REPORT

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31. *Recodifying Criminal Law — A Revised and Enlarged Edition of Report 30* (May 19, 1988)
32. *Our Criminal Procedure* (June 21, 1988)

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REPORT 33

RECODIFYING CRIMINAL PROCEDURE

VOLUME ONE

TITLE I

REPORT

ON

RECODIFYING

CRIMINAL PROCEDURE

VOLUME ONE

Police Powers

TITLE I

Search and Related Matters

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February, 1991

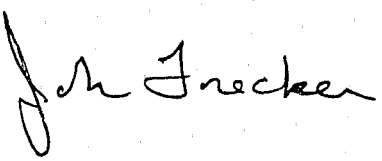
The Honourable A. Kim Campbell, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada

Dear Ms. Campbell:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report undertaken by the Commission on criminal procedure.

Yours respectfully,

Gilles Létourneau
President



John Frecker
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* At the time this Report was approved, Mr. Justice Linden was President, Mr. Létourneau was Vice-President and Judge Rivet was still a member of the Commission. Mr. Maingot was no longer a Commissioner at the time this Report was approved, but was involved in all stages of its development. Mr. Létourneau was appointed President of the Commission on July 6, 1990.

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Acknowledgements

During the course of our work in developing this Report, we have consulted with many distinguished individuals who bring to our processes wide experience from the fields of policing and law enforcement, law teaching, the practice of law (either as prosecutors or as defence counsel) as well as leading members of the judiciary from various jurisdictions across the country. We are truly grateful to all of them for their advice and hereby acknowledge their enormous influence on our work. Although it is not possible to name everyone with whom we met during the codification exercise, we especially wish to thank those persons listed in the Appendix to this Report.

We also express our gratitude to the current and past Ministers of Justice and their Deputies, Solicitors General and their Deputies, and Members of Parliament who have been involved in our work, for their encouragement and support. Without their help, this Report would have been more imperfect than it is. Needless to say, the views contained in this document do not necessarily reflect those of Parliament, the Department of Justice or any of the individual consultants.

And finally, we would like to extend our thanks to present and former co-ordinators, consultants and staff who have assisted us in this project.

INTRODUCTION

> We envision a criminal process governed by rules, simply and clearly expressed, which seeks fairness, yet promotes efficiency; which practises restraint and is accountable, yet protects society; and which encourages the active involvement and participation of the citizen. These basic attributes are the essence of our principles.
>
> *Our Criminal Procedure*[1]

This report presents the first title of the first volume of the Law Reform Commission of Canada's proposed Code of Criminal Procedure. It is to be a code characterized by simplicity, consistency and coherence and earmarked by fidelity to seven governing principles that have guided the reform exercise since the Commission's inception. Those principles, explained and illustrated in a recent Report to Parliament entitled *Our Criminal Procedure*, are:

1. *The Principle of Fairness: Procedures Should Be Fair;*
2. *The Principle of Efficiency: Procedures Should Be Efficient;*
3. *The Principle of Clarity: Procedures Should Be Clear and Understandable;*
4. *The Principle of Restraint: Where Procedures Intrude on Freedom They Should Be Used with Restraint;*
5. *The Principle of Accountability: Those Exercising Procedural Power or Authority Should Be Accountable for Its Use;*
6. *The Principle of Participation: Procedures Should Provide for the Meaningful Participation of Citizens;*
7. *The Principle of Protection: Procedures Should Enhance the Protection of Society.*[2]

Canada has long had a *Criminal Code*.[3] But the passage of time and a process of incremental amendment have diminished its usefulness. As a result, it now has few of the virtues of a true code.

The virtues of codification are well known.[4] Primarily they are the following.[5]

1. It introduces order and system into a mass of legal concepts and ideas and so presents the law as a homogeneous, related whole rather than as a series of isolated propositions.
2. It demands that one take stock of existing legal materials, and so forces an examination not only of the ideas existing in the state engaged in codification but also in all other civilized states.

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1. Law Reform Commission of Canada [hereinafter LRC], *Our Criminal Procedure*, Report 32 (Ottawa: The Commission, 1988) at 54.
2. *Ibid.* at 23.
3. R.S.C. 1985, c. C-46.
4. See especially, a Study Paper by the Commission entitled *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976).
5. F.F. Stone, "A Primer on Codification" (1955) 29 Tul. L. Rev. 303, 307-308.

3. It works to eradicate uncertainty in the law by bringing together the law into one place or book.
4. It makes the law more accessible to the average person.
5. Those engaged in the exposition of the law are assisted by being provided with an authorized framework within which to conduct their work.

Summarized, these advantages are accessibility, comprehensibility, consistency and certainty.[6]

The virtues of codification are, in truth, the virtues of all competent legislation. The law should always seek maximum clarity, coherence and consistency.

Codification provides, in the main, an opportunity to make the criminal law clearer and more logical. Also, the method of codification minimizes the need for *ad hoc* responses to questions of social policy and reduces the possibility of introducing undue rigidity in the written form of the law. A code is not a closed system, either formally or substantively. Codification signals a continuous process of interpretation leading ultimately to greater accuracy in the statement of the law.[7]

Canada's present *Criminal Code* was first enacted in 1892. The substantive part of our *Code* is largely the work of the English codifier, Sir James Stephen. The procedural part of the *Code*, when first introduced was, in many respects, uniquely Canadian. The *Criminal Code* of Canada was a magnificent accomplishment for its time, but it no longer serves us well. As we noted in *Recodifying Criminal Law*, Report 31, the current *Code* has many defects:

> It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled by the judiciary. It includes obsolete provisions. It over-extends the proper scope of the criminal law. And it fails to address some serious current problems. Moreover, it has sections which may well violate the *Canadian Charter of Rights and Freedoms*.[8]

The present *Code* is a *mélange*. Substantive, procedural and evidentiary provisions are scattered throughout, adding to its complexity and incoherence.

The Commission is committed to promoting a better understanding of Canadian laws through a principled and coherent approach to reform. This volume expresses that commitment, in part, through the separation of the basic components — procedure, substance, evidence — that make up the statutory criminal law.

We have already produced a model code of evidence[9] and in 1987 we published *Recodifying Criminal Law* which contains our proposed Code of Substantive Criminal Law for Canada. Our substantive Code sets out in statutory form, for the first time, the

6. The Law Commission (Great Britain), *Codification of the Criminal Law* (London: HMSO, 1985) at 17.
7. G. Létourneau and S.A. Cohen, "*The Merits and Limitations of Codification: A Canadian Perspective*," paper presented at the International Conference on Reform of the Criminal Law, held at the Inns of Court, London, 27 July 1987.
8. LRC, *Recodifying Criminal Law — Revised and Enlarged Edition*, Report 31 (Ottawa: The Commission, 1987) at 1.
9. LRC, *Evidence*, Report 1 (Ottawa: Information Canada, 1975).

general principles of criminal liability for which a person, if found guilty, may be imprisoned.

This publication is the first instalment of our Code of Criminal Procedure. Like our other work, it is based on a deep philosophical probe into the nature of criminal law. In it the reader will see the results of a careful endeavour to balance the liberty of the person against the obligation of the state to provide protection to its citizens. The first complete volume of *Recodifying Criminal Procedure* will be called Police Powers. The first of the two Titles that are to comprise that initial volume is *Search and Related Matters*. Title II will be devoted to the law relating to questioning suspects, arrest, compelling appearance, interim release and detention, and pretrial eyewitness identification. The remaining volumes of the Code of Criminal Procedure will set out procedures with respect to the trial process and remedies and appeals.

The issues that are the subject of this Title have previously been analyzed in several Working Papers and Reports to Parliament, as well as in a number of published and unpublished Studies:

Report 19, *Writs of Assistance and Telewarrants* (1983)

Report 21, *Investigative Tests: Alcohol, Drugs and Driving Offences* (1983)

Report 24, *Search and Seizure* (1985)

Report 25, *Obtaining Forensic Evidence* (1985)

Report 27, *Disposition of Seized Property* (1986)

Working Paper 30, *Police Powers, Search and Seizure in Criminal Law Enforcement* (1983)

Working Paper 34, *Investigative Tests* (1984)

Working Paper 39, *Post-Seizure Procedures* (1985)

Working Paper 47, *Electronic Surveillance* (1986)

Working Paper 54, *Classification of Offences* (1986)

Working Paper 59, *Toward a Unified Criminal Court* (1989)

While the first portion of this Code of Criminal Procedure builds on our previously published work, it also takes into account criticisms of it that have been communicated to us by the general public and our special consultants. Public hearings to discuss our work have been held in many centres across Canada over a number of years. We have heard from eminent judges, criminal lawyers, law teachers, police chiefs, and representatives of the provincial and federal governments. Our debt to all who have taken part in this exercise is immense. The reward for their contributions is a new code which is logical, organized, coherent and consistent. We think it is a code that is in harmony with the *Canadian Charter of Rights and Freedoms*[10] and responds to the needs of present-day Canada.

10. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

These are claims that we have also made for our proposed code of substantive criminal law. While both the Code of Criminal Procedure and the Code of Substantive Criminal Law show the same fidelity to principle, clarity, logic and organization, they appear at first glance to be quite dissimilar. A code that sets out general principles of criminal liability and defines crimes can be written with great economy and need emphasize only a minimum of detail and technicality. Our code of substantive criminal law expresses the substantive law in just 132 sections.

Brevity of this kind is not possible in criminal procedure. Procedural law, at a minimum, must set out the series of steps or actions to be followed in order validly to administer justice within the state. General rules are often inadequate for this purpose. Failure to provide important detail reduces the ability of the law to guide action. Such a failure creates a legal void which must then be filled either by the common law or local practice. This in turn may cause inconsistency and uncertainty — two attributes that surely ought to be avoided in the intrusive and coercive environment in which the criminal law operates.

A useful and effective code of criminal procedure must thus be a larger, more detailed document than a code of substantive criminal law. We explain why this must be so in *Our Criminal Procedure*:

> Criminal statutes not only define crimes; they also set out the procedures for conducting investigations and establishing guilt or innocence. In doing so they define the limits of freedom. Procedural law, since it performs this regulatory function, is notable for its emphasis on detail and technicality. . . . [P]rocedural law, to the extent that it will be regarded as effective law from the point of view of promoting just and equitable resolutions of disputes, must to some extent forever remain "technical" law.[11]

Over the years we have demonstrated the incompleteness of the current *Code*'s statement of the substantive law. It "lacks a comprehensive General Part, which has required our courts to fashion, without legislative guidance, many of the basic principles of criminal law dealing with *mens rea*, drunkenness, necessity, causation and other matters."[12] This defect of incompleteness exists to a far greater degree in the area of criminal procedure. A vast amount of the procedural law can be ascertained only by combing the common law or consulting the actual practices of various jurisdictions. A truly comprehensive code of criminal procedure must incorporate and clarify a wide range of ambiguous, amorphous and uncodified law. This is what we have attempted to accomplish in our new Code of Criminal Procedure. Nevertheless, while we believe that this Code goes some distance towards the removal of gaps and the eradication of uncertainty in procedural criminal law, we recognize that it is neither desirable nor possible for a code to be, in an absolute sense, comprehensive, exclusive or exhaustive. What the reader will encounter in the pages that follow is a statute of impressive range of coverage — one that, in our view, immeasurably improves on the procedures in the present *Criminal Code* and clarifies much of the present law.

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11. *Supra*, note 1 at 6.

12. LRC, *Recodifying Criminal Law*, vol. 1, Report 30 (Ottawa: The Commission, 1986) at 3.

The contrast is great between our draft Code and the present *Code*. To demonstrate this we invite the reader to examine an area, such as search and seizure. The differences between the two codes will be immediately apparent. What is the statutory law concerning the search of a dwelling-house, search and seizure in urgent circumstances, the right to search incident to arrest, the seizure of items in plain view, and so forth? These are questions which our draft Code answers fully, but about which the present *Code* is largely silent.

Not only is our Code more complete in its coverage, it is also easier to understand. This reflects our dedication to the use of plain language in the drafting of statutes, to the extent possible. Whether in drafting legislation or in composing accompanying comments, the challenge for us has been not only to speak clearly but also to express our positions accurately. However, some areas, owing to their technicality, will never be *easy* to understand. Where possible, this Code uses language familiar to ordinary people. Thus Latin phrases such as *ex parte* and *in camera* have been replaced by the more understandable terms "unilateral" and "in private." We have also tried to bring many of the older processes more fully into the twentieth century. Procedural innovations such as the telewarrant, first advocated by us and since incorporated in a minor form into the present *Criminal Code*, as well as others calling for the use of electronic recording and reproduction technologies, have been incorporated and extended to a far greater range of processes within the criminal justice system.

The structure and organization of this portion of our Code is logical and straightforward. It begins with general matters — interpretation provisions and rules of general application. Following this is a series of specific Parts which address the range of applicable police powers that comprise the area that this division of the Code labels *Search and Related Matters*:

Search and Seizure;

Obtaining Forensic Evidence;

Testing Persons for Impairment in the Operation of Vehicles;

Electronic Surveillance;

Disposition of Seized Things; and

Privilege in Relation to Seized Things.

Each Part is appropriately divided and subdivided for ease of use and reference.

Although this Code aspires to be comprehensive, it does not yet contain all the law that may ultimately be collected under the general heading, *Search and Related Matters*. For example, absent from this Code are provisions dealing with enterprise or organized crime. Substantive and procedural amendments to the present *Criminal Code* dealing with this subject were recently enacted by Parliament.[13] Also, in Working Paper 47, *Electronic Surveillance*, we recommended the enactment of laws concerning the use

13. See, *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, S.C. 1988, c. 51, ss. 1-8 proclaimed in force January 1, 1989.

of optical surveillance devices to govern cases where the police had surreptitiously entered premises and installed such devices in the course of a criminal investigation. However, the Part of this Code dealing with electronic surveillance does not include any provisions respecting the use of optical surveillance devices. Both optical surveillance and enterprise crime are worthy of separate sustained study and will be the subject of future Commission work. In the interim, our Code omits mention of these matters.

Also, other important matters are not to be found in this volume. The remedy for a failure to follow a procedure is a vitally important aspect of procedural law; yet there are no remedies provisions in this portion of our Code. Remedies are more properly housed with other matters dealing with the trial and appeal process. The granting or denial of a remedy is a judicial act. While police actions may call for remedial relief or for censure, the law of remedies is not treated here as part of the law of police powers. Our position on the proper place of remedies within the criminal process will be discussed in a future Working Paper. Eventually the Commission's recommendations will appear in another Part of this Code.

Rules of evidence also are generally not included in this volume of the proposed Code. For the most part, their proper place is in a code of evidence, although certain rules, possessing a uniquely procedural character, that are necessary to the proper and complete articulation of our scheme will be found in some Parts of this Code.

In keeping with the proposal advanced in *Equality for All: Report of the Parliamentary Committee on Equality Rights,*[14] we have conscientiously endeavoured to draft this Code in gender-neutral language. In doing so we have adhered to the standards and policies set forth in *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights,*[15] pertaining to the drafting of laws in both English and French.

This Report offers a blueprint for change. The legislation, in the areas canvassed, could be readily implemented if Parliament is inclined to act on our work at this point in time. However, it bears repeating that what we now present is part of a larger enterprise in which all parts are designed to integrate and cohere. While this document is a Report to Parliament and thus expresses the settled views of the Commission at this time, we anticipate the need for revision and refinement as we proceed toward the completion and ultimate consolidation of the remaining work.

14. Canada, Parliament, House of Commons, Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services Canada, 1985) at 119-120 (J. Patrick Boyer, M.P., Chairman).

