qualification has focused on one particular area: the ascertainment and evaluation of the reporter's grounds for belief.

The grounds of belief of the peace officer are not, under subsection 181(1), required to be set out in the report in writing. The report must merely state that the peace officer "has reasonable ground to believe and does believe" that the described offence is being committed. Consequently, there would appear to be no dispute that the evaluation of these grounds is in no sense a matter prerequisite to the conferment of jurisdiction upon the justice to issue the warrant; rather the matter falls solely within the ambit of the discretion vested in him.

In Rex v. Liebman, the Ontario High Court refused to intervene in a decision to issue a search warrant under the former subsection 641(1). Kelly J. stated,

> The second ground urged was that the constable reporting to the Police Magistrate had not the facts to entitle him to a search warrant. Surely this is a matter solely for the Police Magistrate in his investigation, who must be satisfied that the complaint of the constable is sufficient under

> s. 641(1) for the Police Magistrate to issue the search warrant, and have the machines in question brought before him.[236]

What Kelly J. meant by the "sufficiency" of the "complaint" is not clear; certainly, the sufficiency of the actual report under subsection 641(1) (or its successor, subsection 181(1)) could not depend upon its factual basis. The duty of the justice in this regard was clarified in Foster, however. The British Columbia Supreme Court held that the justice, if not presented with the grounds of belief in the report, ought to inquire into and evaluate these grounds in the exercise of his judicial discretion. Aitkins J. stated,

> I think the position is that, in the absence of statutory requirement, the report under s. 171(1) need not show the ground of the reporter's belief; the reporter is not required to do more than meet the statutory requirements of s. 171(1), and that if such a report is put before a Justice of the Peace, the Justice of the Peace, because he must act judicially, should, before giving the warrant, enquire of the person making the report to see whether there is a reasonable ground for the reporter's belief.[237]

Moreover, it would appear from the Foster case that if the report in writing does set out the reporter's grounds of belief, a reviewing court may take these to constitute the full extent of the grounds held by the reporter and presented to the justice. The Court's adoption of this position in Foster was stated to be based on the recital in the warrant itself, in which the existence of reasonable grounds of belief was recognized as being apparent in the report in writing.[238] At the very least, this would seem to dictate that a justice, after ascertaining the existence of reasonable grounds of belief not stated in the report, would be prudent to avoid issuing warrants with recitals such as that involved in Foster. It may be commented though, that any recital, at least under present legislation, would appear to be gratuitous; there is no suggestion in Aitkin J.'s judgment that the justice, having inquired into and evaluated the reporter's grounds of belief, ought to summarize the results of his inquiry in the warrant. The question thus arises as to the basis upon which a court might review the justice's evaluation of the reporter's grounds for belief in cases in which neither the report in writing nor the actual warrant makes any adversion to them.

It is suggested that there is no satisfactory answer to this question. The provisions of the present subsection 181(1) countenance a procedure which, despite attempts such as that made in Foster, defies comprehensive review. It is significant that in the context of subsection 443(1), the Court's intervention in the issuance process, even when expressed in terms of controlling the justice's exercise of discretion, has rested upon the extensive requirements applicable to the information. In Newfoundland & Labrador Corp., for example, it was stated that the information must permit the justice to consider the application for the warrant judicially.[239] The lenient requirements applicable to the report in writing, as well as facilitating the conferment of jurisdiction upon the justice, ultimately prevent effective scrutiny of his judicial performance.

In effect, this places a heavy burden of self-regulation upon the justice. There would not seem, however, to be a lack of guiding authority for him to advert to in the exercise of his discretion. In Foster,[240] Aitkins J. accepted the authority of the jurisprudence dealing with the sufficiency of grounds disclosed by the information under subsection 443(1), citing specifically United Distillers,[241] and the Supreme Court of Ontario, Appellate Division decision in Solloway and Mills.[242] It would seem safe to assert that the grounds of belief which must be revealed to the Justice by a reporter under subsection 181(1) ought to conform to similar standards to those applicable to informations under subsection 443(1).

IV. THE SEARCH WARRANT ISSUED: ARE ITS CONTENTS LEGALLY SUFFICIENT?

A. FORMAL REQUIREMENTS

Like the report in writing, the search warrant issued under subsection 181(1) need not comply with a prescribed statutory form. The warrant is described as "authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence...is being committed at that place and to take into custody all persons..." Three specific formal points arising from the subsection will be discussed here: (1) the jurisdiction of the issuing justice, (2) the designation of executors of the warrant, and (3) the time for execution.

(1) The Jurisdiction of the Issuing Justice

In the discussion of this point in connection with subsection 443(1), it was concluded that the warrant did not have to specify that the territorial jurisdiction of the justice encompassed the premises to be searched. However, the power of the justice to issue a warrant under subsection 181(1), unlike that under subsection 443(1), depends upon the location of the place to be searched within his territorial jurisdiction. It is accordingly suggested, following the line of reasoning articulated in Black,[243] that a warrant under subsection 181(1) must signify the justice's territorial jurisdiction. Paraphrasing from Berger J.'s judgment, it is only by virtue of the location of the premises that the justice has jurisdiction to issue this kind of warrant; the basis of his jurisdiction in this regard ought to be apparent on the warrant's face. Support for this view is afforded by The Queen v. Lyons, which involved search powers under Ontario liquor licensing legislation. Like the present subsection 181(1), the relevant search provision allowed a justice to issue warrants for offences occurring within his territorial jurisdiction.[244] It was held that to be valid a warrant issued under this provision in the City of Toronto had to describe the issuer as a "justice of the peace in and for the City of Toronto".[245]

(2) The Designation of Executors of the Warrant

The caselaw on point in connection with subsection 181(1) has discussed both the question of to whom the warrant may be addressed and the question of who may execute the warrant once it is issued. Rex v. Glenfield et al. dealt with the complex provisions of the former section 641 which provided that, in appropriate cases, an order could be issued "to authorize the constable or other peace officer" to make the mentioned search "with such other constables or peace officers as are deemed requisite" (emphasis added). The Court held that "the order to search must issue to the constable or peace officer who reports to the Magistrate who, however, is authorized to employ other constables to assist him".[246] In Rex v. Miller, however, the Court gave this restriction a rather liberal reading. The warrant issued in that case was directed to the reporter, Sauve, "or other peace officers of the City of Ottawa"; it was subsequently executed by an officer named Conley. The Court held,

> In my opinion the warrant complies with s. 641 [am. 1930, c. 11, s. 19] of the Code. It is directed to the person who applied for it, and under this section the Justice issuing it may authorize the constable who obtained it and other peace officers to enter and search the premises in question, and such peace officer or peace officers may enter and search with such other constables or peace officers as are deemed requisite by him. It is not in evidence that Sauve delegated Conley to make the search, but it is in evidence that Conley when he did make the search was armed with the warrant in question. If Parliament had intended that the person to whom the warrant was issued, was the only person who could execute it, it would, in my opinion, have said so. Such a narrow interpretation of the expression "with such other constables or peace officers as are deemed requisite" was never intended in my opinion. If anything more is required the section goes on to say "and such peace officer or peace officers may thereupon enter and search", etc.[247]

The wording of the present subsection 181(1) differs from that of its predecessor in this regard. It states simply that the warrant may authorize "a peace officer" to conduct the search. This alteration would seem to indicate that the rule enunciated in Glenfield is no longer law; the warrant need no longer be issued to the reporter. However, as was pointed out in Re Old Rex Café the execution of the warrant must still be carried out by the peace officer to whom it is issued.[248] The Court admitted the possibility, however, that a general direction, akin to that sanctioned in Solloway & Mills[249] might be used to allow officers other than the applicant alone to effect the search. Morrow J. commented on the alternative of issuance under subsection 443(1) to "a person named therein or a peace officer", and contrasted this wording with that of subsection 181(1). It is suggested that the sole effect of the distinction in wording is to preclude the issuance of a section 181 warrant to persons other than peace officers; the wide designations permitted under subsection 443(1) ought to be similarly permitted under subsection 181(1).

(3) The Time of Execution

The leading case on the interpretation of the present section 444 (formerly section 630) is Plummer, which

dealt with a special disorderly house warrant. The decision held that a designation in the warrant to search "at any time" amounted to the authorization required by section 630 to exempt the warrant from the rule that it be executed by day.[250] However, since Rex v. Lukich,[251] it has been recognized that the present section 444 is no longer applicable to gaming, bawdy and betting house warrants. This has been clarified by statutory amendment; the wording of section 444 now refers to "a warrant under section 443". As a result, a warrant issued under subsection 181(1) is governed in this respect solely by the words of its own authorizing provision, which specifies that a peace officer may be authorized under the warrant "to search the place by day or night".

B. SUBSTANTIVE REQUIREMENTS

It is characteristic of subsection 443(1) that the standards of particularity pertaining to the elements of search warrants have in effect blended with those pertaining to informations.[252] The situation with respect to warrants under subsection 181(1) is less clear, however. While there is no authority to suggest that the standards of particularity applicable to this warrant differ from those applicable to the reports in writing insofar as the offence and its location are concerned, there is authority to suggest that the warrant, unlike the report, must particularize the items to be seized.

In Shan Yee v. Attorney General for Saskatchewan et al., the Court defined the issue before it as follows:

> The issue here, quite simply, is whether the search warrant was a good one. It was argued before me, and before the Judge below at the time of the proposed examination, that the warrant was invalid in that it failed to give an accurate description of the articles to be seized. If that is the case, then the warrant is bad: see Shumiatcher v. Attorney General of Saskatchewan (1960), 33 W.W.R. 132, 34 C.R. 152, 129 C.C.C. 267 (Sask.); Re Rex and Solloway Mills & Co., 24 Alta. L.R. 410, [1930] 1 W.W.R. 779, 53 C.C.C. 261, [1930] 3 D.L.R. 293 (C.A.).[253]

The Court went on to find that the specification of "all articles, paraphernalia and instruments of betting and all money and security for money found on such premises"

was sufficient. What was striking about the decision, though, was the Court's acceptance of caselaw on subsection 443(1) as relevant to a subsection 181(1) warrant.

The wording of subsection 181(1) specifies that the warrant may authorize the officer "to seize anything found therein that may be evidence" of one of the named offences. The distinction between this provision and subsection 443(1) is noteworthy. The latter allows for a warrant to seize "any such thing", viz. an item set out in the information which falls within one of the limiting paragraphs (a), (b) or (c). However, the words "anything found therein" in subsection 181(1) are not referable to any itemization in the report in writing. The report in writing, indeed, may focus upon the commission of the offence to the exclusion of the particularization of evidentiary items. Upon what basis, then, could a justice include a list of items to be seized in the warrant? The sole possibility would appear to be information conveyed by the reporter to the justice outside the report in writing, a method which seems not only irregular but also somewhat tortuous.

Moreover, it might be wondered whether, if the things to be seized must be identified in the warrant, a similar requirement should not apply to the persons to be taken into custody. Such a requirement would liken a section 181 warrant to a conventional warrant to arrest. The prerequisites to obtaining the warrant, however, bear little resemblance to those which characterize arrest warrant procedure under section 455 of the Code; just as the report in writing is not required to disclose a description of items to be seized, it need not identify an alleged perpetrator of the offence. If such elements are intended to be essential to a warrant under subsection 181(1), it seems inexplicable that they are not similarly essential to the report in writing which precedes its issuance.

It would seem that the better interpretation of subsection 181(1) is that the words "authorizing a peace officer...to seize anything that may be evidence..." do not require the justice to list the items to be seized in the warrant. Rather, they confer the power upon the executor of the warrant, upon entering the designated place, to determine whether an item on the premises has evidentiary value and seize it if it does. This view was

given qualified approval in Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Credit Union, a decision relating to the same factual situation as that in issue in Foster.[254] Aitkins J. commented on counsel's argument on this point as follows:

> The sense of the argument, as I understood it, is this: that the police are given a discretion which they must exercise, the discretion being to decide what things may be evidence of an offence being committed under s. 176, and what things may not be evidence of the commission of any such offence and that the right of the police to seize under the warrant was limited to seizing those things falling within the first category ... ... Without expressing any final opinion as to whether or not Mr. Wallace's contention as to the interpretation to be placed upon s. 171(1) and (2) is correct ... I simply say that at first blush Mr. Wallace's contention for the applicants seems to me a reasonable one.[255]

C. SEVERABILITY

The issue of severability has not been raised in connection with search warrants under subsection 181(1). If the instance of a description partly good and partly defective were to arise, however, there would appear to be no reason why the rule permitting severance ought not to be applicable under this provision just as under subsection 443(1). It should be noted that the rule has not been restricted to these latter warrants; the doctrine of severability was found to be applicable to a warrant for obscene publications under section 160 of the Code in Re Laborde and the Queen.[256]

PART THREE: SEARCH WARRANT PROVISIONS UNDER THE NARCOTIC CONTROL ACT AND THE FOOD AND DRUGS ACT

I. THE CONTEXT OF SEARCH WARRANTS

Subsection 10(2) of the Narcotic Control Act provides:

> (2) A justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.[257]

Subsection 37(2) of the Food and Drugs Act reads:

> (2) A justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a controlled drug, by means of or in respect of which an offence under this Part has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for controlled drugs.[258]

Section 45 of the latter statute applies the provisions of section 37 mutatis mutandis to situations involving "restricted" drugs. Thus, it may be perceived that the issuance of search warrants for narcotics, controlled drugs and restricted drugs is governed by a set of statutory provisions identical except in the specification of the type of contraband involved.

Before discussing the body of caselaw dealing with these provisions, it is useful to visualize the issuance of a search warrant within the framework of search powers generally pertaining to drug legislation. This framework is outlined in subsection 10(1) of the Narcotic Control Act (and replicated in subsection 37(1) of the Food and Drugs Act) as follows:

A peace officer may, at any time,

(a) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed;

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

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

Two significant preliminary points emerge from a reading of this subsection. Firstly, in the case of authority to search a dwelling-house, the warrant is only an alternative to the writ of assistance, which confers upon its holder a general power to engage in particular searches without prior judicial clearance. Indeed, since under subsections 10(3) and 37(3) the issuance of a writ is mandatory upon application by the Minister of National Health and Welfare (whose responsibility in this regard has now been passed to the Attorney General of Canada by Order-in-Council)[259] it may be said that the power of search under a writ of assistance is unfettered by any meaningful judicial scrutinization at any stage, a state of affairs which prompted the critical comments of Collier J. in Re Writs of Assistance.[260] Secondly, it is to be noted that neither a warrant nor a writ of assistance is necessary when the place to be searched is not a dwelling-house.