15. Government of Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services Canada, 1986) at 57-58.

PART ONE

GENERAL

DERIVATION OF PART ONE

LRC PUBLICATIONS

Writs of Assistance and Telewarrants, Report 19 (1983)

Search and Seizure, Report 24 (1984)

Classification of Offences, Working Paper 54 (1986)

Recodifying Criminal Law, Report 31 (1987)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, ss. 2, 254(1), 487(2), 487.1

An Act to revise and codify the law of criminal procedure

CHAPTER I
SHORT TITLE

Short title

1. This Act may be cited as the *Code of Criminal Procedure.*

CHAPTER II
INTERPRETATION

Definitions

2. In this Act,

"clerk of the court" (*greffier*)

"clerk of the court" includes a person, by whatever name or title the person may be designated, who from time to time performs the duties of a clerk of the court;

Criminal Code, s. 2

"court of appeal" (*cour d'appel*)

"court of appeal" means

(*a*) in the Provinces of Nova Scotia and Prince Edward Island, the Appeal Division of the Supreme Court, and

(*b*) in any other province, the Court of Appeal;

Criminal Code, s. 2

"crime"(*crime*)

"crime" means an offence that is defined by the proposed Criminal Code (LRC) or any other Act of Parliament and that is punishable by imprisonment otherwise than on default of payment of a fine;

Working Paper 54, ss. 2, 3
Report 31, App. B, s. 2

"in private" (*huis clos*)

"in private" means

(*a*) in relation to an application made unilaterally, without any member of the public or any party other than the applicant being present, and

(*b*) in relation to a hearing with respect to which notice must be given, without any member of the public being present;

"judge" (*juge*)

"judge" means a judge of the Criminal Court;

Working Paper 59, recs. 1, 2

"judicial district" (*district judiciaire*)

"judicial district" means one of the territorial divisions into which a province is divided for the purposes of the Criminal Court or, if there are no such divisions, the province;

"justice" (*juge de paix*)

"justice" means a justice of the peace or a judge;

Criminal Code, s. 2

"medical practitioner" (*médecin*)

"medical practitioner" means a person qualified under provincial law to practise medicine;

Criminal Code, s. 254(1)

"objects of seizure" (*choses saisissables*)

"objects of seizure" means things, including funds in a financial account, that constitute or provide evidence with respect to the commission of a crime, but does not include

(*a*) residues adhering to the surface of a person's body, or

(*b*) a person's tissues, bodily fluids or other bodily substances such as breath, hair or nails, unless they have been removed or have become dissociated from the person's body;

Report 24, s. 3

"peace officer" (*agent de la paix*)

"peace officer" includes

(*a*) a sheriff, deputy sheriff and sheriff's officer,

(*b*) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison,

(*c*) a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

(*d*) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or *Excise Act*,

(*e*) a person appointed or designated as a fishery officer under the *Fisheries Act* when performing any duties or functions pursuant to that Act,

(*f*) the pilot in command of an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as the owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(*g*) officers and non-commissioned members of the Canadian Forces who are

(i) appointed for the purposes of section 156 of the *National Defence Act*, or

(ii) employed on duties that the Governor in Council, by regulations made under the *National Defence Act*, has prescribed to be of such a kind as to necessitate that the

officers and non-commissioned members performing them have the powers of peace officers;

Report 31, s. 2(1)
Criminal Code, s. 2

"photograph" (*photographie*) **"photograph" means a picture, whether still or moving, that represents the appearance of a thing and that is produced with the aid of a camera;**

"prescribed" (*prescrit*) **"prescribed" means prescribed by regulation;**

"prosecutor" (*poursuivant*) **"prosecutor" means the Attorney General or, where the Attorney General does not intervene, the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them;**

Criminal Code, s. 2

"unilaterally" (*unilatéralement et unilatérale*) **"unilaterally", in relation to the making of an application by a party, means without notice to any other party being required.**

COMMENT[16]

Some of these definitions are taken or adapted from the current *Criminal Code*. Others are derived from our own Reports and Working Papers. The remainder are new. Our goals, in drafting these definitions, have been brevity and accuracy.

A word of explanation is merited for some of these definitions. "In private" replaces the Latin term *in camera* and reflects our policy of using clear language in this draft legislation. "Judicial district," a term less confusing than the current *Code*'s "territorial division" (see section 2 of the *Code*), is defined with reference to the scheme we proposed in Working Paper 59 for a Unified Criminal Court system.

"Objects of seizure," as defined here, does not include "information" although our original recommendation and draft legislation in Report 24 did make "information" part of the definition. This Code's search and seizure regime (found in Part Two) contemplates the seizure of things containing information (such as a computer or its diskettes), rather than seizure of the information itself. Nor is specific mention made of other elements of the definition "objects of seizure," as originally formulated. Rather it was believed that the phrase "constitute or provide evidence with respect to the commission of a crime . . ." necessarily embraces most "takings of an offence,"[17] "evidence of an offence"[18] and "contraband."[19] This definition also now specifically excludes a number of

16. Each provision is followed by a comment unless it is self-explanatory.

17. Report 24, Recommendation One, s. 3(1)(*a*). See the definition of that term in Recommendation One, s. 3(2). Note also that we have elected to exclude those "takings" that merely constitute (in the words of our former definition) "property into or for which property taken illegally has been converted," owing to the difficulty in tracing such things.

18. *Ibid.*, s. 3(1)(*b*).

19. *Ibid.*, s. 3(1)(*c*). See the definition of that term in Recommendation One, s. 3(3).

things that may be loosely described as forensic body samples. These are governed by the provisions of Part Three (*Obtaining Forensic Evidence*) of this Code.

"Objects of seizure" does not specifically include instruments of crime. By contrast, the present law in some circumstances does permit the seizure of instruments of crime.[20] For the most part, instruments of crime will be covered by our definition of objects of seizure, since things used to commit a crime will often constitute potential evidence of a crime. Our definition might also cover things that in themselves would be illegal to possess or things that may be seized on a protective search incident to arrest. Under our scheme, these are justifiable grounds for seizing things that are coincidentally instruments of crime and constitute the appropriate ambit of the seizure power in this area of the law.[21]

Our definition "peace officer" is similar, but not identical, to that in Report 31. As promised,[22] we have given further thought to whether the term, as it is used in this Code, ought to include "justice of the peace." To avoid any potential for the mixing of investigative and adjudicative functions, we have decided that it should not.

The definition "photograph" is straightforward and broad. It covers not only photographs taken from a usual camera, but also photographs resulting from the use of an X-ray machine. It is designed to accomplish the purposes detailed in section 78 in Part Three (*Obtaining Forensic Evidence*) and Division IX of Chapter III of Part Six (*Disposition of Seized Things*). However, the power to use an X-ray machine to obtain images of the inside of a person's body is strictly controlled by section 60 in Part Three.

The definition "prescribed" alerts the reader that various items, such as the fees for copying information or the forms for the applications, warrants or orders set out in this draft legislation, are to be prescribed by regulation. The power to prescribe these items by regulation is not set out in this volume of our Code. Rather, empowering sections will appear when the entire Code of Criminal Procedure is completed and consolidated. The forms will appear in that consolidated Code as well.

"Unilaterally" is the English term that replaces the Latin term *ex parte*.

20. Present *Code* s. 487(1)(c) allows a justice to issue a search warrant for anything that there are reasonable grounds 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. Section 489 allows a person who executes a search warrant to seize, in addition to the things mentioned in the warrant, anything that the person believes has been obtained by or has been used in the commission of an offence. Section 11 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, allows a peace officer, when carrying out a lawful search under that Act, to seize anything by means of or in respect of which the officer believes on reasonable grounds an offence under that Act has been committed. Section 16(2) of that Act allows a court, after conviction, to order forfeiture of a thing seized under section 11 which is a conveyance.

21. For a more complete discussion of the Commission's approach to the seizure of instruments of crime, see: *Police Powers: Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (Ottawa: Supply and Services Canada, 1983) at 153-155; Report 24 at 14-15.

22. See Report 31, note 11 at 13.

CHAPTER III
GENERAL PROVISIONS

Common law powers replaced

3. The provisions of Parts Two to Seven replace any common law powers of a peace officer, in relation to the investigation of a crime, to

(*a*) search a person, place or vehicle, seize a thing or retrieve a confined person, and maintain custody of and dispose of seized things;

(*b*) carry out or have carried out an investigative procedure to which Part Three (*Obtaining Forensic Evidence*) applies;

(*c*) take or have taken samples of a person's breath or blood for the purpose of determining the presence or concentration of alcohol in the person's blood; and

(*d*) intercept or have intercepted, by means of a surveillance device, a private communication.

COMMENT

The provisions of this volume of the Code on police powers replace entirely any common law powers which the police presently have that fall within the subject-matter referred to in this section.

Warning or informing person

4. A peace officer who is under a duty to warn a person or to tell a person anything shall do so in a language and in a manner understood by the person.

COMMENT

The purpose and operation of this provision require little explanation or elaboration. The duty to warn or inform is imposed on peace officers by several provisions of this Code.

Shortening notice period for application

5. (1) The period of notice required for any application may be shortened if the persons to whom the notice must be given consent, or if a justice so orders.

Order shortening notice period

(2) A justice may, on an application made unilaterally, make an order shortening a period of notice if satisfied that doing so would be reasonable in the circumstances and would not prejudice any person to whom the notice must be given.

Expediting hearing

6. A justice may give any directions considered necessary for expediting a hearing.

Execution in province

7. A warrant or order issued by a justice may be executed or carried out anywhere in the province in which it is issued, unless a particular location is specified in the warrant or order.

Criminal Code, s. 487(2)

COMMENT

This provision is designed, in a sense, to render uniform the jurisdiction of justices to issue orders or warrants under this Code, and to dispense with the current requirement to have some warrants "backed"[23] (*i.e.*, endorsed) by other justices in the same province who are entitled to exercise jurisdiction in the territorial division where the warrant is to be executed. We have not done away with all backing requirements. Section 36 in Part Two (*Search and Seizure*) includes a requirement that search warrants from another province be backed by a justice of the province where they will be executed. However, we doubt the value of maintaining an intraprovincial backing requirement, having weighed the cumbersomeness of the formality against the additional protection it offers.

Presumption of authenticity of warrant or order

8. An original warrant or order purporting to be signed by a justice is, in the absence of evidence to the contrary, proof of the authenticity of the warrant or order, without proof of the signature of the justice appearing to have signed it.

COMMENT

This provision dispenses with the need to prove, as a matter of course, the authentic nature of a warrant or order relied on as authority to do the acts it describes. Note, however, that this section refers only to the *original* of a warrant or order. A peace officer's facsimile copy of a warrant obtained by telephone or other means of telecommunication, therefore, would not have the same evidentiary effect. Other provisions, contained in subsequent Parts of this Code, make it clear in fact that "[i]n any proceeding in which it is material for a court to be satisfied that [a particular act] was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that [the particular act] was *not* authorized by a warrant."[24]

23. See *Criminal Code*, s. 487(2).

24. See ss. 41 (search or seizure), 70 (carrying out of an investigative procedure), 120 (taking of a blood sample), 206 (interception of a private communication).

CHAPTER IV
GENERAL APPLICATION PROCEDURES FOR WARRANTS

DIVISION I
INTERPRETATION

Application of Chapter

9. This Chapter applies to applications for warrants under Part Two (*Search and Seizure*), Part Three (*Obtaining Forensic Evidence*) and Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).

DIVISION II
PROCEDURE ON HEARING APPLICATION

Hearing evidence

10. (1) A justice to whom an application for a warrant is made may question the applicant and hear or receive other evidence, including evidence by affidavit based on information and belief.

Questioning deponent

(2) Where affidavit evidence is received, the justice may question the deponent on the affidavit.

Evidence on oath

(3) The evidence of any person shall be on oath.

Report 24, s. 10

COMMENT

Subsection (1) of this provision is designed to provide a broad base of sworn information (by subsection (3)) to a justice who is being asked to issue a warrant. Subsections (1) and (2) enable the justice to "go behind" a warrant application in order to ascertain, in an active and effective manner, whether the requirements for issuing a warrant have been met. In so doing, these subsections seek to guard against issuing warrants in inappropriate circumstances, against the consequent quashing of warrants, and against infringement of the rights of persons under the *Canadian Charter of Rights and Freedoms* (*e.g.*, the right not to be subjected to "unreasonable search or seizure"[25]).

Subsection (3) is to be read in the light of, and subject to, the provisions of section 14 of the *Canada Evidence Act*[26] relating to solemn affirmation.

25. Report 24 at 22.
26. R.S.C. 1985, c. C-5.

Recording oral application, evidence

11. (1) An application made orally and any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of an oral application or of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of an oral application or of oral evidence shall be certified as to time, date and accuracy.

Report 19, Part Two, rec. 2(2)
Criminal Code, s. 487.1(2)

COMMENT

This provision is designed to ensure the maintenance of records sufficient to allow for subsequent review. Because we have allowed generally for the making of oral warrant applications (see subsections 22(2), 57(2), 91(2) and 129(1)) and the hearing of oral evidence, section 11 expands slightly upon our recommendation in Report 19[27] (now embodied in subsection 487.1(2) of the present *Criminal Code*) relating to the recording of applications for warrants obtained by telephone or other means of telecommunication.

Procedure for issuing warrant on application by telephone

12. Where a warrant is issued on application made by telephone or other means of telecommunication, the justice shall

(*a*) complete the warrant; and

(*b*) transmit two copies of the warrant to the applicant, or direct the applicant to complete two copies of it.

Report 19, Part Two, rec. 6(*a*), (*b*)
Criminal Code, s. 487.1(6)(*a*), (*b*)

COMMENT

This section sets out the procedure for the completion of warrants obtained by telephone or other means of telecommunication. These are ordinary warrants and are not a distinct class of warrants. Only the procedure for obtaining the warrant differs. These differences arise and are necessitated by the physical separation of the issuing judge or justice from the applicant peace officer. Although our draft statute only speaks in terms of "warrants," we will, throughout the comments to this Code, use the term "telewarrants" interchangeably with warrants that are obtained by telephone or other means of telecommunication. Paragraph (*a*) of section 12 is aimed at ensuring that an accurate record of an issued warrant is kept, should there be any discrepancy between the warrant issued by the justice and copies completed by an applicant peace officer under the justice's direction in accordance with paragraph (*b*).[28] Paragraph (*b*) expands

27. Part Two, rec. 2(2).
28. Report 19 at 88.

slightly on the wording which we recommended in Report 19,[29] and which now appears in paragraph 487.1(6)(*b*) of the *Criminal Code*, by allowing the justice to "transmit two copies of the warrant to the applicant . . . ." In doing so, it dispenses with the need for the applicant to complete the copies by hand in all cases. Where the applicant has submitted a warrant application by facsimile machine, for example, the use of the same technology to place exact copies of the signed warrant in the applicant's hands would clearly be the most efficient way to proceed.

DIVISION III
FILING

Filing application, evidence, warrant

13. A justice to whom an application for a warrant is made shall, as soon as practicable, have the following filed with the clerk of the court for the judicial district in which the application was received:

(*a*) the application received by the justice, or the record of the application or its transcription;

(*b*) the record of any oral evidence heard by the justice or its transcription;

(*c*) any other evidence received by the justice; and

(*d*) if a warrant is issued, the original warrant.

Criminal Code, s. 487.1(6)(*c*)

COMMENT

The object of this provision is to ensure the maintenance and availability of the material upon which a warrant is based, so that those persons affected by the execution of the warrant can later find out if the warrant was properly issued. Section 13 sets out what must be filed. If the application is in written form, it must be filed. If the application is made orally, then the record of the oral application (*e.g.*, a tape recording), or the transcription of the record of the oral application, must be filed. Along with the application, any other supporting material must be filed, such as the record of oral testimony of witnesses or any affidavit evidence. Finally, the result of a successful application — the original warrant issued — must be filed. Although section 13 specifies the judicial district in which the application was received as the place of filing, it must be read in the light of section 14.

Notice of out-of-district execution

14. (1) A peace officer who executes a warrant in a judicial district other than the one in which it was issued shall, as soon as practicable, advise the clerk of the court for the

29. Part Two, rec. 6(*b*).

judicial district in which the warrant was issued of the place of execution.

Filing material in district where warrant executed

(..) After being so advised, the clerk of the court for the judicial district in which the warrant was issued shall have the material or a copy of the material listed in section 13 filed, as soon as practicable, with the clerk of the court for the judicial district in which the warrant was executed.

Criminal Code, s. 487.1(6)(*c*)

COMMENT

The aim of this provision is to ensure that material relating to an application for a warrant is filed where it is executed. As we noted in Report 19 (at 85), filing the material in that place is most likely to facilitate speedy access by persons affected by the seizure.

The two-step procedure contemplated by section 14 is made necessary by the possibility that a warrant may be executed at an unanticipated location.

PART TWO

SEARCH AND SEIZURE

DERIVATION OF PART TWO

LRC PUBLICATIONS

Police Powers — Search and Seizure in Criminal Law Enforcement, Working Paper 30 (1983)

Writs of Assistance and Telewarrants, Report 19 (1983)

Search and Seizure, Report 24 (1984)

Obtaining Forensic Evidence: Investigative Procedures in Respect of the Person, Report 25 (1985)

Disposition of Seized Property, Report 27 (1986)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, ss. 2, 101, 103, 164, 199, 320, 339(3), 395, 447(2), 487, 487.1, 488, 488.1, 489; Part XXVIII, Forms 1, 5, 5.1, 5.2

Food and Drugs Act, R.S.C. 1985, c. F-27, ss. 42, 51

Income Tax Act, R.S.C. 1952, c. 148; S.C. 1970-71-72, c. 63, s. 231

Narcotic Control Act, R.S.C. 1985, c. N-1, ss. 10-12, 14

INTRODUCTORY COMMENTS

This Part sets out the general procedures regulating the crime-related search for, and the seizure or retrieval of, "objects of seizure" and "confined" persons. (See the definition of these terms in sections 2 and 15, respectively. The search for, and seizure of, objects of seizure within a person's body, including objects within the mouth, are dealt with separately in Part Three (*Obtaining Forensic Evidence*).