It may thus be seen that the standards developed for search warrant issuance can only be of limited impact when viewed in the context of narcotic and drug searches as a whole. This does not mean, however, that the justice's supervisory function in the issuance process loses its importance. On the contrary, the justice plays perhaps an even more critical role in the area of narcotic and drug warrants than in the area of search warrants generally. This is because the course of quashing a warrant after its execution is likely to be of limited

usefulness to a person from whose dwelling-house unlawful narcotics or drugs have been seized. Whatever the discretion of a reviewing court may be after Bergeron[261] to order unlawfully seized goods returned to their owner, it seems unlikely that such an order would ever be made in the instance of narcotics or drugs seized. Thus, the onus of ensuring that narcotics or drugs are not seized and retained by the police under an unlawful warrant falls squarely upon the shoulders of the issuing justice.

As in the instances of other warrants studied in this manual, the issuance of search warrants for narcotics or drugs may be perceived to involve three stages:

(1) the conferment of jurisdiction upon the justice by an information upon oath;

(2) the decision of the justice, after being satisfied as to his jurisdiction to exercise his discretion and grant the warrant;

(3) the issuance of the warrant for the search which the justice has decided to authorize.

The following analysis is necessarily somewhat sketchy. Because of the limited usefulness of quashing a search warrant, there is, in fact, little caselaw which has actually reviewed this process.

II. THE INFORMATION UPON OATH: DOES IT VALIDLY CONFER JURISDICTION ON THE JUSTICE?

Like subsection 443(1), both subsection 10(2) of the Narcotic Control Act and subsection 37(2) of the Food and Drugs Act require that "information upon oath" be placed before the justice in order to invoke his jurisdiction to issue the desired warrant. However, unlike both section 443, which prescribes the mandatory use of Form 1, and subsection 181(1), which specifically alludes to a "report in writing", the corresponding narcotic and drug provisions do not allude to a specific documentary form. Consequently, special problems arise in connection with the prerequisites to issuance of narcotics and drugs warrants.

A. FORMAL REQUIREMENTS

(1) Is an Oral Information Sufficient?

In Campbell v. Clough, McQuaid J., discussing subsection 10(2) of the Narcotic Control Act commented:

> This section prescribes no special form, and merely provides that the justice be satisfied on oath of grounds. Conceivably, the justice could be satisfied by viva voce evidence, that there is believed to be a narcotic in a dwelling house, contrary to the Act.[262]

Similarly, in Drug Offences in Canada, MacFarlane contemplates the possibility that viva voce testimony could suffice, although recognizing that "in most cases it would seem preferable to reduce the application to writing".[263]

It is suggested that the possibility that a search warrant might be issued on the basis of an oral information is a worrisome one. There is at present no provision for the transcribing of an oral application for a search warrant; in the absence of a documentary record of the presentation under oath, the effective power of a superior court to review the justice's determination of his jurisdiction would be severely impaired. However, it is arguable that the comments in favour of oral informations run counter to the decision of the Ontario Court of Appeal in Goodbaum, supra. Writing for the Court, Brooke J.A. commented:

> Proper forms should be carefully drawn and provided for the assistance of Justices of the Peace who may have to act under the provisions of statutes which provide extraordinary powers of search, seizure and forfeiture, to assure that in determining whether a warrant should issue safeguards set forth in the statute are first carefully considered.[264]

The observation was made in the context of criticizing the adaptation of Form 5 under the Criminal Code to suit the purposes of a warrant to search for narcotics, but the assertion of the need for proper form basically assumes the desirability of formal presentation. A more explicit stand in favour of written informations was adopted in Regina v. Lauzon, an Ontario Provincial Court decision, in which a massive array of

authority on subsection 443(1) was applied to the issuance of a warrant to search for narcotics and drugs.[265]

(2) Requirements of a Written Information

Assuming that the information before the justice is a written one, what formal standards must it satisfy? As has been mentioned, no specific form is prescribed by the relevant provisions; until recently, a generally accepted course of procedure was to modify Form 1 of the Criminal Code, the information for a search warrant under subsection 443(1).[266] In Campbell, it was held that this practice was permissible, McQuaid J. stating:

> The fact that Form 1, intended to be used under Section 443, was used in this case is, I think, immaterial, provided that it does, as I think it does, meet the requirements of Section 10(2). The Narcotic Control Act itself prescribes no particular forms.[267]

The use of Form 1, without modification, of course will produce certain formal irregularities. In Lauzon, for example, the words "building receptacle or place" appeared in the information despite the fact that narcotic and drug search warrant provisions only cover dwelling-houses. However, the Court was willing to regard the words as mere surplussage since both Acts allowed places other than dwelling-houses to be searched without a warrant.[268]

While the practice of modifying Form 1 may still be permissible, however, judicial disapproval of it was clearly enunciated in Goodbaum. "There is an obvious danger in attempting to improvise documents such as warrants", Brooke J.A. stated, "where the duties of police officers and the rights of citizens are at stake".[269] MacFarlane comments that as a result of Goodbaum, precedent forms for narcotic and drug searches have been brought into use.[270] The precedent form for an information is outlined as follows:[271]

Narcotic Control Act, Section 10.(1)
Section 10.(2)

INFORMATION TO OBTAIN SEARCH WARRANT

CANADA
PROVINCE OF
COUNTY [*or* DISTRICT]

INFORMATION of .....
(Name of Peace Officer(s))
Peace Officer(s) in the said Province of

The informant says that (s)he has reasonable grounds for believing and does believe that there is in a certain dwelling-house, namely the dwelling-house

of .....
(Owner or Occupant of Dwelling-House)

at .....
(Address or Location of Dwelling-House)

in the said
Judicial District

a narcotic, to wit, ...
(Describe narcotic to be searched for)

by means of or in respect of which an offence under The Narcotic Control Act has been committed, namely the offence of

.....
(Describe offence in respect of which search is to be made)

and that his grounds for so believing are that [*state grounds of belief*]

WHEREFORE the informant prays that a search warrant may be granted to search the said dwelling-house for the said narcotic.

SWORN BEFORE ME at .....

in the Province of , this .....

day of ..... 19 .....

.....

A Provincial Judge, Magistrate or a Justice of the Peace in and for the Province of

.....
Informant

B. SUBSTANTIVE REQUIREMENTS

Like subsection 443(1), the narcotic and drug warrant provisions envisage an information upon oath specifying three elements: an offence, a set of items to be seized, and a location to be searched. The definitions of these elements, however, are somewhat narrower than those in the general warrant provisions. The location to be searched must be a dwelling-house, the offence must be contrary to the Act invoked, and the items must fall within the ambit of "narcotic", "controlled drug", or "restricted drug", as the case may be.

The relationship of the statute invoked to the items to be seized has attracted attention in the caselaw. In effect, the caselaw has insisted on keeping the Narcotic Control Act and the Food and Drugs Act discrete; one cannot apply for a warrant under one to search for a substance prohibited under the other. In Re Regina and Kellet, it was held that a warrant could not issue under the Narcotic Control Act to search for "drugs".[272] In Lauzon, it was found that an information and warrant naming "narcotics and/or illegal drugs" relating to offences against both Acts as the objects of search were invalid. Sharpe Prov.Ct.J. held that while a justice could issue search warrants under each Act separately, he could not combine in one warrant searches authorized under the two statutes. Moreover, the Court found that the simple designation of "illegal drugs" could not invoke the warrant provisions of the Food and Drug Acts; rather these provisions contemplated informations specifically describing "controlled drugs" or "restricted drugs".[273]

There is a dearth of authority on the standards of particularity governing the description of the essential elements of both informations and warrants. In Lauzon, the Court turned to leading authorities on subsection 443(1) for guidance in this respect, citing decisions such as Frain,[274] Shumiatcher,[275] and La Vesque.[276] It suggested that this reference to the general caselaw is sound. Similar considerations are present in the context of narcotics and drug warrants as in the general context: the need to apprise persons concerned of the alleged offence to which the search relates, the dangers of delegating decisions as to the scope of search to the executor of the warrant, the countervailing desirability of affording the police reasonable latitude in descrip-

tion, the basic necessity of giving the justice sufficient detail to enable him to act judicially.

The Lauzon case dealt directly with each of the three elements in turn. Firstly, the general description of the offence as "against the Narcotic Control Act and/or Food and Drugs Act" was held to be insufficiently particular, as in order to enable the justice to act judicially, the actual offence had to be described.[277] Secondly, it was held that the narcotic itself, in the case of an alleged offence against the Narcotic Control Act, would have to be identified, in order for the justice to determine whether it was in fact a narcotic included in the schedule to the Act and hence illegal.[278] Finally, it was found that the description of the location to be searched as merely a street address was not as precise as it might have been, since the person suspected of illegal activity occupied only the top portion of the house; however, the Court found that this deficiency did not invalidate the information.[279]

C. THE DISCLOSURE OF "REASONABLE GROUND TO BELIEVE"

The search warrant provisions for narcotics and drugs contemplate only one basis upon which a warrant may be issued: that the prohibited narcotic or drug, by means of which a defined offence has been committed, is in a dwelling-house. As was pointed out in Goodbaum, section 10 of the Narcotic Control Act contains no provision authorizing the issuance of a warrant to search for anything in respect of the intended commission of an offence.[280] It might be commented, though, that this distinction, practically speaking, is probably not a very significant one. In the instance of either narcotics or restricted drugs, mere possession of which constitutes an offence (section 3 of the Narcotic Control Act, section 41 of the Food and Drugs Act), a search warrant would be justified by reasonable grounds simply supporting the possession of the prohibited substance in the place to be searched. In the case of controlled drugs, possession is only unlawful if for the purposes of trafficking (s. 34 of the Food and Drugs Act); essentially this means that in addition to establishing the existence of the prohibited substance in the premises, the grounds for belief would have to indicate the unlawful purpose of the possession, in effect bringing the intended commission of the offence of trafficking into consideration.

Unlike subsection 443(1), the narcotic and drug provisions do not allow the issuance of a search warrant for anything of evidentiary value. Rather, in order to justify the issuance of the warrant, there must be reasonable grounds to believe that the prohibited substance is itself in the specified location. This does not preclude the executor, once armed with the warrant, from seizing other evidence on the searched premises, however; paragraphs 10(1)(c) of the Narcotic Control Act and 37(1)(c) of the Food and Drugs Act explicitly countenance the seizure of such evidence. The reasonable belief in the presence of the narcotic or drug, in other words, must be demonstrated to the justice to get the officer past the front door of the house; once inside, it is the officer's own reasonable belief alone which determines whether an evidentiary connection exists to justify seizure. The sufficiency of the evidentiary connection only becomes reviewable by a judicial authority upon the making of a restoration application under subsection 10(5) or subsection 37(5) as the case may be. (It is interesting to note that the reviewing magistrate's standard, like that of a justice under subsection 443(1) is that of relevance: Burgess v. the Queen.[281])

In Campbell, the Court appeared to sanction the practice of oral disclosure of the reasonable ground for belief, notwithstanding the fact that the information itself was a written one. In that case, the police officer had merely stated that "there are reasonable and probable grounds to believe that narcotics are being kept"; on an attached sheet the justice had written a summary of the officer's reason for belief. McQuaid J. stated:

> I conclude also that Ms. Clough quite properly pressed the Constable for his reasonable and probable grounds for requesting the search warrant, and took the added precaution of making a note of such either directly on the Information or on a sheet attached hereto. In this respect, I am of the opinion that she not only acted prudently, but also judicially as she is required to do.[282]

If this practice is indeed proper, the disclosure of reasonable grounds under the narcotics and drugs warrant provisions is governed by rules similar to those pertaining to subsection 181(1) of the Code: the grounds need not be specified in writing, but ought to be inquired into by the justice granting the warrant. In

Foster, this was identified as a necessary step in the exercise of the justice's judicial discretion.[283] However, it is clear from a reading of the narcotics and drugs warrant provisions that the matter is not a discretionary one. Rather, the wording of these provisions in this regard corresponds to that of subsection 443(1). The ascertainment of reasonable grounds for belief is jurisdictional; if such grounds are not disclosed by the information upon oath, the justice is not furnished with a proper basis upon which he may be "satisfied".

The Campbell decision does not clearly purport to classify reasonable grounds as a discretionary matter. Logically, the justice, in orally examining the informant, could still be determining his jurisdiction. As a practical matter, though, the identification in subsequent proceedings of the grounds sworn to by the officer is rendered uncertain if Campbell is correct. While notetaking by the justice was of some assistance to the reviewing Court, it is important to realize that the justice did not attest to the actual swearing of the described grounds of belief by the officer. Yet if the officer did not disclose the reasonable grounds under oath, it is apparent under the narcotics and drugs provisions that the justice ought not to have taken account of them.

It is suggested that the preferable analysis to that of the Court in Campbell is that adopted in Lauzon. Citing an array of authorities on subsection 443(1) including Worrall[284] and Kehr,[285] Sharpe Prov.Ct.J. stated:

> In the long line of reported decisions dealing with this aspect, it seems to be well established that the justice is acting in a judicial capacity and he must be satisfied not only that there is a reasonable belief but the grounds of this belief must be before him and therefore should be expressed in the information sworn before him.[286]

III. JUDICIAL DISCRETION: SHOULD THE JUSTICE ISSUE THE WARRANT ONCE IT IS ESTABLISHED THAT HE HAS JURISDICTION?

Both subsection 10(2) of the Narcotic Control Act and subsection 37(2) of the Food and Drugs Act specify that a justice "may" issue a warrant when presented with the requisite information upon oath. As was argued in

the earlier discussion of subsection 443(1) warrants, this reposes a discretion in the justice to refuse to issue the warrant, even if his jurisdiction to do so is established.[287] The factors relevant to the exercise of this discretion, of course, depend upon the nature of the jurisdictional tests which the information upon oath must meet. If, as has been suggested, the information must conform to standards similar to those established under subsection 443(1), then it follows that the factors left for the justice in the exercise of his discretion are similarly limited.