Part Two confers certain powers primarily on the police but also on others, and states the circumstances in which these powers may be acquired and the manner in which they should be exercised. Included are provisions specifying the circumstances in which a warrant may issue, the procedures to be followed in obtaining a warrant and the circumstances in which a search or seizure may be conducted without a warrant.

The search and seizure provisions in this Code replace the variety of search and seizure powers and procedures now found at common law, in the *Criminal Code* and in other federal crime-related statutes such as the *Narcotic Control Act*, the *Food and Drugs Act* and the *Income Tax Act*.[30] The basic goal is to better protect against unreasonable search and seizure while still providing for effective criminal investigation and law enforcement.

The *Canadian Charter of Rights and Freedoms* declares that "[e]veryone has the right to be secure against unreasonable search or seizure" (section 8),[31] and that a law inconsistent with this right is "of no force or effect" (section 52). These declarations require that powers to search and seize — which impinge on such fundamental interests as the inviolability and dignity of the individual and the security and privacy of home, property and personal possessions — be carefully controlled.

We believe that legislation governing searches and seizures must incorporate the characteristics of "judiciality." "particularity" and "accountability."

In the landmark case of *Hunter* v. *Southam Inc.*,[32] the Supreme Court of Canada held the obtaining of a warrant, where "feasible,"[33] to be a pre-condition to a valid search. In that case, the Court clearly incorporated the element we call "judiciality" into the warrant requirement. It stated that a statute authorizing a search or seizure is reasonable under the *Charter* if it requires that a neutral and detached arbiter determine, before authorizing a search, that there are reasonable and probable grounds (established on oath) to believe that an offence has been committed, and that there is evidence of that offence in the place to be searched.[34] This element of judiciality is an historically

30. See N.C. Brooks and J. Fudge, *Search and Seizure Under the Income Tax Act*, a Study Paper prepared for the Law Reform Commission of Canada (unpublished, 1985) at 64. The study concluded that investigatory search powers should be the same in all federal statutes and that powers broader than those set out in the *Criminal Code* could not be justified. Similarly, the Commission recommended, in Report 24, rec. 2(f) and 47-51, that special search and seizure provisions under the *Narcotic Control Act* and the *Food and Drugs Act* should be abolished.

31. A search is reasonable "if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable": *R.* v. *Collins*, [1987] 1 S.C.R. 265, *per* Lamer J. at 278.

32. [1984] 2 S.C.R. 145.

33. *Ibid.* at 161.

34. *Ibid. per* Dickson J. at 159-168.

established characteristic of the warrant, that limits uncontrolled state intrusions on individual rights, and promotes the responsible use of search and seizure powers.

The requirement that the intrusion authorized be particularly identified has also become a characteristic of most Canadian search warrant legislation. We call this element "particularity." It requires, both in warrant applications and in the warrant itself, that the place to be searched, the items sought and the crime under investigation be clearly specified. Again, the ultimate purpose of requiring this detail is to limit and control state intrusions on individual rights.

The issuance of search warrants is now mainly a documentary process in Canada. Material and information supporting the issuance of a warrant must be reduced to writing or be recorded, and must be filed and made accessible to interested parties. This requirement facilitates accountability and subsequent review of the legality of any search or seizure that takes place.

In contrast, accountability and the potential for control and review are diminished when searches or seizures are conducted without warrant. A search or seizure without warrant depends solely on a judgment by the person conducting the search or seizure that the necessary pre-conditions for exercising the power have been satisfied. The authority to search or seize without warrant provides the opportunity for personal bias to influence decision-making. Accountability is impaired because objective supporting documentation or material need not be prepared, filed or made available either to persons affected or to the courts.

In our scheme, warrants are required wherever possible, so that discretionary intrusions by the state upon individual rights are carefully limited. This approach is consistent both with that of the Supreme Court of Canada in its interpretation of the *Charter* and with the aim of accountability. Accountability is enhanced by other provisions in this Part, such as that generally requiring search warrants to be executed "in the presence of a person who occupies or is in apparent control of the place or vehicle being searched . . ." (section 39), and that requiring unexecuted warrants to be returned with an explanation (section 34). Exceptions to the warrant requirement are clearly identified and restricted to searches conducted with consent, searches incident to arrest, searches conducted in exigent circumstances and, in limited and defined circumstances, the seizure of objects in "plain view."

For the benefit of the public as well as persons exercising search or seizure powers, provisions designed to promote the reasonable execution of the powers are included. Rules are clearly set out on such matters as: the general authority conferred by a warrant; the persons authorized to act under a warrant; the time when, and manner in which, a search or seizure may be made; the notification to be given to persons affected; and the procedure to be followed when a claim of privilege is made during a search.

CHAPTER I
INTERPRETATION

Definitions

15. In this Part,

"confined" (*séquestrée*)

"confined" means confined or taken into custody unlawfully as defined in section 49 (confinement), 50 (kidnapping) or 51 (child abduction) of the proposed Criminal Code (LRC);

"night" (*nuit*)

"night" means the period between 2100 hours and 0600 hours on the following day;

"vehicle" (*véhicule*)

"vehicle" means a thing used or designed to be used as a means of transportation.

COMMENT

As noted, this Part applies not only to the search for and seizure of things, but also to the search for and retrieval of illegally detained persons. Because this Part is concerned, essentially, with crime-related searches, the definition "confined" is designed to limit the applicability of our search and retrieval provisions to circumstances in which the detention of a person constitutes a crime.

The definition "vehicle" is drafted widely to embrace all forms of conveyance, and is to be contrasted with the narrower definition of this term appearing in Part Four (*Testing Persons for Impairment in the Operation of Vehicles*). While the definition in Part Four is designed to limit the applicability of our breath and blood test provisions to cases involving conveyances that are not humanly powered, the definition in section 15 above recognizes the illogicality of distinguishing between different types of vehicles on this basis when dealing with the power to search.

Meaning of power to search person

16. The power to search a person, otherwise than with consent, for an object of seizure or a confined person means the power to

(*a*) stop and detain the person;

(*b*) carry out a protective search of the person;

(*c*) search anything carried by the person in which it is reasonable to believe that the object of seizure or confined person might be found;

(*d*) search those areas of the surface of the person's body where it is reasonable to believe that the object of seizure might be found;

(*e*) search those areas of the person's clothing where it is reasonable to believe that the object of seizure or confined person might be found; and

(*f*) remove any article of the person's clothing that it is reasonable and necessary to remove to see whether the person is carrying or concealing the object of seizure or confined person, or to effect seizure or retrieve the confined person.

COMMENT

Except for the general *Charter* requirement of "reasonableness," there is, at present, little statutory guidance as to the permitted scope of personal searches. The police have therefore effectively acquired a broad but poorly defined power in this area. Certain provisions in this Chapter, together with certain provisions in Part Three relating to investigative procedures, further the goal of clarity by defining with precision the nature and limits of the power. Section 16 accomplishes much of this task by particularizing and defining the power to conduct external searches of persons for objects of seizure and confined persons.

The *Criminal Code* does not generally allow for a warrant to search a person.[35] A warrant under subsection 487(1) of the *Code* may only authorize a search of a "building, receptacle or place." Crime-related searches of the person, therefore, are mainly done either pursuant to the common law power of search incident to arrest, or with consent. These two sources of authority to conduct personal searches are continued in this scheme. In addition, provision is made for the obtaining of a warrant to search a person for an object of seizure or a confined person, and for dispensing with the warrant requirement in exigent circumstances.

Paragraph (*a*) of section 16 is designed to facilitate the conducting of a personal search in a very basic way. It makes clear that there need not be independent authorization for stopping or detaining the person to be searched. The absence of independent authorization, therefore, will not render the detention arbitrary (see section 9 of the *Charter*) or support a civil claim for false arrest.

Paragraph (*b*) recognizes that a non-consensual personal search (whether legally authorized or not) may provoke unpredictable reactions, and that anyone authorized to search a person must have the power to take appropriate steps for self-protection. In order to achieve the purpose of protection, paragraph (*b*) does not require any actual belief that the person is carrying a weapon or escape tool; rather, it allows a protective search to be carried out simply as a precaution. The precise scope of a protective search is specified in section 17.

The remaining paragraphs of section 16 recognize that the scope of a personal search must bear a rational relationship to the purpose for which the search is authorized, but must be broad enough to enable those given the power to search to find and

35. See, however, s. 395(1) dealing with warrants to search for "precious metals . . ." and so forth.

to seize what they are authorized to look for. The authority to search a person is not the same as a discretion to conduct an exploratory search of any part of the body or clothing until an object is found. Regard must first be had to the characteristics of what is sought, and the search must be confined to areas where it might reasonably be found.[36]

The Supreme Court of Canada, in the recent case of *Cloutier* v. *Langlois*,[37] described the scope of the power to search a person incident to arrest for evidence as being a power to "frisk" the person. "Frisk" was stated to mean:

> . . . a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual. Pockets may be examined but the clothing is not removed and no physical force is applied.[38]

Our formulation of the scope of the power, particularly paragraph 16(*f*), allowing for the removal of clothing, might appear to be in some respects broader than that stated by the Court. However, our statement of the officer's basis for the exercise of the power, set out in section 44, is in some respects narrower. Under our scheme, reasonable grounds are necessary to search for evidence, as distinct from searching for weapons (*i.e.*, a protective search). In contrast to *Cloutier*, the mere fact of arrest is not, under this scheme, a sufficient basis upon which to ground a warrantless search for evidence, in the absence of exigent circumstances. In our view, the overall balance struck in this legislation ensures that these searches will meet *Charter* standards.

Meaning of protective search

17. The power to carry out a protective search of a person means the power to

(*a*) frisk the person and search the person's clothing and anything carried by the person or within the person's reach for weapons and instruments of escape;

(*b*) if the frisk or search discloses that anything believed on reasonable grounds to be a weapon or instrument of escape is located under or in the person's clothing, remove any article of the person's clothing that it is reasonable and necessary to remove to effect a seizure; and

(*c*) seize anything believed on reasonable grounds to be a weapon or instrument of escape.

Report 24, s. 20(*a*)

36. Note in this regard the requirement of s. 50, that every search of the person should respect the person's dignity and involve the least degree of intrusion and invasion of privacy as is reasonably practicable. Section 17 should also be read in conjunction with s. 55 (obtaining forensic evidence) which makes it clear that the right to carry out a personal search does not, for example, include the power visually to inspect the naked body, manually probe body cavities, or perform surgical or other "medical" procedures, even where resort to such procedures might reasonably be expected to reveal the object sought. Such highly intrusive or potentially dangerous procedures are separately regulated with special safeguards.

37. [1990] 1 S.C.R. 158.

38. *Ibid.* at 185.

COMMENT

Section 17 defines the scope of the power (conferred by paragraph 16(*b*) and section 43) to conduct a protective search of the person. Paragraph (*a*) sets out what may be searched for: weapons and instruments of escape. It enables someone conducting a protective search to look for these things by frisking the person, searching the person's clothing, and searching anything carried by the person or that is within the person's reach. In this context, "frisk" has the meaning (previously referred to in the comment to section 16) given to it by the Supreme Court of Canada in the *Cloutier* case. The "reach" limitation defines the ambit of the search in a way that relates the scope of the search to its purpose; someone who conducts a protective search only needs to search those places that might realistically contain a weapon or an instrument of escape.

Paragraphs (*b*) and (*c*) set out additional powers facilitating seizure. These flow naturally from the general power to conduct the protective search.

The mechanism for returning or otherwise disposing of things seized temporarily during protective searches under the authority of this section is regulated by section 54.

Meaning of power to search vehicle

18. The power to search a vehicle, otherwise than with consent, for an object of seizure or a confined person means the power to stop and detain the vehicle, enter the vehicle and search those areas of the vehicle, or of anything within the vehicle, where it is reasonable to believe that the object of seizure or the confined person might be found.

Report 24, ss. 14, 28(2)

COMMENT

Sections 18 and 19 parallel, for vehicles and places, the scope provision for personal searches. (See section 16 and the comment thereto.)

The basic power to search a vehicle or place presupposes the inclusion of a power to stop, detain and enter a vehicle, or to enter a place. The further powers given in these sections, relating to the areas of vehicles or places that may be searched, once again are designed both to enable those conducting searches to find what is being sought, and to restrict the scope of searches in a rational manner.

Meaning of power to search place

19. The power to search a place, otherwise than with consent, for an object of seizure or a confined person means the power to enter the place and search those areas of the place, or of anything within the place, where it is reasonable to believe that the object of seizure or the confined person might be found.

Report 24, ss. 14, 28(2)

COMMENT

See the comment to section 18.

Meaning of power to seize

20. The power to seize means

(*a*) in the case of a thing, the power to take possession or control of the thing; and

(*b*) in the case of funds in a financial account, the power to take control over the funds.

Report 24, s. 4

COMMENT

Taking physical possession of a thing is the traditional approach to effecting seizure, and is reflected in the present *Criminal Code*. Section 20 incorporates this traditional approach and expands upon it. Where a seizure is authorized by law, it will be possible to carry it out by taking control of the thing or funds without necessarily taking physical possession.

In the case of funds in a financial account, it is not technically possible to take physical possession and a seizure may be made only if control is assumed over the account. Alternatively, some seized things may not easily be moved to, or stored at, locations in police control. Allowing seizure by taking control should thus reduce administrative and storage burdens now imposed on the police.

Section 20 also reflects the Commission's support for the general principle that interference with an individual's interest in maintaining possession of property should be minimized wherever possible. This section encourages the use of an alternative to taking physical possession (*i.e.*, taking control) when such an approach can be as effective and will not prejudice the law enforcement interest.

Unlike paragraph 4(*b*) of Recommendation One in Report 24, section 20 does not envision a seizure being made by "taking photographs or other visual impressions of an object of seizure." We have not implemented the recommendation for three basic reasons.

First, the recommendation was partly intended to encourage the use of methods of seizing "information"[39] that would be less intrusive than physically taking things revealing the information.[40] It was thought that seizure of the information "in secondary or recorded form"[41] under the authority of paragraph 4(*b*) would accomplish this goal. However, we have come to the conclusion that it is not technically possible to seize information in any event. As already noted,[42] we have deleted "information" from the definition "objects of seizure"[43] and section 20 now defines only the power to seize

39. Report 24, rec. 1, s. 3, then included information within the proposed definition of "object of seizure."

40. *Ibid.* at 15-16.

41. *Ibid.* at 15.

42. See comment to s. 2.

43. See s. 2.

things and funds in a financial account. Thus, seizure of information recorded on or contained in a thing may be effected, under section 20, only by the seizure or taking control of the thing on which the information is recorded. However, the basic goal of the original recommendation can still be realized, and the intrusion and deprivation minimized, by use of the alternative procedures contained in sections 266 to 269. In the case of information contained in a seized thing, a peace officer may make a copy of the information which, when properly certified, is admissible in evidence and is to be given the same probative force as the information itself. If this procedure is used, the thing originally seized may be promptly returned.

Second, many sections of Part Six (*Disposition of Seized Things*) (*e.g.*, those relating to the custody of and access to seized things, the sale of perishables and the destruction of dangerous things) can properly and logically apply only to things seized by taking physical possession or control.

Third, the recommendation can be applied only if accompanied by other provisions that would make the photograph or other visual impression admissible and give it the same probative value as the thing itself. However, we have concluded that such a blanket declaration as to probative value would not be appropriate in all cases, but rather could properly apply only in relation to information contained in, or to identify, seized things. It thus must be set out more narrowly and precisely than is done in the recommendation. Accordingly, we encourage the early return of these categories of things by providing, in the case of information, the already noted procedure and, for things requiring identification (usually things alleged to have been stolen), that a certified photograph of any thing seized in accordance with section 20 be admissible for the purpose of identifying that thing and, in the absence of evidence to the contrary, that it have the same probative force, for identification purposes, as the seized thing itself.

Thus, to make clear what the provisions of Part Six apply to, we have restricted the meaning of seizure and have placed the separate power to take photographs and make copies in sections 266 and 267.

CHAPTER II
SEARCH AND SEIZURE WITH A WARRANT

DIVISION I
APPLICATION FOR SEARCH WARRANT

Applicant

21. Any person may apply for a search warrant.

COMMENT

At present, anyone may apply for a search warrant under section 487 of the *Criminal Code*. Applications for telewarrants, however, may only be made by peace

officers.[44] Applications by private citizens for search warrants are quite rare, and allegations that citizens are abusing the procedure are scarce (perhaps non-existent). Section 21 continues to allow such applications to be made; however, sections 25 and 35 make it clear that only a peace officer may execute a warrant.