IV. THE SEARCH WARRANT ISSUED: ARE ITS CONTENTS LEGALLY SUFFICIENT?

A. FORMAL REQUIREMENTS

There is no form of warrant referred to in any of the relevant narcotics or drugs provisions. Consequently, as was the case with informations, search warrants issued for narcotics and drugs have often been on the documentary form appropriate to subsection 443(1) of the Criminal Code, Form 5. However, while the Courts have been somewhat tolerant towards this practice in the instance of informations, they have adopted a stricter position in regard to warrants. Primarily, the Courts have asked whether or not the warrant has been truly issued pursuant to the relevant narcotics or drugs provision or whether its form establishes that it was actually issued, incorrectly, under the Code. As a related matter, the Courts have invalidated searches carried out by officers covered only by a general designation in the warrant, as permitted by subsection 443(1), and not specifically named, as required by the narcotics and drugs provisions.

(1) What Statute Has Been Invoked?

The leading case on point is Goodbaum, in which Brooke J.A. stated:

> Section 10 of the Narcotic Control Act is a code for search, seizure and forfeiture for the purposes of those who enforce the provisions of the Act, and of significance, it protects the citizen by limiting the use of those powers to those peace officers named therein. In my opinion, a warrant for the

> purpose of search and seizure of narcotics can only be issued under the provisions of the Narcotic Control Act and the warrant in issue here is invalid.[288]

Brooke J.A. did not elaborate upon why the warrant in question was not issued under the provisions of the Narcotic Control Act. The warrant appears to have been an adapted copy of Form 5, and argument in the case proceeded upon the question of whether subsection 443(1) could be properly invoked to search for narcotics.

Goodbaum was followed in Campbell, where it was simply observed that the warrant was in Form 5. McQuaid J. observed:

> Here, the intent was to seek a warrant under Section 10(2) of the Narcotic Control Act which contains within its own framework the appropriate procedure. What was, in fact, done was to secure a warrant under Section 443 of the Code, the application of which is restricted to offences "under this Act".[289]

A similar conclusion was reached in Lauzon, in which "a badly amended Form 5 search warrant" was before the Court. Sharpe, Prov.Ct.J. commented that "it may be impossible to amend a Criminal Code search warrant to comply with the search provisions of the Narcotic Control Act".[290] There has, in fact, been no reported decision in which such an amendment has been found to be successful. It is suggested that the strict attitude of the courts indicates that in order to effect such an amendment, appropriate revisions would have to be made to the document such as (1) the alteration of the notation of form number and statutory authority, and (2) a modification of the direction in the heading from the general one permitted by subsection 443(1) to one naming a group of specifically identified officers, as is required by the narcotics and drugs provisions.

The labour of altering Form 5 is no longer necessary, however. The following precedent form, developed for general use, is set out in MacFarlane:[291]

Narcotic Control Act, Section 10.(1)
Section 10.(2)

WARRANT TO SEARCH

CANADA
PROVINCE OF
COUNTY [*or* DISTRICT]

To .....
(Name of Peace Officer(s))
Peace Officer(s) in the said Province of

WHEREAS it appears on the oath of

.....

.....

that there are reasonable grounds for believing there is a narcotic, to wit,

which is being sought as evidence by means of or in respect of which an offence under The Narcotic Control Act has been committed, to wit,

in the dwelling-house of .....

at .....

THIS IS, THEREFORE, to authorize and require you, between the hours of .....

to enter into the said dwelling-house to search for the said narcotic.

DATED at .....

in the Province of , this ..... day

of ....., 19 .....

.....

A Provincial Judge, Magistrate or a Justice of the Peace in and for the Province of

(2) The Executors of the Warrant

The wording of the narcotics and drugs provisions is stricter than both subsections 443(1) and 181(1), as far as the designation of executors is concerned. Where the general provision mentions "a person named therein" or a "peace officer", and the special provision specifies "a peace officer", both the narcotics and drugs provisions limit execution to "a peace officer named therein".

This distinction has not escaped the attention of the Courts. In Goodbaum, the warrant was directed "to the peace officers in the Municipality of Metropolitan Toronto and in the Judicial District of York and in the Province of Ontario". Brooke J.A. held that even if the warrant was purportedly issued pursuant to section 10 of the Narcotic Control Act it was totally defective "as it was not issued to a peace officer named therein." His Lordship went on to observe,

> I agree with the submission of Crown counsel that s. 26(7) of the Interpretation Act provides that "words in the singular include the plural, and words in the plural include the singular" might be applied so that a warrant can be issued to more than one peace officer. However, I do not agree with his submission that this is broad enough for the warrant to be issued to "all members of the drug squad or all members of the Metropolitan Toronto police force". In my view, its application is limited to the extent that the warrant may be issued to more than one peace officer named in the warrant.[292]

Similarly in Campbell, the direction of the warrant to "the peace officers in the said county of Queens" was held to be unlawful. "What is clearly contemplated", stated McQuaid J. was "that the warrant be directed to one or more certain and particularly identified police officers..."[293]

B. SUBSTANTIVE REQUIREMENTS

It would appear that, as in the case of subsection 443(1), the standards applicable to the descriptions of the offence, items to be seized and location to be searched are common to the information and the warrant. In Lauzon, in discussing the failure of the warrant to describe an offence adequately, the Court cited the same general caselaw it had applied in invalidating the information.[294] A consideration particular to the narcotics and drugs warrants, on the other hand, is the need for correctly identifying the prohibited substance and authorizing the search for it under the appropriate statute, as discussed earlier in the context of informations.

C. SEVERABILITY

There is no reason why the general rule permitting severance of an offending part of a search warrant ought not to be applicable to narcotics and drugs warrants.[295] As a practical matter, however, severance is likely to make little difference to the scope of search. Under paragraph 10(1)(c) of the Narcotic Control Act, (duplicated mutatis mutandis in paragraph 37(1)(c) of the Food and Drugs Act) an officer armed with a warrant is permitted to:

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

Thus, even if an item were excised from the warrant, so long as a warrant itself in some form were issued, the officer executing it would be able to seize the item, so long as it fell within the wide ambit of paragraph 10(1)(c).

ENDNOTES

1. Re Pacific Press Ltd. and the Queen et al (1977) 37 C.C.C. (2d) 487 (B.C.S.C.), at p. 489.

2. Re McAvoy (1970) 12 C.R.N.S. 56 (N.W.T. Terr. Ct.).

3. Re United Distillers Ltd. (1946) 88 C.C.C. 338 (B.C.S.C.).

4. Re Black and the Queen (1973) 13 C.C.C. (2d) 446 (B.C.S.C.).

5. Ibid., pp. 449-50.

6. Bergeron et al v. Deschamps et al (1977) 33 C.C.C. (2d) 461 (S.C.C.).

7. Re Atkinson and the Queen (1978) 41 C.C.C. (2d) 435 (N.B. S.C. - A.D.).

8. Regina v. Pomerleau et al (unreported February 14, 1979, Que. C.A.).

9. Re Model Power and the Queen (unreported, October 1, 1979, Ont. H.C.J., affirmed January 25, 1980, Ont. C.A.).

10. Re Alder et al v. the Queen (1978) 37 C.C.C. (2d) 234 (Alta. S.C. - T.D.), at p. 251.

11. Leave to appeal in Model Power was refused on March 18, 1980.

12. The Queen v. Wray [1970] 4 C.C.C. 1 (S.C.C.).

13. R. Thomas Farrar, "Aspects of Police Search and Seizure Without Warrant in England and the United States", (1975) 29 Univ. of Miami L.R., 491, at p. 551.

14. Rex v. Kehr (1906) 40 O.L.R. 517 (Ont. Div. Ct.) at p. 521.

15. Re Worrall [1965] 2 C.C.C. 1 (Ont. C.A.) at p. 5. See also MacIntyre v. A.G. of Nova Scotia et al (as yet unreported, March 14, 1980, N.S.C.A.).

16. James A. Fontana, The Law of Search Warrants, Toronto, Butterworths, 1974; at p. 32.

17. Re Purdy et al and the Queen (1972) 8 C.C.C. (2d) 52 (N.B.S.C.), at p. 60.

18. Reginald Francis Carter, The Law Relating to Search Warrants, The Law Book Company of Australia, 1939, at p. 77.

19. Fontana, supra, note 16 at p. 47.

20. Lynn v. McCuish et al (1924) 41 C.C.C. 272 (N.S.S.C.).

21. Purdy, supra, note 17, at p. 60.

22. Re Pacific Press Ltd. and the Queen et al, supra,

23. Re Abou-Assale and Pollack and the Queen (1978) 39 C.C.C. (2d) 546 (Que. S.C.).

24. Re Regina and Johnson & Franklin Wholesale Distributors Ltd. (1973) 12 C.C.C. (2d) 221 (B.C.C.A.), at p. 223.

25. Re Regina and Johnson & Franklin Wholesale Distributors Ltd. (1971) 3 C.C.C. (2d) 484 (B.C.C.A.) at p. 488.

26. Regina v. Colvin, ex parte Merrick et al (1970) 1 C.C.C. (2d) 8 (Ont. H.C.J.), at p. 11.

27. David Watt, Criminal Law Precedents, Toronto, Carswell, 1978.

28. Abou-Assale, supra, note 23, at p. 549.

29. Re Worrall, supra, note 15, at p. 21.

30. Rex v. La Vesque (1918) 30 C.C.C. 190 (N.B.S.C. - A.D.), at pp. 197-8.

31. Royal American Shows Incorporated v. the Queen et al [1975] 6 W.W.R. 571 (Alta S.C.).

32. Rex v. Solloway & Mills (1930) 53 C.C.C. 271 (Ont. S.C. - A.D.).

33. Rex v. Kilmartin [1924] 1 W.W.R. 107 (B.C.S.C.).

34. Campbell v. Walsh (1910) 18 C.C.C. 304 (N.B.S.C.), per Barry and McKeown JJ.

35. Rex v. Woods (1925) 44 C.C.C. 371 (N.S.S.C.).

36. Re PSI Mind Development Institute Ltd. et al and the Queen (1977) 37 C.C.C. (2d) 263 (Ont. H.C.J.).

37. Royal American Shows, supra, note 31.

38. Norland Denture Clinic Ltd. v. Carter et al (1968) 5 C.R.N.S. 93 (Sask. Q.B.).

39. R.S.C. 1970, c. I-23.

40. Re Adelphi Book Store Ltd. and the Queen (1972) 8 C.C.C. 49 (Sask. C.A.), at p. 51.

41. R.S.C. 1970, c. C-30.

42. Re Krassman v. the Queen (1972) 8 C.C.C. (2d) 45 (Alta. S.C. - A.D.).

43. R.S.C. 1970, c. S-11.

44. Re Goodbaum and the Queen (1977) 38 C.C.C. (2d) 473 (Ont. C.A.).

45. R.S.C. 1970, c. N-1.

46. Abou-Assale, supra, note 23.

47. R.S.C. 1970, c. C-40.

48. Purdy, supra, note 17, at p. 58.

49. Re McAvoy, supra, note 2.

50. R.S.C. 1970, c. A-3.

51. La Maison du Fleuriste du Québec Ltée et al v. Dumontier (unreported, July 3, 1979, Que. Sup. Ct.).

52. Re Doer and the Queen (unreported, Sept. 7, 1979, Ont. H.C.J.).

53. Norland, supra, note 38, at p. 96.

54. Martin's Criminal Code (1955), at p. 712.

55. Solloway & Mills, supra, note 32, at p. 274.

56. Rex v. Frain (1915) 24 C.C.C. 389 (Sask. S.C.).

57. La Vesque, supra, note 30.

58. Rex v. Munn, (No. 1) (1938) 71 C.C.C. 139 (P.E.I. S.C.) at p. 141.

59. Fontana, supra, note 16 at p. 24.

60. See Weins et al v. the Queen (1973) 24 C.R.N.S. 341 (Man. Q.B.), and Worrall, supra, note 25.

61. Re Lubell and the Queen (1973) 11 C.C.C. (2d) 188 (Ont. H.C.J.), at p. 189.

62. Regina v. Trottier et al [1966] 4 C.C.C. 321 (Que. Q.B. - A.S.), at p. 327.

63. Regina v. Read, ex parte Bird Construction Ltd. [1966] 2 C.C.C. 137 (Alta. S.C.).

64. Regina v. Harrison and Burdeyneu [1965] 1 C.C.C. 367 (B.C.S.C.).

65. PSI Mind, supra, note 36, at p. 268.

66. Alder, supra, note 10, at p. 247.

67. Trottier, supra, note 62.

68. Marlboro Manufacturing Ltd. et al v. The Queen (1971) 16 C.R.N.S. 338 (Man. Q.B.).

69. Regency Realties Inc. v. Loranger (1961) 36 C.R. 291 (Que. S.C.).

70. PSI Mind, supra, note 36, at p. 270.

71. Regency Realties, supra, note 69, at p. 197.

72. Trottier, supra, note 62.

73. Worrall, supra, note 15.

74. Regency Realties, supra, note 69, at p. 297.

75. Lubell, supra, note 61. See p. 22 of this manual.

76. Re Liberal Party of Quebec and Merzwinski (1978) 46 C.C.C. (2d) 118, at p. 122.

77. Abou-Assale, supra, note 23.

78. Marlboro Manufacturing, supra, note 53.

79. Alder, supra, note 10, at p. 248.

80. Re Flanagan et al and Morand et al (1978) 43 C.C.C. (2d) 546 (Que. S.C.).

81. Re Pink Triangle Press and the Queen (unreported, March 15, 1978, Ont. H.C.J., approved May 2, 1978, Ont. C.A.).

82. Royal American Shows, supra, note 31, at p. 573.

83. Re United Distillers Ltd., supra, note 3.

84. Weins, supra, note 60.

85. Munn, supra, note 58, at p. 141.

86. Fontana, supra, note 16, at p. 145.

87. Re Bell Telephone Company of Canada (1947) 89 C.C.C. 196 (Ont. H.C.).

88. Colvin, supra, note 26. See also Attorney General of Quebec v. T., G., W., R. and C. (1977) 2 C.R. (3d) 32 (Que. Ct. S.P.).