Subsection 22(1) continues the requirement that telewarrant applications be made by peace officers.

Application in person or by telephone

22. (1) An application for a search warrant shall be made in person or, if the applicant is a peace officer and it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally, in private and on oath, orally or in writing.

Report 24, s. 6

Form of written application

(3) An application in writing shall be in the prescribed form.

Report 19, Part Two, rec. 2(1)
Report 24, s. 6
Criminal Code, ss. 487(1), 487.1(1)

COMMENT

Section 22 sets out how a search warrant application is to be made. The procedure covers all search warrant applications and replaces a number of *Criminal Code* sections containing diverse requirements.[45]

Subsection (1) states the two methods currently provided for in the *Criminal Code*.

Notwithstanding our belief that better and greater use should be made of new and simpler technologies, we nevertheless favour the "in person" application as the procedure that is normally to be used. Telewarrant applications should remain an exception to the rule.

Subsection (2), which deals with the manner in which the application is made, begins by requiring that the application be unilateral[46] and in private,[47] in order to enhance the effectiveness of the procedure. Subsection (2) retains the requirement that the decision to issue a warrant be based on information given on oath. However, unlike the present law, it allows applications in person to be made orally. In so doing, it

44. *Criminal Code*, s. 487.1(1), adopting a previous Commission recommendation. See Report 19, Part 2, rec. 2(1). The comments to this recommendation (at 84) justify the restriction on the basis that telewarrant procedures are designed to facilitate the access by peace officers to the justice of the peace.

45. See ss. 103(1), 164(1), 199(1), 320(1), 395(1), 487(1), and 487.1(1). See also s. 12 of the *Narcotic Control Act* and ss. 42(3) and 51 of the *Food and Drugs Act*.

46. "Unilaterally" is defined in s. 2 to mean "without notice to any other party being required."

47. "In private" is defined in s. 2 to mean, in relation to a unilateral application, "without any member of the public or any party other than the applicant being present."

recognizes the existence of modern methods for recording evidence in support of an application. As long as an accurate record is made of the material and evidence in support of an application, accountability is maintained. As a result of the requirements contained in subsection 11(1), an oral application in person will only be entertained if the justice has the means to record verbatim the application and any additional evidence presented. Since the justice may "question the applicant and hear or receive other evidence . . ." under subsection 10(1), an oral application can impart as much information to the justice as a written application.

To better realize the goal of particularity, subsection (3) requires that an application be made in accordance with a prescribed form. Subsection 487(1) of the present *Criminal Code* also prescribes a form for an information on oath (Form 1), but its adequacy has been questioned. The problems with the *Code*'s Form 1 are more fully discussed in the comment to section 24.

Justice on application in person

23. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on application by telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

Report 19, Part Two, rec. 2(1)
Criminal Code, s. 487.1(1)

COMMENT

Section 487 of the *Criminal Code* does not now specify the place where an "in person" search warrant application should be presented. The warrant may be issued in a judicial district different from that in which the alleged offence occurred, and the "building, receptacle or place" to be searched may be outside the judicial district of the issuing justice. Section 487 only requires that the application be made to a justice. Subsection (1) of section 23, however, requires the application to be made to a justice in a location having a substantial connection with the investigation.

On the other hand, the nature of the telewarrant application is such that insistence on a similar requirement for the place of application is not practical or necessary. In some jurisdictions, a centralized system for the receipt of applications has been established. For example, in Quebec all applications are directed to and considered by designated justices in Montreal. With such systems in place, telewarrant applications are most likely to be considered by justices having no connection with the location of the investigation. This is now recognized in subsection 487.1(1) of the *Criminal Code*, which requires that telewarrant applications be made to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction. Subsection (2) preserves the essence of the present approach. However, in accordance with the new Unified Criminal Court structure that we propose, it provides that the Chief Justice of

the Criminal Court shall designate the justices who may receive telewarrant applications.

Contents of application

24. An application for a search warrant shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the person, place or vehicle to be searched;

Report 19, Part Two, rec. 2(4)(*b*)
Criminal Code, s. 487.1(4)(*b*)

(*e*) if the application is for a warrant to search for and seize objects of seizure,

(i) the objects of seizure sought,

(ii) the applicant's grounds for believing that the objects of seizure will be found on the person or in the place or vehicle, and

(iii) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person, place, vehicle or objects of seizure and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;

Report 19, Part Two, rec. 2(4)(*b*), (*c*)
Report 24, ss. 5, 7
Criminal Code, s. 487.1(4)

(*f*) if the application is for a warrant to search for and retrieve a confined person,

(i) the person sought,

(ii) the applicant's grounds for believing that the person will be found in the place or vehicle or concealed on the person to be searched, and

(iii) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person, place, vehicle or confined person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;

Report 24, ss. 5, 7, 28(2)

(*g*) if the applicant requests authority for the warrant to be executed during the night, the applicant's grounds for

believing that it is necessary for the warrant to be executed during the night;

Report 24, s. 12

(*h*) if the applicant, on application made in person, requests authority for the warrant to be executed more than ten days after it is issued, the applicant's grounds for believing that the longer period is necessary; and

Report 24, s. 13

(*i*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

Report 19, Part Two, rec. 2(4)(*a*)
Criminal Code, s. 487.1(4)

COMMENT

The *Criminal Code* now provides little guidance as to the form and content of the documentation required in an application for a search warrant. Some guidance is provided in Form 1, relating to section 487 search warrants. However, this form does not properly align with the substantive and probative requirements of section 487.[48] This state of affairs has led to improvisations and hence, to considerable variation in the form and content of applications, leading, on occasion, to reliance on forms that actually obscure the meaningful disclosure of the very detail required by law.

In contrast to the present law, section 24 sets out the mandatory, specific ingredients of every search warrant application. This detailed listing should reduce the number of search warrants approved on vague or deficient criteria and, by ensuring a better record of the application, should facilitate later review.

A separation of "substantive" and "probative" elements is not now required in an application for a search warrant under section 487 of the *Criminal Code*. However, this kind of separation is required in an application for a telewarrant.[49]

Paragraphs (*a*) and (*b*) require the inclusion of certain basic formal elements, and are self-explanatory. The crime under investigation must be disclosed under paragraph (*c*).

Paragraph (*d*) and subparagraphs (*e*)(i) and (*f*)(i) set out the essential "substantive" requirements. They require the applicant to disclose what or who is to be searched and the object or person being sought.

Subparagraphs (*e*)(iii) and (*f*)(iii), which will not always be relevant, incorporate a disclosure requirement pertaining to prior applications that is currently only applicable

48. See the critical comments of Osler, J. in *R.* v. *Colvin, Ex Parte Merrick* (1971), 1 C.C.C. (2d) 8 at 11 (Ont. H.C.J.).

49. *Criminal Code*, s. 487.1(4), which adopted a Commission recommendation. See Report 19, Part Two, rec. 2(4); Report 24, rec. 6, comment at 17-18 and Appendix A at 75-76.

in the case of telewarrant applications.[50] A requirement of this nature should serve to inhibit forum shopping (which can undermine the judiciality of warrant proceedings), and help to curtail unjustified multiple applications. We see no reason, therefore, why it should not be made applicable to all search warrant applications.

Subparagraphs (*e*)(ii) and (*f*)(ii) state the key "probative" ingredients of any search warrant application; they relate directly to criteria that must be satisfied under subsections (1) and (2) of section 25 before a justice may issue a search warrant.

Paragraph (*g*), which will only be relevant in some search warrant applications, relates directly to the criteria that must be satisfied under section 28 before a justice may authorize the execution of a search warrant by night.

A search is a distressing and invasive procedure at the best of times. Night searches potentially add to the upset and intrusion. Our proposals encourage searches by day whenever possible. Section 488 of the *Criminal Code* provides that warrants issued under sections 487 and 487.1 must be executed by day unless night execution is specifically authorized. However, section 488 fails to specify criteria for granting authorizations to search at night. Further, warrants issued under some federal statutes (*e.g.*, under section 10 of the *Narcotic Control Act*) may be executed at any time. Night searches are particularly disruptive of normal life and privacy but may be necessary, in some cases. Section 28 permits a night search to be authorized where the applicant has specified grounds for believing that it is necessary, and where "the justice is satisfied there are reasonable grounds for that belief." The onus on the applicant can be discharged by proof that the object of seizure will be removed or destroyed if night execution is not allowed.

Paragraph (*h*), which again will only be relevant in some search warrant applications, relates directly to the criterion that must be satisfied under subsection 31(3) before a justice may authorize execution of a search warrant beyond the normal ten-day expiration period. The *Criminal Code* does not now require that searches with warrant be conducted within a specified period of time. However, a reasonable proximity between the time of issuance and execution of the warrant is desirable, so as to ensure that a warrant is executed in essentially the same circumstances that prompted the issuer to grant it.[51] If a longer period than is normal for execution of the warrant is thought to be necessary, the applicant must justify an extension by setting out the grounds in the application itself.

Paragraph (*i*), concerning the necessity for the personal appearance of the applicant, will only be relevant in telewarrant applications. It relates directly to the additional criterion that must be satisfied under section 26 before a justice may issue a search warrant pursuant to an application "made by telephone or other means of telecommunication." In most cases, "impracticability" will be synonymous with "urgency," but it is not necessarily limited to such circumstances alone. A telewarrant should be available whenever circumstances of time or distance make it inappropriate

50. *Criminal Code*, s. 487.1(4)(*d*). An analogous requirement exists pertaining to previous wiretap applications: see *Criminal Code*, s. 185(1)(*f*).

51. See Report 24, rec. 3.

to insist on the applicant's personal appearance. Such circumstances will be encountered most frequently in remote areas where the need for a warrant may be pressing but too much time would be taken to travel to a location where a justice may be seen personally. On the other hand, this dispensation is not intended as a mere convenience for peace officers who simply prefer not to appear in person. The justice, in deciding the issue, has a measure of discretion equivalent to that enjoyed in deciding to issue the warrant itself.[52]

DIVISION II
ISSUANCE OF SEARCH WARRANT

Grounds for issuing warrant for object of seizure

25. (1) A justice who, on application, is satisfied there are reasonable grounds to believe that an object of seizure will be found on a person or in a place or vehicle may issue a warrant authorizing a peace officer to search the person, place or vehicle for the object of seizure and to seize the object of seizure.

Report 19, Part Two, rec. 2(5)(*c*)
Report 24, s. 5
Criminal Code, ss. 487(1), 487.1(5)

Grounds for issuing warrant for confined person

(2) A justice who, on application, is satisfied there are reasonable grounds to believe that a confined person will be found in a place or vehicle or concealed on the person to be searched may issue a warrant authorizing a peace officer to search the person, place or vehicle for the confined person and to retrieve the confined person.

Report 24, ss. 5, 28(2)

COMMENT

Section 25 replaces differently formulated requirements in various sections of the *Criminal Code* and other federal statutes.[53] Unlike the current *Code*'s main search warrant provision (section 487), it provides general authority for the issuance of a warrant to search a person. The scope of "[t]he power to search a person, otherwise than with consent, for an object of seizure or a confined person" is set out in section 16. The scope of the powers to search vehicles or places, "otherwise than with consent, for an object of seizure or a confined person" is defined in sections 18 and 19. Section 37 further sets out what may be done "under the authority of a search warrant."

Subsection (1) establishes the basis for issuing a warrant to search for and seize an object of seizure. The wording is permissive. The justice has a discretion, to be exercised judicially, concerning whether to issue the warrant.[54] The general approach of the

52. Report 19, Part Two, note 10 at 102.

53. See *Criminal Code*, ss. 103(1), 164(1), 199(1), 320(1), 395(1), 487(1), 487.1(5); *Narcotic Control Act*, s. 12; *Food and Drugs Act*, s. 42(3).

54. See *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860, *per* Lamer, J. at 888-890.

present law continues. In determining whether to issue a search warrant, the justice must apply an objective test[55] and consider whether he or she is satisfied, based on the facts presented in the application, that there are reasonable grounds to believe that an object of seizure, related to a specific offence, is to be found on a specified person, or in a place or vehicle that is to be searched. The "reasonable grounds to believe . . ." criterion requires more than a mere suspicion, but the justice is not required to decide whether the mentioned crime has been committed, or whether the objects sought will, in fact, establish the commission of the crime.[56] The things or persons sought, the location or person to be searched and the particular crime under investigation must be linked, to the point that there are reasonable grounds to believe both that the things sought are in the premises to be searched[57] and that those things are objects of seizure.[58]

Subsection (2) gives the justice a novel authority to issue a warrant to search for and retrieve a "confined" person (as defined in section 15). It is now included out of an abundance of caution to recognize clearly and directly a search for this purpose as being a legitimate aspect of police powers. The justice, in deciding whether to issue the warrant, must approach the matter in the same manner as an application for a warrant to search for an object of seizure.

Additional ground if application by telephone

26. If the application is made by telephone or other means of telecommunication, a warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

Report 19, Part Two, rec. 2(5)
Criminal Code, s. 487.1(5)(*b*)

COMMENT

Section 26 sets out the additional test that the justice must apply if the application is brought by telephone or other means of telecommunication. Its equivalent is found in paragraph 487.1(5)(*b*) of the current *Criminal Code*.

Conditions relating to execution

27. A justice who issues a search warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

55. *Re Bell Telephone Co. of Canada* (1947), 89 C.C.C. 196 (Ont. H.C.), *per* McRuer, C.J. at 198.

56. *R.* v. *Johnson & Franklin Wholesale Distributors Ltd.* (1972), 16 C.R.N.S. 107 (B.C.C.A.); leave to appeal to S.C.C. refused at 114 (C.R.N.S.).

57. *R.* v. *Johnson & Franklin Wholesale Distributors Ltd.*, [1973] 5 W.W.R. 187 (B.C.C.A.).

58. See *Re Worrall* (1965), 44 C.R. 151 (Ont. C.A.).

COMMENT

Section 27 gives the justice a new discretion to impose conditions governing the execution of the warrant. Since the justice will be allowed a wider scope of inquiry on the application than was formerly the case (and should thus have a more thorough appreciation of all of the surrounding circumstances), a power to include such conditions is appropriate. One example of how this power might be exercised is if it is anticipated that the search will require the handling of privileged material. In such a case, the justice may consider it appropriate to impose special conditions on the manner of executing the warrant so as to safeguard the contentious material.

Authorizing execution by night

28. If the applicant has specified grounds for believing that it is necessary for the search warrant to be executed during the night and the justice is satisfied there are reasonable grounds for that belief, the justice may, by the warrant, authorize its execution during the night.

Report 24, s. 12
Criminal Code, s. 488

COMMENT

Section 28 empowers the justice to authorize execution of the search warrant by night. It should be read together with paragraph 24(*g*), which sets out the information that must be supplied to the justice to justify this authorization. Unlike section 488 of the present *Code*, section 28 includes criteria for deciding whether to allow execution by night.

Form of warrant

29. A search warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

Report 19, Part Two, rec. 2(6)(*a*)
Criminal Code, ss. 487(3), 487.1(6)(*a*)

COMMENT

In later volumes of this Code, we will be providing specific model forms setting out the contents of search warrants in general.[59] Subsection 487(3) of the *Criminal Code* now provides that a search warrant issued under section 487 "may be in the form set out as Form 5 in Part XXVIII, varied to suit the case." While the use of Form 5 is not mandatory, the substance of the form must be incorporated in some manner.[60] However, the present form is deficient and may cause confusion. On its face, for example, the form does not require that an alleged offence be set out or in any way related to the things searched for.

A warrant should disclose the nature of the offence in relation to which evidence is sought precisely enough to enable anyone concerned to understand it. It should

59. In our previous Reports we provided this detail only for telewarrants: Report 19, Part Two at 98.
60. *Rex* v. *Solloway Mills & Co.* (1930), 53 C.C.C. 261 (Alta. S.C.A.D.), *per* Hyndman, J.A. at 263.

describe the location to be searched with sufficient accuracy to enable one to know the precise premises or vehicle in relation to which the search has been authorized. Accordingly, to prevent "fishing expeditions" and to achieve particularity more effectively than do the forms suggested in the *Criminal Code*, this section contemplates mandatory prescribed forms for all search warrants as well as a specific list of the items and information they are to contain.

Contents of warrant

30. A search warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the objects of seizure or confined person sought;

(*d*) the person, place or vehicle to be searched;

(*e*) any conditions imposed relating to its execution;

(*f*) the date it expires if not executed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

DIVISION III
EXPIRATION OF SEARCH WARRANT

Warrant issued on application in person

31. (1) A search warrant issued on application made in person expires ten days after it is issued.

Shortening expiration period

(2) A justice who is satisfied that a shorter expiration period is sufficient may issue a warrant with an expiry date that is less than ten days after the date of issue.