89. Re B.X. Development Inc. et al and the Queen (1976) 31 C.C.C. (2d) 14 (B.C.C.A.), at p. 17.

90. Re Borden & Elliot and the Queen (1975) 30 C.C.C. (2d) 337 (Ont. C.A.).

91. Alder, supra, note 10, at p. 245.

92. Re Steel (1974) 29 C.R.N.S. 355 (Ont. Prov. Ct.).

93. Regina v. Mowat, ex parte Toronto Dominion Bank [1968] 2 C.C.C. 374 (Ont. H.C.J.).

94. R.S.C. 1970, c. E-10.

95. S.C. 1968-69, c. 14, s. 3(2).

96. Abou-Assale, supra, note 23, at p. 560.

97. See Johnson and Franklin Wholesale Distribitors, supra, note 25, at p. 489, and Regency Realities, supra, note 69, at p. 298.

98. Lubell, supra, note 61 at p. 189.

99. Royal American Shows, supra, note 31, at p. 573.

100. Dare to be Great of Canada (1971) Ltd. v. Attorney General for Alberta et al [1972] 3 W.W.R. 308 (Alta. S.C.), at p. 314.

101. Alder, supra, note 10.

102. Lubell, supra, note 61.

103. PSI Mind, supra, note 36.

104. Regency Realties, supra, note 69.

105. Johnson and Franklin Wholesale Distributors, supra, note 25, at p. 489.

106. McAvoy, supra, note 2.

107. Merzwinski, supra, note 76.

108. Pink Triangle Press, supra, note 81, at p. 4

109. Schumiatcher v. Attorney General of Saskatchewan et al (1960) 129 C.C.C. 270 (Sask. Q.B.).

110. Weins, supra, note 60.

111. Laporte v. Laganiere J.S.P. et al (1972) 18 C.R.N.S. 357 (Que. Q.B.) at p. 368.

112. Solloway & Mills, supra, note 32. See the text of the manual at p. 21.

113. Solloway Mills & Co. v. A.G. Alta. (1930) 53 C.C.C. 306 (B.C.C.A.).

114. McLeod v. Campbell (1894) 26 N.S.R. 458 (N.S.C.A.).

115. S.A. 1916, c. 4, s. 79, as amended by S.A. 1917, c. 22, s. 15.

116. Rex v. Gibson (1919) 30 C.C.C. 308 (Alta. S.C.), at pp. 308-9.

117. Fontana, supra, note 16, at pp. 27-8.

118. R.S.C. 1886, c. 106, s. 108.

119. Sleeth v. Hurlbert (1896) 3 C.C.C. 197 (S.C.C.), at p. 201.

120. McAvoy, supra, note 2.

121. Purdy, supra, note 17, at p. 58.

122. McAvoy, supra, note 2.

123. Gibson, supra, note 116.

124. Royal American Shows, supra, note 31.

125. Johnson & Franklin Wholesale Distributors, supra, note 25.

126. Bell Telephone, supra, note 87, at p. 198.

127. Purdy, supra, note 17, at p. 60.

128. Weins, supra, note 60.

129. B.X. Developments, supra, note 89.

130. Colvin, supra, note 26.

131. Johnson & Franklin Wholesale Distributors, supra, note 25.

132. Re Newfoundland & Labrador Corp. Ltd. (1974) 6 Nfld. & P.E.I. R. 274 (Nfld. C.A.), at p. 281.

133. Weins, supra, note 60, at p. 347.

134. Bell Telephone, supra, note 86, at p. 198.

135. Purdy, supra, note 17, at p. 59.

136. Borden & Elliot, supra, note 90, at p. 347.

137. Worrall, supra, note 15, at p. 5.

138. See the text of the manual at pp. 28-30.

139. Included among these cases are Bell Telephone, supra, note 87, Borden & Elliot, supra, note 90, and Purdy, supra, note 17.

140. Hicks v. McCune (1921) 36 C.C.C. 141 (Ont. S.C. - A.D.).

141. Johnson and Franklin Wholesale Distributors, supra, note 25 at p. 488.

142. Goodbaum, supra, note 44, at p. 478.

143. Hicks, supra, note 140.

144. Kehr, supra, note 14, at p. 524.

145. Weins, supra, note 60.

146. Borden & Elliot, supra, note 90.

147. Lubell, supra, note 61, at p. 190.

148. Trottier, supra, note 62. See the text of this manual at p. 25.

149. Abou-Assale, supra, note 23.

150. Alder, supra, note 10.

151. Imperial Tobacco Sales Co. v. A.-G. Alta. et al [1941] 2 D.L.R. 673 (Alta. S.C. - A.D.).

152. Poliquin v. Decarie (1927) 33 R. de J. 367 (Que. S.C.).

153. Worrall, supra, note 15.

154. Lubell, supra, note 61, at p. 190.

155. Newfoundland and Labrador Corp., supra, note 132, at p. 289.

156. Solloway & Mills, supra, note 32, at p. 276.

157. Imperial Tobacco Sales, note 151.

158. Royal American Shows, supra, note 31.

159. Newfoundland and Labrador Corp., supra, note 132, at p. 281.

160. Regency Realties Inc., supra, note 69, at p. 289.

161. Royal American Shows, supra, note 31.

162. Trottier, supra, note 62.

163. Weins, supra, note 60.

164. Fontana, supra, note 16, at p. 174.

165. United Distillers, supra, note 3, at p. 341.

166. Pacific Press, supra, note 1, at p. 495.

167. PSI Mind, supra, note 36 at p. 271.

168. Re Wurm et al and the Queen (unreported, March 16, 1979), Alta S.C. - T.D.).

169. Borden & Elliot, supra, note 90.

170. Colvin, supra, note 26.

171. Fontana, supra, note 16, at p. 174.

172. Abou-Assale, supra, note 23, at p. 560.

173. Carter, supra, note 18, at p. 52.

174. Fontana, supra, note 16, at p. 7.

175. R.S.C. 1952, c. 58, R.S.C. 1970, c. C-40.

176. Re Writs of Assistance [1965] 2 Ex C.R. 646 (Ex. Ct.), at p. 650.

177. Regina v. Coughlan, ex parte Evans [1970] 3 C.C.C. 61 (Alta. S.C.), at p. 72.

178. Regina v. Foster, ex parte Royal Canadian Legion Branch 177 et al [1964] 3 C.C.C. 82 (B.C.S.C.), at p. 90.

179. Worrall, supra, note 15, at p. 5.

180. Carter, supra, note 18 at p. 52.

181. S.A. De Smith, Judicial Review of Administrative Action (3rd ed.) London, Stevens and Sons, 1973; at p. 253.

182. Re Blythe and the Queen (1973) 13 C.C.C. (2d) 192 (B.C.S.C.).

183. Gilles Letourneau, The Prerogative Writs in Canadian Criminal Law and Procedure, Toronto, Butterworths, 1976, at p. 144.

184. Newfoundland and Labrador Corp., supra, note 132, at p. 280.

185. Foster, supra, note 178, at p. 90.

186. By way of contrast, s. 455.3(1) provides that when deciding whether to issue process subsequent to the laying of an information charging an offence, the justice shall hear and consider the evidence of witnesses, where he considers it desirable or necessary.

187. See, for example, Arthur Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates", (1973) 64 Journal of Criminal Law and Criminology 270.

188. Dare to be Great, supra, note 100.

189. Re United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada and the Queen (1972) 8 C.C.C. (2d) 364 (B.C.S.C.), pp. 355-6.

190. Worrall, supra, note 15, at p. 11.

191. Re Den Hoy Gin (1965) 47 C.R. 89 (Ont. C.A.), at p. 90.

192. Pacific Press, supra, note 1, at p. 492.

193. R.S.C. 1970, Appendix III.

194. Pink Triangle Press, supra note 81, at p. 2.

195. Rex v. Solloway Mills & Co. (1930) 53 C.C.C. 261 (Alta. S.C. - A.D.), at p. 263.

196. La Vesque, supra, note 30.

197. Black, supra, note 4, at p. 182.

198. Sleeth v. Hurlbert, supra, note 119.

199. Solloway Mills, supra, note 113.

200. Abou-Assale, supra, note 23.

201. Rex v. Plummer (1929) 52 C.C.C. 288 (Man. C.A.).

202. Arthur Rogers and Clifford Magone, Police Officer's Manual, Toronto, Carswell, 1955; at p. 205.

203. Regina v. Execu-Clean Ltd. (unreported, Jan. 30, 1980, Ont. H.C.J.)

204. Purdy, supra, note 17, at p. 60.

205. Solloway & Mills, supra, note 32, at p. 274.

206. Flanagan, supra, note 80, at p. 549.

207. Abou-Assale, supra, note 23.

208. Black, supra, note 4, at p. 448.

209. See the text of this manual, at p. 17.

210. Royal American Shows, supra, note 31, at p. 573.

211. Abou-Assale, supra, note 23, at p. 560.

212. Gibson, supra, note 116, at p. 308.

213. Flanagan, supra, note 80, at p. 548.

214. Johnson and Franklin Wholesale Distributors, supra, note 25, at p. 489.

215. Abou-Assale, supra, note 23.

216. Worrall, supra, note 15. See the text of this manual at p. 15.

217. Johnson and Franklin Wholesale Distributors, supra, note 25, at p. 490.

218. PSI Mind, supra, note 36.

219. Alder, supra, note 10.

220. Abou-Assale, supra, note 23.

221. Re Sommerville's Prohibition Application (1962) 38 W.W.R. 344 (Sask. Q.B.), at p. 347.

222. Re MacKenzie and The Queen (1973) 10 C.C.C. (2d) 193 (Sask. Q.B.), at p. 196.

223. See text of this manual at p. 11.

224. Worrall, supra, note 15, at p. 21.

225. MacKenzie, supra, note 222.

226. These were the forms of the documents used by the named forces during the course of the survey conducted by the Law Reform Commission in the autumn of 1978.

227. Fontana, supra, note 16, at p. 113.

228. Rex v. Miller (1931) 55 C.C.C. 232 (Alta. S.C. - A.D.), at p. 235.

229. See the text of this manual at pp. 28-34.

230. Plummer, supra, note 201.

231. MacKenzie, supra, note 222 at p. 197.

232. Regina v. Chew (1964) 44 C.R. 145 (Ont. S.C.), at p. 148.

233. Campbell, supra, note 34.

234. See the text of this manual at pp. 51-57.

235. Foster, supra, note 178, at p. 90.

236. Re Rex v. Liebman (1943) 79 C.C.C. 86 (Ont. H.C.), at p. 88.

237. Foster, supra, note 178, at p. 89.

238. Ibid., at p. 92.

239. Newfoundland & Labrador Corp., supra, note 132.

240. Foster, supra, note 178, at p. 93.

241. United Distillers, supra, note 3.

242. Solloway & Mills, supra, note 32.

243. Black, supra, note 4. See the text of this manual at p. 58.

244. The Liquor License Act, R.S.O. 1887, ch. 19, s. 131.

245. The Queen v. Lyons (1892) 2 C.C.C. 218 (Ont. Ct. Gen. Sess.), at p. 219.

246. Rex v. Glenfield et al (1934) 62 C.C.C. 334 (Alta. S.C. - A.D.), at p. 339.

247. Rex v. Miller (1951) 99 C.C.C. 79 (Ont. Co.Ct.), at p. 87.

248. Re Old Rex Cafe (1972) 7 C.C.C. (2d) 279 (N.W.T. Terr. Ct.), at pp. 283-4.

249. Solloway & Mills, supra, note 32.

250. Plummer, supra, note 201.

251. Rex v. Lukich [1946] 2 W.W.R. 508 (Alta. S.C. - A.D.).

252. See the text of this manual at p. 17.

253. Shan Yee v. Attorney General for Saskatchewan et al (1971) 16 C.R.N.S. 263 (Sask. Q.B.), at p. 264.

254. Foster, supra, note 178.

255. Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Credit Union [1964] 3 C.C.C. 381, at p. 388.

256. Re Laborde and the Queen (1972) 7 C.C.C. (2d) 86 (Sask. Q.B.).

257. R.S.C. 1970, c. N-1.

258. R.S.C. 1970, c. F-27.

259. Order-in-Council P.C. 1978-732.

260. Re Writs of Assistance (1975) 34 C.C.C. (2d) 62 (Fed. Ct. - T.D.).

261. Bergeron, supra, note 6. See the discussion in this manual at pp. 5-6.

262. Campbell v. Clough (unreported, P.E.I. S.C., March 26, 1979), at p. 5.

263. Bruce MacFarlane, Drug Offences in Canada, Toronto, Canada Law Book Co., 1979, at p. 333.

264. Goodbaum, supra, note 44, at p. 480.

265. Regina v. Lauzon (unreported, March 30, 1977, Ont. Prov. Ct.).

266. As of the autumn of 1978, (the time at which search warrant practices in seven Canadian cities were surveyed by the Commission), two cities (Toronto and Vancouver) were using special forms for NCA/FDA searches. One other (Edmonton) was using both modified Code forms and special NCA/FDA forms. The remaining four cities (Winnipeg, Montreal, Fredericton, St. John) were using basically identical forms for NCA/FDA searches and searches under s. 443 of the Code.

267. Campbell, supra, note 262, at p. 5.

268. Lauzon, supra, note 265.

269. Goodbaum, supra, note 44, at p. 480.

270. MacFarlane, supra, note 263, at p. 333.

271. Ibid., at p. 586.

272. Re Regina and Kellet (1973) 14 C.C.C. (2d) 4 (Ont. C.A.).

273. Lauzon, supra, note 205, at p. 7.

274. Frain, supra, note 56.

275. Schumaitcher, supra, note 108.

276. La Vesque, supra, note 30.

277. Lauzon, supra, note 265, at p. 9.

278. Ibid.

279. Ibid., at p. 2.

280. Goodbaum, supra, note 264, at p. 478

281. Burgess v. The Queen (1975) 18 Crim. L.Q. 254 (Ont. Prov. Ct.).

282. Campbell, supra, note 6, at p. 2.

283. Foster, supra, note 178. See the discussion in this manual at pp. 73-75.

284. Worrall, supra, note 15.

285. Kehr, supra, note 14.

286. Lauzon, supra, note 265, at p. 5.

287. See the text of this manual at pp. 51-57.

288. Goodbaum, supra, note 44, at p. 478.

289. Campbell, supra, note 262, at p. 8.

290. Lauzon, supra, note 265, at p. 12.

291. MacFarlane, supra, note 263, at p. 587.

292. Goodbaum, supra, note 44, at p. 479.

293. Campbell, supra, note 262, at p. 6.

294. Lauzon, supra, note 265, at p. 19.

295. See the text of this manual at pp. 62-64.

APPENDIX: TABLE OF AUTHORITIES