Extending expiration period

(3) A justice who is satisfied there are reasonable grounds to believe that a longer expiration period is required may issue a warrant with an expiry date that is more than ten days but not more than twenty days after the date of issue.

Report 24, s. 13(1), (2)(*a*), (*b*)

COMMENT

Imposing a reasonable time-limit on the execution of search warrants is, in our view, necessary in the interests of particularity and judiciality; it ensures, to a reasonable degree, that warrants are not executed in circumstances that have altered radically from those contemplated by the justices issuing them.[61]

61. See Report 24 at 26.

The *Criminal Code* does not generally require that a search warrant be executed within a specified period (although a seven-day expiry period for warrants to search for obscene matter and crime comics may be inferred from subsections 164(2) and 320(2) of the *Code*). Our empirical research indicates that some issuers have attached deadlines for execution, and that warrants with expiry dates have been executed more promptly than those without deadlines.[62]

Our research also reveals that most search warrants are executed within two days after issuance.[63] We therefore believe that a deadline of ten days for the execution of a search warrant issued on application made in person should generally be adequate; a longer period would undermine the rationale for the existence of expiry dates. Subsection 31(1) thus establishes that such search warrants expire ten days after being issued.

The discretion to issue a warrant having a later expiry date, given by subsection 31(3), makes a fixed longer deadline unnecessary. Subsection 31(2) also empowers the justice to set an expiry date less than ten days after the date of issue.

The power to shorten the expiry period, provided in subsection (2), may be exercised on the justice's own motion, and on the basis of the information in the application. As noted above, however, the power to extend the time will be exercised only if an extension is sought in the warrant application and the application specifies the applicant's grounds for belief that the longer period is necessary.

Warrant issued on application by telephone

32. A search warrant issued on application made by telephone or other means of telecommunication expires three days after it is issued.

Report 19, Part Two, rec. 2(9)

COMMENT

The telewarrant is designed for situations in which the need for a warrant is immediate and it is impracticable for the applicant to appear personally before the justice. This being so, we consider the three-day expiration period provided by this section to be ample.

Paragraph (*c*) of subsection 487.1(5) of the *Code* now provides that the justice has a discretion to specify a time period within which the warrant should be executed. Form 5.1, relating to warrants that issue under section 487.1, previously adhered to the format we favour. Initially, Form 5.1 required execution within three days; however, it was recently amended[64] to delete the reference to the three-day expiry period.

In recommending a three-day expiry period in Report 19 (at 93), we drew from empirical research demonstrating that 82.5 per cent of all conventional warrants were

62. Report 19, Part Two at 93; Report 24 at 25-26.

63. Report 24 at 26.

64. *Miscellaneous Statute Law Amendment Act, 1987*, S.C. 1988, c. 2, s. 26.

executed within two days and that 97.1 per cent of warrants on which an expiry date was specified were executed within only one day.

Expiry on execution

33. A search warrant that is executed before the expiry date disclosed in it expires on execution.

COMMENT

Section 33 provides that a warrant expires upon execution, even if it is executed before its specified expiration date.

We have, through the inclusion of this provision, endeavoured to preclude the possibility of multiple successive searches being carried out (within the stated period) with respect to the same person, place or vehicle under the purported authority of a single warrant.

Return of expired warrant

34. If a search warrant expires without having been executed, a copy of the warrant shall have noted on it the reasons why the warrant was not executed, and shall be filed as soon as practicable with the clerk of the court for the judicial district in which it was issued.

Report 19, Part Two, rec. 2(9)(*a*)
Report 27, rec. 2(2)
Criminal Code, s. 487.1(9)(*a*)

COMMENT

This provision, which serves the principle of accountability, is largely self-explanatory. Except in the case of telewarrants,[65] the present law does not require a report to a supervising authority where a warrant is not executed. Section 34 would change this situation by requiring an explanation whenever any search warrant (telephonic or otherwise) goes unexecuted.

DIVISION IV
EXECUTION OF SEARCH WARRANT

Who may execute warrant

35. A search warrant may be executed in the province in which it is issued by a peace officer of the province.

Report 24, s. 11(1)

65. See *Criminal Code*, s. 487.1(9)(*a*).

COMMENT

The current provisions of the *Criminal Code* contain differing formulations describing who may execute a search warrant. Some are silent on the subject. Section 103, although it envisions an application "by or on behalf of the Attorney General," does not specify by whom a warrant must be executed. Sections 164, 320 and 395 do not say by whom warrants must be executed either. Section 199 specifies execution by "a peace officer," and section 487.1 says that a justice "may issue a warrant to a peace officer." Section 487 envisions execution of a warrant issued thereunder by "a person named therein or a peace officer." (This latter provision has been interpreted as allowing a warrant to be issued to all peace officers in a given province.[66])

Warrants issued under the *Narcotic Control Act* and the *Food and Drugs Act* must be executed by a "peace officer named therein." Accordingly, although more than one officer may execute such warrants under the supervision of a named officer who is present, a general direction or failure to name would invalidate the warrant.[67]

This section restricts the execution of search warrants to peace officers. It is premised on our view that the rarely used power of private individuals to execute warrants (where it exists) is unnecessary, and that searches should be conducted by disinterested persons.[68] Although the section requires that the executing officer be a peace officer of the province in which the search warrant is issued, we see no legitimate interest served by restricting execution to a named peace officer.[69] Such a restriction cannot lessen the intrusiveness of a search. Also, the justice is not normally in a position to evaluate the particular fitness of a named person to execute the warrant. The decision is an administrative one that is best left to the appropriate police force.

Execution in different province

36. (1) A search warrant may be executed in another province if it is endorsed by a justice of that province.

Endorsement by justice

(2) The justice may endorse the warrant if it was issued on application made in person and the justice is satisfied that the person, place or vehicle to be searched is in the province.

Form of endorsement

(3) The endorsement shall be in the prescribed form.

66. *R.* v. *Solloway and Mills* (1930), 53 C.C.C. 271 (Ont. C.A.).

67. See *R.* v. *Genest*, [1989] 1 S.C.R. 59; *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

68. See Report 24 at 24.

69. In *R.* v. *Genest*, *supra*, note 67 at 84, the Supreme Court described the naming requirement in drug searches as being "important", because it establishes an accountability mechanism to balance the extensive extra powers now given to officers to search private dwellings for drugs. Since these extraordinary powers are eliminated in this scheme and new accountability mechanisms are added with respect to all searches, a counterbalancing naming requirement is no longer necessary.

Effect of endorsement

(4) The endorsement authorizes peace officers of the province in which the warrant was issued or endorsed to execute the warrant in the province in which it was endorsed.

Criminal Code, s. 487(2), (4)

COMMENT

Section 487(2) of the current *Criminal Code* implies that a search warrant may not be executed outside of the territorial division of the justice who issues it, even if the location of the intended search is in the same province, unless the warrant is first "endorsed . . . by a justice having jurisdiction in [the] territorial division" where the target "building, receptacle or place" is located. "Endorsement" is basically an administrative requirement; in practical terms, it is a signature that has the effect of indicating the approval of a judicial officer in the location of the intended search.

Section 7 (for reasons explained in the comment to that section) allows a search warrant to be executed, without further endorsement, at any location within the province of issuance. Subsection (1) of section 36 complements that provision by allowing a warrant to be executed extraprovincially after it has been endorsed. We have retained an extraprovincial endorsement requirement to ensure that justices are made aware of, and are given some say in, the execution of search warrants within their province.

Subsection (2) elaborates and, in our view, improves upon subsection 487(2) of the present *Code* by clearly articulating a test for the justice to apply in determining whether to endorse the warrant.

Subsection (3) is self-explanatory. It is the equivalent of the current requirement in subsection 487(2) that an endorsement be "in Form 28."

Subsection (4) is self-explanatory, and is the equivalent of subsection 487(4) of the current *Code*.

The endorsement and execution of search warrants issued on application made by telephone or other means of telecommunication outside of the province of issuance is not allowed under this scheme. Taking the time to appear before a justice in another province to have a warrant endorsed would be incompatible with the function of such warrants as devices to be used in cases where a personal appearance is not practicable. If there is time to appear, this kind of application is not appropriate; if there is no time to appear, telewarrant applications can be made in the province of intended execution.

Power under warrant

37. A peace officer may, under the authority of a search warrant,

(*a*) search a person, place or vehicle specified in the warrant;

(*b*) search a person who is found in a place or vehicle specified in the warrant if the officer believes on reasonable grounds that the person is carrying or concealing the

object of seizure or the confined person identified in the warrant;

(*c*) seize anything believed on reasonable grounds to be the object of seizure identified in the warrant; and

(*d*) retrieve any person believed on reasonable grounds to be the person identified in the warrant as a confined person.

Report 24, ss. 5, 24(*a*), (*b*), 28(1)

COMMENT

Section 37 defines the scope of the authority to search and seize under a warrant.

Paragraph (*a*) is self-explanatory.

Paragraph (*b*) is drafted so as to ensure that warrants to search places or vehicles are not frustrated simply because the objects of seizure (or the confined persons) sought are being carried or concealed by persons who are present at the time of execution. Currently, where a warrant issued under section 487 of the *Criminal Code* authorizes the search of a place, a person who happens to be in the place at the time of the search may not be searched under the authority of the warrant even if the officer believes on reasonable grounds that the person is carrying a thing specified in the warrant.[70] In our view, the present law is unnecessarily restrictive. Personal search should not always be regarded as a distinct intrusion requiring independent authorization. An important investigation can be totally frustrated by the artificiality of the line that is presently drawn.[71] Accordingly, paragraph (*b*) provides a power to search persons found in the place or vehicle specified in a warrant, incidental to the search of the place or vehicle. It does not, however, confer a general power to search all persons found in the target place or vehicle; the authority is conditional on the officer's reasonable belief "that the person is carrying or concealing the object of seizure or the confined person identified in the warrant."

Paragraphs (*c*) and (*d*) permit an officer having reasonable grounds to seize objects or retrieve confined persons under the authority of a warrant. Other objects of seizure, in order to be seizable, must fall within the "plain view" rule set out in sections 48 and 49.

Execution by day

38. A peace officer shall execute a search warrant during the period beginning at 0600 hours and ending at 2100 hours,

70. See, for example, *R.* v. *Ella Paint* (1917), 28 C.C.C. 171 (N.S.S.C.); *R.* v. *Mutch* (1986), 26 C.C.C. (3d) 477 (Sask. Q.B.).

71. This in turn may lead officers to seek alternative justifications to conduct personal searches. For example, an unnecessary arrest may occur so as to allow the officer to conduct a personal search incident to that arrest.

unless the issuing justice has, by the warrant, authorized its execution during the night.

Report 24, s. 12
Criminal Code, s. 488

COMMENT

See the comment to paragraph 24(g) and section 28.

Execution in presence of occupier

39. A peace officer shall execute a search warrant in the presence of a person who occupies or is in apparent control of the place or vehicle being searched, unless it is impracticable to do so.

COMMENT

Under our proposed law, a search is generally not to be conducted by stealth or in the absence of parties affected by the search or having an interest in the things to be seized.[72] Section 39 is designed, as far as possible, to provide occupiers or persons in apparent control of searched places or vehicles with first-hand knowledge of the fact of the search and of the manner in which it is conducted. This enables them, among other things, to ascertain that search methods are no more drastic than they need to be. If the occupier or person in apparent control of a house is present during a search, for example, he or she may wish to supply the police with the keys to locked cupboards or cabinets, and so forth, that might otherwise be forced open and damaged in the process. The personal presence of an affected party also provides a means of ensuring that only that which is authorized to be seized is taken and that no unnecessary rummaging occurs. The section thus promotes accountability in the execution of search warrants.

Providing copy of warrant

40. (1) A peace officer shall, before starting a search or as soon as practicable, give a copy of the warrant

(*a*) in the case of a warrant to search a person, to the person; or

(*b*) in the case of a warrant to search a place or vehicle, to a person present and in apparent control of the place or vehicle.

Report 19, Part Two, rec. 2(7)
Report 24, s. 15(1)
Criminal Code, s. 487.1(7)

72. Some searches, of course, will have to be carried out in the absence of any other person. Searches of open fields or abandoned property are examples of this. Also, if the owner or occupier is missing or his or her whereabouts cannot be ascertained, then it will be impractical to insist upon his or her presence during the search.

Copy in unoccupied place or vehicle

(2) A peace officer who executes a warrant to search a place or vehicle where there is no person present and in apparent control shall, when the search is done, indicate on a copy of the warrant the date and time of the search and whether anything was seized, and shall affix the copy of the warrant in a prominent location in the place or vehicle.

Report 19, Part Two, rec. 2(8)
Report 24, s. 15(2)
Criminal Code, s. 487.1(8)

COMMENT

The purpose of this section to inform the individual affected by a search conducted pursuant to a search warrant as to the scope and purpose of the search, and to assure that individual (at the earliest time practicable) that the search is one for which there has been prior judicial authorization.[73] This information and assurance should, in many cases, make the job of peace officers easier.[74] Although the requirements of this provision may cause minor inconvenience to peace officers in some instances, we believe that the overall benefit, both to peace officers and to persons affected by search warrants, outweighs any possible disadvantages.[75]

Subsection 29(1) of the current *Criminal Code* (the heading to which refers only to arrest situations) makes it "the duty of everyone who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so." Subsections (7) and (8) of section 487.1 of the *Code* contain provisions, applicable to peace officers executing telewarrants, other than those issued under subsection 258(1), that are very similar to section 40 of our proposed legislation. Like subsections (7) and (8) of section 487.1, section 40 goes beyond what is currently provided for in subsection 29(1) of the *Code*. Section 40 does not require that a request for a copy of the warrant be made by the affected person before being entitled to it. Also, the section is not conditional upon it being feasible for the officer to have the search warrant with him or her when executing it; section 40 requires the officer to have a copy of the warrant available at the time of the search.

Finally, the section requires generally that a copy of the warrant should be provided before the search is started, when information and assurance would be of most benefit.[76]

Subsection (2) sets out requirements for posting the warrant when it is executed in a place or vehicle where there is no person present and in apparent control. It is self-explanatory.

73. See Report 24 at 27-28.
74. *Ibid.* at 28.
75. *Ibid.*
76. *Ibid.*

DIVISION V
EVIDENTIARY RULE WHERE ORIGINAL OF WARRANT ABSENT

Absence of original warrant

41. In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant.

Report 19, Part Two, rec. 2(12)
Criminal Code, s. 487.1(11)

COMMENT

In this scheme, a justice who issues a warrant on an application made by telephone or other means of telecommunication retains the original. The applicant either receives two transmitted copies or prepares two copies by hand on the direction of the issuing justice. In these circumstances, the original warrant is not in the possession of the officer when the search is conducted and there is a potential for error in the process of preparation of the warrant by the applicant. It is therefore essential that the original warrant be before the court when review of the legality of the warrant or its execution takes place.

Section 41 partly mirrors subsection 487.1(11) of the current *Criminal Code*. The *Code* section provides that the absence of either the transcribed and certified information on oath or the original warrant is, in the absence of evidence to the contrary,[77] proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication. Section 41, however, provides that only the absence of the original warrant will, in the absence of evidence to the contrary, provide such proof. This change avoids a potential anomaly that could result from the present subsection, *i.e.*, a finding that a search has not been authorized by a warrant issued on such application (because the information on oath cannot be found) even though the original warrant is before the court.

77. See *R.* v. *Titus*, 20 September 1988 (N.B. Prov. Ct.), [unreported]. There it was suggested (at 35 of the original judgment) that "evidence to the contrary" might be "a verbatim record of the entire transaction" and not simply the oral recollection on oath of a police officer.

CHAPTER III
SEARCH AND SEIZURE WITHOUT A WARRANT

DIVISION I
SEARCH AND SEIZURE IN EXIGENT CIRCUMSTANCES

Power to search

42. (1) A peace officer may, without a search warrant, search a person, place or vehicle for an object of seizure or a confined person if the officer believes on reasonable grounds that

(*a*) the object of seizure or confined person will be found on the person or in the place or vehicle; and

(*b*) the delay involved in obtaining a warrant would endanger anyone's life or safety.

Power to seize

(2) The peace officer may seize anything believed on reasonable grounds to be the object of seizure, or retrieve any person believed on reasonable grounds to be the confined person, found in the course of the search.

Report 24, ss. 21, 28(1)

COMMENT

Section 42 defines the limit of the power to search in exigent circumstances outside of the context of an arrest, and reflects the Commission's view that some sacrifices of warrant protections are justified when life or safety would otherwise be endangered.

The power provided by section 42 allows, without a warrant, only searches that could otherwise be authorized by warrant. The power to stop conferred here is triggered by the satisfaction of an onerous test.[78]

Once a search is authorized under this test, the scope of the power to search is defined by sections 16 to 19 and 50.

78. The power provided by s. 42 is not a power to "stop and frisk," as developed in the United States. There, the stop and frisk law authorizes "investigatory stops" of persons in public places where there is a "reasonable suspicion" (the suspicion must be particular and objective rather than general or a "hunch") that a crime has been, or is about to be, committed. Once an authorized "stop" occurs, a "protective frisk" (something less than a "full" search) is authorized if there is a reasonable apprehension for the officer's safety. The "frisk" is limited to what is necessary to discover weapons that might be used to harm the officer or others nearby, and generally may not exceed a "pat down" of outer clothing. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Sibron* v. *New York*, 392 U.S. 40 (1968).

Section 42 subsumes the powers to seize weapons and explosives now found in sections 101, 102 and 492 of the *Criminal Code*.

DIVISION II
SEARCH AND SEIZURE INCIDENT TO ARREST

Protective search

43. Anyone who has arrested another person may, incident to the arrest and without a search warrant, carry out a protective search of the person.

Report 24, s. 20(*a*)

COMMENT

This section should be read in conjunction with section 17, which defines the scope of the power to carry out a protective search.

Searches made incident to arrest, without warrant, likely constitute the vast majority of all searches in Canada. Recent case law has tended to broaden this common law power. Originally intended for self-protection, to prevent an apprehended escape or to prevent the imminent destruction of evidence, the Supreme Court of Canada has now declared the existence of a police discretion to use the power to frisk search the arrested person for evidence as well as for weapons, even in the absence of reasonable grounds to believe that the weapons or evidence will be found.[79]

We believe that this power should be codified and that clear and precise conditions for its exercise should be established. The general guiding principle is, again, that the scope of a search permitted incident to arrest should be defined and limited by its authorized purpose. The purpose should, in turn, bear some relationship to the fact that the search is taking place in the context of an arrest.

Section 43 recognizes that an arrest carries with it the possibility that the arrested person may react unpredictably and violently. The authority to arrest must carry with it the power to arrest effectively and to cope with any dangerous action or attempted escape the arrest may provoke. Section 17, consistent with the approach of the Supreme Court of Canada in the *Cloutier* case, defines the scope of the protective search power in terms of these goals. Because of the potential for unpredictable reactions, the power may be exercised pre-emptively and need not be based on reasonable grounds for belief that the arrested person in fact possesses anything that may help him or her to escape or that could cause danger. In our view, a measured power to act to prevent escape and protect life or safety in the context of an arrest outweighs the interest of the arrested person in maintaining the inviolability of his or her person.

79. See *Cloutier* v. *Langlois, supra*, note 37; *R.* v. *Morrison* (1987), 58 C.R. (3d) 63 (Ont. C.A.); *R.* v. *Miller* (1987), 62 O.R. 97 at 100-101.

Additional power of peace officer

44. A peace officer who has arrested a person may, incident to the arrest and without a search warrant,

(*a*) if the officer believes on reasonable grounds that an object of seizure will be found on the person and that the delay involved in obtaining a warrant would result in the loss or destruction of the object of seizure, search the person for the object of seizure and seize anything believed on reasonable grounds to be the object of seizure; or

Report 24, s. 19

(*b*) if the person is in present control of, or is an occupant of, a vehicle and the officer believes on reasonable grounds that an object of seizure will be found in the vehicle and that the delay involved in obtaining a warrant would result in the loss or destruction of the object of seizure, search the vehicle for the object of seizure and seize anything believed on reasonable grounds to be the object of seizure.

Report 24, s. 22

COMMENT

Section 44 provides an additional power to conduct personal or vehicular searches, incident to arrest, in relation to objects of seizure. As previously discussed in the comment to section 16, it confines the availability of the power to cases in which the peace officer has a reasonably grounded belief that he or she will find an object of seizure on the person or in the vehicle that is in the present control of, or is occupied by, the arrested person and that the obtaining of a warrant would be impracticable. In our view, this test fulfils both the letter and spirit of the *Charter* without impeding law enforcement. The guiding principle that powers to search should be defined by, and be proportional to, the authorized purposes of the search again applies.

DIVISION III
SEARCH WITH CONSENT AND SEIZURE

Power to search

45. (1) A peace officer may search without a warrant

(*a*) a person or anything carried by the person if the person consents to the search; and

(*b*) a place or vehicle with the consent of a person who is present and in apparent control and who is apparently competent to consent to the search.

Report 24, s. 18(1)

Restriction on consent under this Part

(2) A person may not consent, under this Part, to a search for an object of seizure inside the person's body.

COMMENT

The common law has tolerated searches with consent on the basis that consent amounts to a waiver of the normal legal protections against the intrusion, including the need to establish sufficient legal grounds for the action and the need to fulfil required procedural conditions. Before enactment of the *Charter*, Canadian case law on the specific issue of consent searches was almost non-existent. In essence, mere co-operation with the police in allowing a search was considered to amount to consent and little attention was given to the motives for, or circumstances of, that co-operation.[80] However, the Supreme Court of Canada adopted a different approach in setting out principles governing the general issue of waiver of statutory procedural guarantees. The Court held that such waivers should be clear and unequivocal, made with full knowledge of the rights that the guarantees are designed to protect, and with an appreciation of the consequences of giving up those rights.[81] Similar principles were then applied by the Court in considering the question of the waiver of constitutional or *Charter* guarantees, such as the right to counsel before police questioning.[82]

These principles may also be properly applied to the question of waiver or consent in the context of a search. The failure of the law to establish procedural safeguards for consent searches may frustrate accountability, encourage the use of trickery and ultimately undermine citizen co-operation with police investigations. The *Charter* also makes it desirable to codify consent procedures as a way of ensuring that consent searches are reasonable.

Subsection (1) of section 45 establishes the general legitimacy of consent searches — whether of persons, the things they are carrying or the places and vehicles they control. Subsection (2) limits the scope of section 45, making it inapplicable to the types of personal searches for objects of seizure that are dealt with as investigative procedures under Part Three (*Obtaining Forensic Evidence*). That Part has its own procedures governing consent.

Information required to be disclosed

46. (1) When asking a person for consent, a peace officer shall tell the person

(*a*) what crime is being investigated;

(*b*) what the officer is looking for;

(*c*) what the proposed search will involve; and

(*d*) that consent may be refused or, if given, may be withdrawn at any time.

Report 24, s. 18(2)

Form of consent

(2) Consent may be given orally or in writing.

Report 24, s. 18(3)

80. See *Reynen* v. *Antonenko* (1975), 20 C.C.C. (2d) 342 (Alta. S.C.T.D.) at 348-349.

81. See, for example, *Korponay* v. *Attorney General of Canada*, [1982] 1 S.C.R. 41.

82. See *Clarkson* v. *R.*, [1986] 1 S.C.R. 383; *R.* v. *Manninen*, [1987] 1 S.C.R. 1233, *per* Lamer, J. at 1241-1244. See also *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, re: waiver of right to a jury trial.

COMMENT

To be legally effective, a consent must be voluntary and informed. This is our minimum standard.

Subsection (1) of section 46 establishes, in detail, the information that the peace officer must give to the person whose consent is sought.

Subsection (2) recognizes that it may not always be practicable to obtain a written consent.

Power to seize

47. The peace officer may seize anything believed on reasonable grounds to be an object of seizure, or retrieve any person believed on reasonable grounds to be a confined person, found in the course of the search.

Report 24, s. 18(1)

COMMENT

This section gives the express power to seize things (or retrieve confined persons) found during a consensual search. The power to seize (or retrieve) is not contingent on the subject's consent.

CHAPTER IV
SEIZURE OF OBJECTS IN PLAIN VIEW

Power to seize

48. (1) Where a peace officer engaged in the lawful execution of duty discovers in plain view anything believed on reasonable grounds to be an object of seizure, the officer may seize it.

Report 24, s. 25

Private premises

(2) Subsection (1) does not confer authority to enter private premises.

COMMENT

Sections 48 and 49 are designed to provide peace officers with the authority to seize objects of seizure that they discover while lawfully executing their duty. A peace officer searching premises for stolen goods may discover a cache of illegal drugs or, when arresting an individual, may see a prohibited weapon close by (but not within the reach of the person and therefore not seizable incident to arrest by virtue of sections 17 and 43). A power to seize such items when they are discovered in plain view is an obvious necessity.

Section 489 of the *Criminal Code* now enables anyone executing a section 487 or 487.1 search warrant to seize things not covered by the warrant if they are reasonably believed to have been "obtained by or . . . used in the commission of an offence." This

power, it has been argued, does not allow the seizure of mere evidence. For such evidence, another warrant would have to be sought; in the interim, the things discovered in plain view might be lost or destroyed.

In Report 24 (at 42-43), we rejected a proposal that would have permitted the seizure of all objects of seizure found in the course of a search. We were concerned that such a rule might encourage arbitrary seizures and, in effect, invite peace officers to conduct "fishing expeditions" for objects totally unrelated to the original justification for search. We remain of the view that adoption of a "plain view" rule would provide a balanced solution and would prevent such general exploratory intrusions into the privacy of individuals.

Certain elements of the American "plain view doctrine" have been incorporated into these provisions. First, there must be prior legal authority for the intrusion that provides the "plain view." An officer who sees an object of seizure in a house while on the street "walking the beat" and looking through the window of a house would still have to obtain a warrant; seeing the object does not, in itself, authorize an entry onto private property. On the other hand, if the officer is already in the house pursuant to a warrant authorizing a search for specified things, other objects of seizure in plain view may be seized without warrant. This element of the rule is codified in section 48. Second, consistent with earlier authorities but contrary to recent American Supreme Court jurisprudence, discovery of the object must be inadvertent. This means that the discovery was not anticipated and that the police did not know in advance the location of the evidence and intend to seize it. Where the police have prior knowledge, they should obtain a warrant. This aspect of the rule is embodied in the term "discovers" used in section 48. Third, it must be immediately apparent to the police, by the visual sighting and without the manipulation or movement of the object, that they have an object of seizure before them. This requirement, set out in section 49, prevents unjustifiable rummaging. By contrast, a search for specified objects under a warrant does comprehend a movement or manipulation of other objects so as to reveal or uncover the objects sought. If, in the course of a search with a warrant, movement or manipulation occurs and other unanticipated objects of seizure come into plain view, they are seizable, provided, of course, that the search itself was not a mere pretext for general rummaging. The manner in which the search itself was conducted also has a bearing on this. One cannot, for example, search in desk drawers when looking for stolen television sets. Where this occurs, the searcher is in fact engaging in a fishing expedition and the view of potentially seizable objects thus provided is not legally sufficient to justify the seizure of those objects. These aspects of the rule emerge on a proper construction of section 48.

If all of the requirements of the "plain view" rule are satisfied, objects of seizure so found may be seized without a warrant.[83]

Object of seizure not in plain view

49. An object of seizure is not in plain view if movement or manipulation of it is required in order for the peace officer

83. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), at 466-471; *Horton* v. *California*, 110 S. Ct. 2301 (1990); *R. v. Askov* (1987), 60 C.R. (3d) 261 at 270-271 (Ont. Dist. Ct.); *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 (Sask. C.A.).

to acquire reasonable grounds for believing it to be an object of seizure.

COMMENT

See the comment to section 48.

CHAPTER V
EXERCISING SEARCH AND SEIZURE POWERS

Manner of carrying out search

50. (1) A search of the person shall be carried out in a manner that respects the dignity of the person and that, having regard to the nature of the search and the circumstances,

(*a*) involves as little intrusion as is reasonably practicable; and

(*b*) provides as much privacy as is reasonably practicable.

Report 25, rec. 11

Waiver of requirements

(2) A person who is to be searched may waive the requirement set out in paragraph (1)(*a*) or (*b*), orally or in writing.

COMMENT

Section 50 is a prescription of common sense that applies whenever a personal search is undertaken. While recognizing that the specific purpose of the search must, to some extent, define the manner in which it is conducted, it seeks to minimize the intrusion and loss of privacy occasioned by the search. Where, for example, a person is to be searched for a particular and identifiable object of seizure, this section (when combined with paragraph 16(*f*)) would require that the person's clothing be removed in stages (as opposed to all at once) until the object is found or discovered not to be present.[84] It would also require, whenever feasible, that the search be conducted out of public view, and by an officer of the same sex as the person being searched.

Insofar as it requires that the dignity of searched persons be respected, section 50 is also the embodiment of a fundamental principle. In practical terms, this principle would require basic decency and courtesy, and would prohibit behaviour that is calculated to degrade the subject of a personal search.

A significant deviation from the requirements of this section could well be unconstitutional and might, in any event, result in the exclusion of evidence seized. The remedies applicable to breaches of provisions of this Code are considered in a forthcoming Commission Working Paper, and will be the subject of a separate Part of this Code.

84. See *R.* v. *Simmons*, [1988] 2 S.C.R. 495.

Subsection 50(2) is self-explanatory. For further discussion of the subject of waiver, see the comment to section 45.

Obtaining assistance to search

51. A peace officer who carries out a search may obtain the assistance of any person whose assistance the officer reasonably believes is necessary to carry out the search effectively.

Report 24, s. 11(2)

COMMENT

In some cases, the assistance of a private individual (for example, an accountant in a search related to a complex commercial crime) may both improve the effectiveness of a search and minimize the intrusion suffered. Section 51 does not change the present law[85] but is included clearly to give the officer a discretion, without the need for special or additional authorization, to obtain any assistance reasonably believed to be necessary.

Under our proposed Criminal Code, no duty is imposed on citizens to assist in the carrying out of searches.[86] Accordingly, anyone who fails or refuses to assist an officer in conducting a search does not commit the crime of obstruction under our proposed Criminal Code.[87]

Demand to enter private premises

52. A peace officer who is authorized to enter private premises to carry out a search shall, before entering the premises, identify himself or herself as a peace officer, make a demand to enter, state the purpose of the entry and allow the occupant a reasonable time to let the officer in, unless the officer believes on reasonable grounds that doing so would result in the loss or destruction of an object of seizure in relation to which the search is authorized, or would endanger anyone's life or safety.

Report 24, s. 27(1), (2)

COMMENT

Section 52's requirement of the making of a "demand to enter . . ." and the stating of the purpose of entry codifies and expands upon the common law applicable to searches of dwelling-houses.[88] It is our belief that an equally legitimate expectation of privacy extends to all private premises (including, for example, offices),[89] and not

85. See *R.* v. *Strachan*, [1988] 2 S.C.R. 980.

86. This may be contrasted with the duty imposed to take reasonable steps, on request, to help a public officer in the execution of his or her duty to arrest a person. See Report 31, rec. 25(3).

87. Report 31, rec. 25(1) and at 116-117.

88. *Semayne's Case* (1604), 5 Co. Rep. 91a, at 91b; *Wah Kie* v. *Cuddy* (1914), 23 C.C.C. 383 (Alta. C.A.); *R.* v. *Landry*, [1986] 1 S.C.R. 145; *Eccles* v. *Bourque*, [1975] 2 S.C.R. 739.

89. See *R.* v. *Rao* (1984), 40 C.R. (3d) (Ont. C.A.), *per* Martin, J.A. at 32-33.

merely to residential private premises. The requirement that the occupant be given a reasonable time to let the officer in follows reasonably from the requirement that the demand be made and the purpose of entry stated.

This section, however, dispenses with the need to make the demand, and so forth, in circumstances where, we believe, an overriding interest must be protected.[90] If circumstances render it illogical to insist on a demand being made, or if the occupant does not respond to the officer's demand within a reasonable time, the use of force to enter is authorized. The degree of force that may be resorted to in these circumstances is regulated by subsection 23(1) of our proposed Criminal Code.[91]

In drug searches, reliance on the above exceptions to the "demand" requirement will likely be frequent. However, the qualifications built into this section reflect a different, more structured approach from that now evident in section 14 of the *Narcotic Control Act* and subsection 42(5) and section 51 of the *Food and Drugs Act*. Those provisions authorize, without requiring prior notice or demand, the breaking open of virtually anything during the course of a search for drugs under those Acts.

Opportunity to make claim of privilege

53. (1) No peace officer, or person assisting a peace officer, who knows of the possible existence of a privilege in respect of a thing or in respect of information contained in a thing shall examine or seize the thing or examine the information without affording a reasonable opportunity for a claim of privilege to be made.

Report 27, rec. 3(5)
Criminal Code, s. 488.1(8)

Procedure if claim made

(2) If a privilege is claimed, the officer shall, without examining the thing or the information or having it photographed or copied,

(*a*) seize the thing by taking control of it, and take steps to ensure that the thing or the information contained in it is not examined or interfered with; or

(*b*) seize the thing by taking possession of it, place it in a package, suitably seal and identify the package and place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is an agreement in writing between the officer and the person claiming the privilege that a specified person will act as custodian, in the custody of that person.

Report 27, rec. 3(5)
Criminal Code, s. 488.1(2)

90. See *Eccles* v. *Bourque*, and *Wah Kie* v. *Cuddy*, *supra*, note 88.

91. See Report 31 at 178-179 and rec. 3(13)(*a*) at 38-40. Section 23(1) of the proposed Criminal Code (LRC) protects from criminal liability any person who "performs any act that is required or authorized to be performed by or under an Act of Parliament or an Act of the legislature of a province; and . . . uses such force, other than force used for the purpose of killing or inflicting serious harm on another person, as is reasonably necessary to perform the act and as is reasonable in the circumstances."

Custodian of seized thing

(3) The peace officer who seizes the thing by taking control of it, or the sheriff or person in whose custody the sealed package is placed, is the custodian of the seized thing for the purposes of Part Seven (*Privilege in Relation to Seized Things*).

COMMENT

Section 53 regulates the general manner of seizing and dealing with property in respect of which a claim of privilege might be made. The purpose is to preserve that privilege while causing minimal interference with the power to search.

Subsection 53(1) continues and expands upon subsection 488.1(8) of the present *Criminal Code*. The current provision applies only when documents are to be examined, copied or seized, and only when the documents are in the possession of a lawyer who claims that a named client has a solicitor-client privilege. In contrast, subsection 53(1) applies whenever a seizing officer knows that a privilege may be claimed by anyone in relation to any thing or any information recorded on a thing, regardless of who possesses the thing. The new formulation ensures that the special procedures of subsection 53(2) protect all things and forms of information in respect of which a claim of privilege may be asserted.

Subsection 53(2) establishes the procedure applicable when a privilege is claimed in relation to anything that an officer is about to seize. The sealing procedure has been designed so as to prevent a breach of a claimed privilege before the validity of the claim can be determined. Paragraph 53(2)(*a*) is drafted to take into account things for which the sealing provision is impracticable. The sealing procedure now set out in subsection 488.1(2) of the *Criminal Code* is basically continued in paragraph 53(2)(*b*).

Part Seven (*Privilege in Relation to Seized Things*) regulates the procedure for hearing and deciding the merits of the privilege claim. It also regulates disposition of the seized things once the validity of the claim is determined. (Disposition is now governed by subsections (3) to (11) of section 488.1 of the *Criminal Code*.)

Return of seized weapons

54. (1) A peace officer who, during a protective search, seizes anything believed to be a weapon or instrument of escape shall have the thing returned to the person from whom it was seized as soon after the seizure as it is safe and practicable to do so, unless seizure or retention of the thing is otherwise authorized.

Delivery of seized weapons to peace officer

(2) If a person other than a peace officer seizes, during a protective search, anything believed to be a weapon or instrument of escape, the seized thing shall be delivered, as soon as practicable, to a peace officer to be dealt with in accordance with subsection (1).

COMMENT

Section 54 provides a simple and straightforward mechanism for the return of items seized temporarily during protective searches conducted by either peace officers or private citizens. It recognizes that when things are seized solely as a precautionary measure (for example, a nail file with a sharp point may present a potential danger), the need to retain them generally disappears once the investigatory encounter is at an end or the risk has subsided.[92]

92. The provision is designed to avoid the necessity of treating anything removed in the course of a protective search as a seized thing that must be retained and only returned in accordance with the provisions of Part Six (*Disposition of Seized Things*).

PART THREE

OBTAINING FORENSIC EVIDENCE

DERIVATION OF PART THREE

LRC PUBLICATIONS

Investigative Tests, Working Paper 34 (1984)

Obtaining Forensic Evidence, Report 25 (1985)

Classification of Offences, Working Paper 54 (1986)

INTRODUCTORY COMMENTS

Part Three establishes a scheme to regulate certain investigative procedures that are not regulated by other Parts of this Code and that use the suspected or accused person as a source of incriminating evidence. It deals with procedures, as section 55 puts it, that are "carried out by or at the request of a peace officer for the purpose of obtaining evidence or information relating to a person's responsibility for the commission of a crime, in a manner that requires physical contact with the person or the person's participation in the procedure and awareness of that participation." Included within the ambit of this Part are such diverse procedures as the examination of a person's body for identifying marks, the making of dental impressions, the taking of hair or blood samples, and the employment of physical performance tests. It does not deal, as section 55 also states, with "an investigative procedure that merely involves questioning the person, searching the person pursuant to Part Two (*Search and Seizure*) or taking samples of the person's breath or blood pursuant to Part Four (*Testing Persons for Impairment in the Operation of Vehicles*)." The rules governing such procedures, as section 55 suggests, are to be found in other Parts of this Code.

Very few of the investigative procedures to which this Part relates are now the subject of clear statutory regulation in Canada. Many are conducted only through the uninformed or unwitting co-operation of the subject or the ingenuity of investigators. There is no clear or comprehensive statute law regulating when such procedures may be used, how they should be performed, or what the rights and obligations of prospective subjects are.

The common law also fails to be clear and comprehensive in regulating investigative procedures. For example, there is no common law (or statutory) basis in Canada for issuing a search warrant to extract evidence from a human body by means of surgery;[93] the taking of blood samples from a suspect without consent or statutory authority has been held to constitute an unreasonable search and seizure;[94] and the cases are conflicting as to whether hair samples may be seized from a person in the course of a search incident to arrest.[95] Other issues — for example, the precise scope of police powers to remove concealed, indigenous or other substances from the body, the extent to which police powers to arrest and investigate include the power to forcibly administer investigative procedures,[96] and the consequences of a suspect's failure or refusal to co-operate with investigators[97] — have not been fully clarified or resolved.

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93. *Re Laporte and The Queen* (1972), 8 C.C.C. (2d) 343 (Que. Q.B.).

94. *R.* v. *Pohoretsky*, [1987] 1 S.C.R. 383.

95. See *R.* v. *Alderton* (1985), 44 C.R. (3d) 254 (Ont. C.A.); *R.* v. *Legere* (1988), 43 C.C.C. (3d) 502 (N.B.C.A.).

96. The law is unclear as to compulsory inclusion of a suspect in a lineup. See *Marcoux and Solomon* v. *The Queen*, [1976] 1 S.C.R. 763. This case must now be read in the light of the Supreme Court of Canada's decision in *R.* v. *Ross*, [1989] 1 S.C.R. 3. Requiring a suspect to participate in a lineup after his assertion of a desire to consult with counsel is a violation of the *Charter* and resulting evidence of identification should be excluded. See also *R.* v. *Beare*; *R.* v. *Higgins*, [1988] 2 S.C.R. 387, holding that statutory requirements that persons charged but not yet convicted submit to fingerprinting do not violate the *Charter* and expressing *obiter*, at 404, an extremely broad power to strip and examine the body for identifying features incident to arrest.

97. See the discussion and cases cited in Working Paper 34 at 57-60.

One undesirable consequence of the lack of recognition and regulation of police powers of investigation is that prosecutors, seeking to adduce evidence derived from use of the procedures, have had to resort to the common law principle that relevant evidence, even if illegally obtained, is *prima facie* admissible. In our view, it is preferable that evidence in criminal cases be admitted because it is recognized as having been legally obtained by following clearly stated rules.

The purposes of this scheme are: (1) to enhance the certainty, clarity, consistency and accessibility of the law for the benefit of investigators, suspects and the general public; (2) to recognize and effectively regulate the use of a number of modern techniques of criminal investigation; and (3) to balance individual and state interests in a manner consistent with the letter and spirit of the *Canadian Charter of Rights and Freedoms* (section 8).[98] The effectiveness of criminal investigation and law enforcement is maintained and enhanced in a scheme that implements principles of restraint, minimizes opportunities for the police to exercise unnecessary discretion and ensures fairness, equality and accountability.

The approach we have employed may be roughly summarized as follows.

1. With one exception, any investigative procedure to which this Part relates may be carried out by (or at the request of) a peace officer if the subject consents. Conditions are set out for securing a valid consent.
2. Some investigative procedures may be carried out without the subject's consent if a warrant is obtained. The conditions and procedure for obtaining a warrant are clearly spelled out.
3. With the exception of X-ray and ultrasound examinations, the procedures for which a warrant could otherwise be obtained may be carried out without consent or a warrant in exigent circumstances (as we have defined them).
4. A warrant may not be issued to administer "a drug known or designed to affect mood, inhibitions, judgment or thinking," and moreover, a person may not consent to the administration of such a drug if it is to be done (in the words of subsection 55(1)) "by or at the request of a peace officer for the purpose of obtaining evidence or information relating to [that] person's responsibility for the commission of a crime."
5. Certain procedures involving inspection of the surface of the body, except specified private parts, may be carried out without either consent or a warrant, when an arrest is made for a crime punishable by more than two years' imprisonment.
6. Any investigative procedure may be carried out privately by a suspect or an accused person. This scheme does not in any way regulate arrangements for investigative procedures made for defence purposes.

98. For a detailed discussion of the relationship between our scheme and the *Charter* (especially as regards "self-incrimination," the "presumption of innocence," "security of the person," "unreasonable search or seizure," and "cruel and unusual treatment"), see Report 25 at 15-23.

CHAPTER I
INTERPRETATION

Application of Part

55. (1) This Part applies to any investigative procedure that is carried out by or at the request of a peace officer for the purpose of obtaining evidence or information relating to a person's responsibility for the commission of a crime, in a manner that requires physical contact with the person or the person's participation in the procedure and awareness of that participation.

Exception

(2) This Part does not apply to an investigative procedure that merely involves questioning the person, searching the person pursuant to Part Two (*Search and Seizure*) or taking samples of the person's breath or blood pursuant to Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).

Report 25, rec. 1

COMMENT

Section 55 states which investigative procedures are regulated by this Part. It begins, in subsection (1), by specifying that this Part is only concerned with procedures carried out by or at the request of peace officers. It does not, therefore, purport to govern investigative procedures conducted with respect to a suspect or accused at the instance of counsel, and so forth. Moreover, as the term "investigative" suggests, this Part is concerned only with procedures carried out before an adjudication takes place. It does not, for example, apply to search or identification procedures carried out in prisons after conviction and sentence. In that context, such procedures would not be "for the purpose of obtaining evidence or information relating to a person's responsibility for the commission of a crime," nor would procedures or tests carried out for medical purposes (although some activity within the scope of this section could have medical aspects or implications).

Subsection (1) further makes it clear that investigative contacts with victims or witnesses are not regulated here. Only procedures contemplating physical contact with, or the participation of, the person under investigation fall within the scope of these provisions.

Any investigative procedure not involving physical contact must, in order to fall within the scope of this Part, involve "the person's participation in the procedure and awareness of that participation." These words make it clear that procedures carried out surreptitiously or through the use of stratagems are not governed by the particular provisions of this Part.

Standing alone, subsection 55(1), if read literally, might appear to suggest that this Part applies to a number of other investigative procedures that are actually regulated elsewhere in our Code, such as searches and interrogations. Subsection (2) clarifies the

scope of application of the rules contained in this Part of our Code by specifying the procedures that have been excluded from it.

CHAPTER II
INVESTIGATIVE PROCEDURES WITH A WARRANT

DIVISION I
APPLICATION FOR WARRANT

Applicant and nature of warrant

56. A peace officer may apply for a warrant authorizing the carrying out of one or more of the following investigative procedures:

(*a*) the visual inspection of the surface of a person's body;

(*b*) the visual inspection of a person's body cavities and the probing for, removal of and seizure of any object of seizure concealed in a body cavity;

(*c*) the taking of prints or impressions from any exterior part of a person's body;

(*d*) the taking of dental or bite impressions from a person;

(*e*) the taking of hair samples from a person;

(*f*) the taking of scrapings or clippings from a person's finger-nails or toe-nails;

(*g*) the removal of residues or substances from the surface of a person's body by means of washings, swabs or adhesive materials;

(*h*) the taking of saliva samples or swabs from a person's mouth for purposes other than the detection of intoxicating substances;

(*i*) the physical examination of a person by a medical practitioner; or

(*j*) the examination of a person by means of X-rays or ultrasound.

Report 25, rec. 4

COMMENT

In Report 25,[99] we divided investigative procedures into three broad categories: those that were absolutely prohibited; those that could be carried out with consent; and

99. Recommendations 2, 3, 6.

those for which judicial authorization could be obtained or that could be carried out without consent or judicial authorization in exigent circumstances. Following consultations on Report 25, we have modified our scheme by adding a limited power to carry out certain investigative procedures incident to arrest, without consent or a warrant.[100] Also, we have been persuaded to permit a number of procedures previously included in the "absolutely prohibited" category to be carried out pursuant to a warrant or with consent.[101]

The only procedure that we continue to recommend be prohibited is the administration of drugs known or designed to affect mood, inhibitions, judgment or thinking.[102] This prohibition results indirectly from the fact that the procedure may not be conducted even with consent (as specified in section 73), nor does it appear in the section 56 list of procedures for which a warrant may be obtained. However, one procedure which we formerly recommended be prohibited — radiographic or ultrasonic examination (paragraph 56(*j*)) — may now be judicially authorized, subject to considerations of health and safety.

The procedures for which a warrant may be issued are those designed to obtain "real evidence" (in the sense that term was used by the Supreme Court of Canada in the *Collins* case[103]). The inclusion of each represents a balancing of the potential probative value of evidence that may be obtained through its use against the intrusion it involves.

By the terms of section 56, only a peace officer may apply for a warrant to conduct an investigative procedure. In this respect, an investigative procedure warrant application is different from a search warrant application.

Application in person or by telephone

57. (1) An application for a warrant shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally, in private and on oath, orally or in writing.

Form of written application

(3) An application in writing shall be in the prescribed form.

COMMENT

Sections 57 through 59 establish the basic procedure for obtaining this kind of warrant. (See also the provisions in Part One.)

100. See s. 72 and the accompanying comment.

101. See s. 73 and the accompanying comment.

102. See comment to s. 73.

103. *R.* v. *Collins*, *supra*, note 31 at 284.

Section 57 envisions (as is the case in search warrant applications) that the application for a warrant to conduct an investigative procedure will normally be made in person. Once again, however, a telewarrant application may be made if the personal appearance of the applicant is impracticable.

As with the other warrant application provisions in this Code, section 57 provides that the application shall be oral or written, made unilaterally, in private and on oath, and made in a particular form if it is written.

Justice on application in person

58. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on application by telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

COMMENT

Section 58 is identical to section 23, dealing with search warrant applications. Subsection (1) requires the application to be made to a justice in a location having a substantial connection with the investigation, and provides flexibility to the applicant in choosing the place of application.

Subsection (2), consistent with provision concerning other telewarrant applications in this Code, does not specify a place for bringing an application.

Contents of application

59. An application for a warrant shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the person who is to be subjected to the investigative procedure;

(*e*) whether the person has been arrested for, charged with or issued an appearance notice in relation to the crime under investigation;

(*f*) the procedure to be carried out;

(*g*) the applicant's grounds for believing that carrying out the procedure will provide probative evidence of the person's involvement in the crime and that there is no practicable and less intrusive means for obtaining the evidence;

(*h*) if the application is for a warrant for an examination of the person by means of X-rays or ultrasound, the

applicant's grounds for believing that carrying out the examination would not endanger life or health;

(*i*) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;

(*j*) the name of a person or a class of persons believed by the applicant to be competent, by virtue of training or experience, to carry out the procedure;

(*k*) if the applicant, on application made in person, requests authority for the warrant to be executed more than ten days after it is issued, the applicant's grounds for believing that the longer period is necessary; and

(*l*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

COMMENT

For the same reasons that this Code establishes specific requirements for the contents of search warrant applications, section 59 sets out, with precision, the required contents of an application for a warrant to conduct an investigative procedure. The substantive and probative elements of the application are again clearly separated, as in section 24 in Part Two (*Search and Seizure*).

Paragraphs 59(*i*) to (*l*) set out certain elements that supplement the substantive and probative elements of this application. The requirements include specification of the person or class of persons believed to be competent to carry out the procedure, the grounds for seeking a longer than normal expiry period for the warrant and the justification, where necessary, for applying by telephone or other means of telecommunication. These supplement the other formal elements set out in paragraphs 59(*a*) to (*c*).

Paragraphs (*d*) to (*g*) set out the substantive and probative elements of the application, including identification of the intended subject, the fact that the subject has been arrested, charged with or issued an appearance notice in relation to a specified crime under investigation, the procedure to be carried out and the applicant's grounds for belief that carrying out the procedure will provide evidence of the intended subject's involvement in the crime and that there is no practicable and less intrusive means of obtaining the evidence.

Paragraph (*h*) adds a unique probative element that must be considered if an X-ray or ultrasound examination is sought: the applicant's grounds for belief that carrying out the examination will not endanger life or health. This complements subparagraph 60(1)(*b*)(iii), which requires the justice, before approving this application, to be satisfied of this condition.

The clear specification of matters to be included in the application helps to ensure that only reasonable, necessary and expressly justified intrusions are approved. An application containing the proper information will provide an objective reviewable basis for, and record of, the decision.

DIVISION II
ISSUANCE OF WARRANT

Grounds for issuing warrant

60. (1) A justice may, on application, issue a warrant authorizing the carrying out of an investigative procedure listed in section 56 if

(*a*) the person who is to be subjected to the procedure has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment; and

(*b*) the justice is satisfied there are reasonable grounds to believe that

(i) carrying out the procedure will provide probative evidence of the person's involvement in the crime,

(ii) there is no practicable and less intrusive means for obtaining the evidence, and

(iii) if the application is for a warrant for an examination of the person by means of X-rays or ultrasound, the carrying out of the examination would not endanger life or health.

Report 25, rec. 5

Additional ground if application by telephone

(2) If the application is made by telephone or other means of telecommunication, the warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

COMMENT

Section 60 establishes the grounds for issuing a warrant. Paragraph (*a*) of subsection (1) is designed to ensure that bodily intrusions of the type described in section 56 not be judicially authorized in relation to minor offences. In this respect, it is premised on the principle of restraint. The requirement that the grounds exist to justify an arrest or charge or the issuance of an appearance notice is an essential protection against unjustified encroachments on the freedom or personal security of the individual.

Our desire to ensure that unreasonable encroachments on individual freedom be prevented, that personal security be protected, and that the principle of restraint be respected finds expression in the exacting standards of paragraph (1)(*b*).

Subsection (2) is identical to section 26 in Part Two (*Search and Seizure*) and reflects the purpose and exceptional nature of telewarrant applications.

Conditions relating to execution

61. A justice who issues a warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

COMMENT

Section 61 gives a justice the power to impose conditions on the execution of the warrant. The need for such conditions may become apparent in the course of the thorough inquiry that may be conducted on the application.[104] A justice may find it desirable to impose conditions concerning the person or class of persons who will carry out the procedure, requiring that the procedure be carried out by a person of the same sex as the subject, and so on.

Form of warrant

62. A warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

COMMENT

Sections 62 and 63 are included for consistency with the principle of particularity (a principle we have sought to implement in other Parts of this Code). The application of this principle requires that warrants authorizing intrusions into the privacy or bodily security of individuals be precise and readily understandable by all parties affected. Also, they should not be subject to local variations in form or substance. The ultimate goals of these requirements are fairness, accessibility and the prevention of unreasonable or unnecessary intrusions. As with other warrants under this Code, use of a form appropriate to the specific procedure is prescribed. The items to be included in the warrant are self-explanatory.

Section 69 generally requires that the subject of an investigative procedure be given a copy of the warrant before the procedure is carried out. Thus, both investigators and the subject are given a clear statement of what is authorized and required and opportunities for abuses or misinterpretations (which exist whenever the scope of an authority is vaguely stated) are diminished.[105]

Contents of warrant

63. A warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

104. The power is similar to that given a justice who issues a search warrant: see s. 27 and the accompanying comment.

105. See the accompanying comment to s. 40, relating to search and seizure.

(*c*) the person who is to be subjected to the investigative procedure;

(*d*) the procedure to be carried out;

(*e*) any conditions imposed relating to its execution;

(*f*) the date it expires if not executed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

COMMENT

See the comment to section 62.

DIVISION III
EXPIRATION OF WARRANT

Warrant issued on application in person

64. (1) A warrant issued on application made in person expires ten days after it is issued.

Shortening expiration period

(2) A justice who is satisfied that a shorter expiration period is sufficient may issue a warrant with an expiry date that is less than ten days after the date of issue.

Extending expiration period

(3) A justice who is satisfied there are reasonable grounds to believe that a longer expiration period is required may issue a warrant with an expiry date that is more than ten days but not more than twenty days after the date of issue.

COMMENT

We have already noted that the goals of judiciality and particularity require a reasonable proximity between the times of issuance and execution of search warrants and that warrants should be executed under substantially the same circumstances that have prompted the issuer to grant them. Also, research has shown that warrants with fixed expiry dates tend to be executed more promptly than those without them. These observations have equal force and relevance to expiration periods for investigative procedure warrants. Investigative procedures can ordinarily be easily arranged and performed within the ten-day period this Code sets for the execution of search warrants. Ten days, therefore, is the expiration period established in section 64. As with search warrants, power is provided to the justice, under subsections (2) and (3) of section 64, to either shorten or lengthen (to a maximum of twenty days) the expiration period. In considering whether to specify a longer expiration period, the justice will have to have regard to the applicant's grounds for belief that the longer period is necessary (which paragraph 59(*k*) mandates as part of the application). As with search warrants, the justice may also shorten the period on his or her own motion.

In providing, in section 66, that a warrant executed before its expiration date expires on execution, we have attempted to prevent the repetition of a particular investigative procedure under the purported authority of a single warrant. If a warrant authorizes more than one investigative procedure, carrying out any particular procedure only causes the warrant to expire with respect to that procedure.

Warrant issued on application by telephone

65. A warrant issued on application made by telephone or other means of telecommunication expires three days after it is issued.

COMMENT

For telewarrants to conduct investigative procedures, section 65 specifies an expiration period identical to that established in section 32 for searches authorized in the same way. See the comment to section 32 in Part Two (*Search and Seizure*).

Expiry on execution

66. If all of the procedures authorized by a warrant are carried out before the expiry date set out in the warrant, the warrant expires on the date that the last procedure is carried out.

COMMENT

See the comment to section 64.

Expiration of unexecuted warrant

67. (1) If none of the procedures authorized by a warrant is carried out before the warrant expires, a copy of the warrant shall have noted on it the reasons why no procedure was carried out.

Filing copy of warrant

(2) The copy shall be filed as soon as practicable with the clerk of the court for the judicial district in which the warrant was issued.

COMMENT

Subsection 67(1), like section 34, is designed to promote accountability. Subsection 67(2) complements the standard filing requirements for warrants set out in section 13.

DIVISION IV
EXECUTION OF WARRANT

Who may execute warrant

68. A warrant may be executed by a peace officer of the province in which it is issued.

Providing copy of warrant

69. A peace officer shall, before executing a warrant or as soon as practicable, give a copy of the warrant to the person who is subjected to the procedure.

COMMENT

This section imposes a requirement similar to that imposed by paragraph 40(1)(*a*) in relation to warrants to search a person. As the comment to that provision explains, the purpose of the requirement is to assure the affected person (at the earliest time practicable) that the procedure is one for which there has been prior judicial authorization.[106] For further elaboration, see the comment to paragraph 40(1)(*a*).

DIVISION V
EVIDENTIARY RULE WHERE ORIGINAL OF WARRANT ABSENT

Absence of original warrant

70. In any proceeding in which it is material for a court to be satisfied that the carrying out of an investigative procedure was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the carrying out of the procedure was not authorized by a warrant.

COMMENT

Section 70 is similar to the evidentiary provision applicable to search warrants issued on application by telephone or other means of telecommunication (section 41). It is designed, once again, to facilitate later review. Its insistence upon the production of the original warrant in subsequent proceedings emphasizes our belief that while provision for telewarrant applications should be made in an attempt to make our processes more efficient, such processes should raise no questions concerning their rigour or integrity. See also the comment to section 41.

106. See Report 24 at 27-28.

CHAPTER III
INVESTIGATIVE PROCEDURES WITHOUT A WARRANT

DIVISION I
INVESTIGATIVE PROCEDURES IN EXIGENT CIRCUMSTANCES

Grounds for carrying out procedure

71. Where a person has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment, a peace officer may, without a warrant, carry out or have carried out with respect to that person any investigative procedure listed in paragraphs 56(*a*) to (*i*) if the officer believes on reasonable grounds that

(*a*) doing so will provide probative evidence of the person's involvement in the crime;

(*b*) the delay involved in obtaining a warrant would result in the loss or destruction of the evidence; and

(*c*) there is no practicable and less intrusive means for obtaining the evidence.

Report 25, rec. 6

COMMENT

Section 71 creates a limited exception to the requirement that investigative procedures regulated by this Part be carried out only by consent or under the authority of a warrant. These requirements may be dispensed with in exigent circumstances where clear justification, based on grounds specified in this section, exists. Only procedures for which a warrant could otherwise be obtained under section 56, with the exception of examination by means of X-rays or ultrasound (paragraph 56(*j*)), may be carried out under this exception.

Section 71 closely follows Recommendation 6 of Report 25. The following four cumulative conditions must be met before the power may be exercised.

1. The intended subject must have been "arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment." In other words, the officer must already have reasonable grounds to believe that the intended subject has committed the crime. This section does not authorize the conducting of investigative procedures in order to acquire the reasonable grounds for belief necessary to justify an arrest or charge. The only alterations to our previous recommendation[107] are the substitution of "more than two years' imprisonment," for "five years or more" (in

107. Report 25, rec. 6(*a*).

order to conform with the scheme for the classification of offences[108] to be incorporated in this Code), and the addition of a reference to persons who have been "charged . . . or issued an appearance notice." If the criteria of this section are satisfied, we believe the public interest in preventing the loss or destruction of evidence justifies carrying out the procedures even if the subject is not then in custody.

2. The officer must believe, on reasonable grounds, that carrying out the procedure "will provide probative evidence of the person's involvement in the crime." The procedure, therefore, may not be carried out if it merely amounts to a "fishing expedition" based on a hope or mere suspicion that probative evidence will emerge.

3. The officer must believe, on reasonable grounds, "that there is no practicable and less intrusive means for obtaining the evidence." Unreasonable or unnecessary intrusions are not permitted.

4. The officer must believe, on reasonable grounds, "that the delay involved in obtaining a warrant would result in the loss or destruction of the evidence." This requirement will most often be satisfied in the case of persons arrested immediately before the need to conduct the procedure arises, but it could also relate to other circumstances. The availability of an application by telephone or other means of telecommunication for these procedures should narrow the range of occasions in which the peace officer will be able to claim to have the necessary grounds for belief that evidence will be lost or destroyed owing to delay.

It should be noted that the safeguards contained in Chapter IV, Division I, including the requirement that the procedures be conducted by qualified and competent persons, also come into play when investigative procedures are conducted in exigent circumstances. The reporting and filing requirements of sections 80 and 81 must also be complied with to ensure accountability.

DIVISION II
INVESTIGATIVE PROCEDURES INCIDENT TO ARREST

Visual inspection

***72. A peace officer who has arrested a person for a crime punishable by more than two years' imprisonment may, incident to the arrest and without a warrant, carry out or have carried out the visual inspection of the surface of the person's body, excluding the person's genitals, buttocks and, where the person is female, breasts, if the officer believes on reasonable grounds that**

108. This scheme derives from LRC Working Paper 54.

* A minority of the Commission dissents with respect to the inclusion of this section in the Code.

(*a*) doing so will provide probative evidence of the person's involvement in the crime; and

(*b*) there is no practicable and less intrusive means for obtaining the evidence.

COMMENT

This section provides a power, exercisable without a warrant in carefully restricted circumstances, visually to inspect the body of the arrested person for probative evidence. This minimally intrusive power complements the power to search a person incident to arrest set out in sections 43 and 44.

Section 72 is not based on a previous Commission recommendation. In Report 25, we had taken the position that inspection of the surface of the person's body to seek evidence should only be allowed on consent, with judicial authorization (Recommendations 3, 4(*b*)) or in exigent circumstances (Recommendation 6). A majority of the Commission is now of the view, however, that the minimal intrusion involved in a purely visual inspection of the surface of the body (excluding private parts) of a person arrested for a crime punishable by more than two years' imprisonment is justified in the circumstances stated. It seems inappropriate, for example, to require a peace officer to obtain a court order to authorize the rolling up of a sleeve to look for a wound or tattoo, especially when one considers that this administrative burden is avoided if the arrested person is fortuitously wearing a short-sleeved shirt. Further, if the limited power conferred here did not exist, the police officer who believes that a visual inspection will produce probative evidence would be encouraged to resort to other devices in order to enable the inspection to take place: for example, arrested persons might be taken into custody in order to facilitate an even more intrusive, but quite legal, custodial strip search. Also, it appears that the essence of this power is available to the police at common law in any event.[109]

A minority of us do not endorse this approach and continue to support the position taken in Report 25. In Part Two of this Code, we apply the principled approach of the Supreme Court of Canada in the *Southam* case, requiring that independent judicial authorization, where feasible, precede any significant invasion of privacy or intrusion on the security of property. A minority of us reason that this approach ought to apply with even more force in the case of bodily intrusions. A modest amount of administrative inconvenience is not too great a cost to pay in the service of these interests. Also, since the person will be under arrest in any event, and therefore subject to restraint, nothing is lost by requiring that a warrant be obtained and that the police justify the need to carry out the bodily intrusion before it takes place. However, a majority of us have been persuaded by the argument that the Report 25 approach imposes an unpalatable administrative burden on the police. Perhaps more importantly, any safeguards erected in this way would prove to be more illusory than real, since the police would be legally capable of bypassing the requirement by resorting to other lawful devices in order to carry out the inspection. This reasoning, the minority counters, if applied consistently, would suggest the elimination of all warrant requirements.

109. See *R.* v. *Beare*; *R.* v. *Higgins*, *supra*, note 96 at 403-404.

DIVISION III
INVESTIGATIVE PROCEDURES WITH CONSENT

Procedures that may be conducted with consent

73. (1) A peace officer may, without a warrant, carry out or have carried out any investigative procedure, other than an investigative procedure that involves the administration of a drug known or designed to affect mood, inhibitions, judgment or thinking, if the person who is to be subjected to the procedure consents.

Report 25, recs. 2(*a*), 3(*a*)

Information required to be disclosed

(2) Where a person's consent is sought,

(*a*) the person shall be given a description of the investigative procedure, an explanation of its nature and the reasons for its being carried out;

(*b*) the individual who is to carry out the procedure shall tell the person whether there are any significant risks to health or safety associated with the procedure and, if so, what those risks are; and

(*c*) a peace officer shall tell the person that the person has the right to consult with counsel before deciding whether to consent to the procedure, and that consent may be refused or, if given, may be withdrawn at any time.

Report 25, rec. 10(1)

Form of consent

(3) Consent may be given orally or in writing.

COMMENT

As noted in the comment to section 56, we proposed in Report 25 that investigative procedures be divided into three groups: those that were absolutely prohibited, those that could be carried out with judicial authorization (or without such authorization in exigent circumstances) and those that could be carried out with consent. The absolute prohibition category related to procedures of a medical nature which, when transposed to a non-therapeutic setting, we believed should not be conducted even with consent. Included were procedures involving: the administration of substances (*e.g.*, truth serums, enemas or emetics);[110] all surgical procedures involving "the puncturing of human skin or tissue . . ." (but not the less intrusive, quasi-surgical taking of blood samples);[111] procedures for removing stomach contents;[112] and "any procedure designed to produce a pictorial representation of any internal part of the subject that is not exposed to view . . ." (*e.g.*, X-rays, ultrasound or other potentially dangerous procedures having a similar purpose).[113]

110. Report 25, rec. 2(*a*).

111. *Ibid.*, rec. 2(*b*).

112. *Ibid.*, rec. 2(*c*).

113. *Ibid.*, rec. 2(*d*).

We took the position that consent to such objectionable methods of obtaining evidence could never reasonably be given.[114] On the other hand, we also observed in Report 25 that to deny persons the right to consent to procedures for which a warrant might otherwise be obtained would be an unjustified curtailment of individual rights and analogous to preventing accused or suspected persons from making voluntary statements to the police.

Subject to the mind-altering drug exception, and in accordance with our preference for respecting the autonomy of individuals, section 73 alters our former position and now permits all investigative procedures to be carried out if the subject gives a genuine and informed prior consent. With respect to the exception, we remain of the view that the administration of such drugs is such a repugnant, unreliable and intrusive method of obtaining evidence that it should continue to be absolutely prohibited.

Subsection (2) generally parallels the conditions for obtaining a valid consent to search, set out in section 46, but is more stringent in some respects because of the potentially more intrusive nature of some of these investigative procedures. As is the case when seeking consent to an ordinary search, the officer must here advise the intended subject that consent can be refused or withdrawn at any time, and must describe the procedure, explain its nature and tell the subject why it is being carried out. However, paragraph (*b*) also requires that the person carrying out the procedure tell the person whose consent is sought about potential risks to health or safety, while paragraph (*c*) requires the peace officer to advise the subject of his or her right to consult with counsel before deciding whether to consent. These precautions are employed in the cause of ensuring that any consent given where such intrusive powers are implicated is genuinely voluntary and informed. Since these intrusions are to occur when the criminal process has already been set in motion, the need for clear advice as to right to counsel is crucial. The subject's stated desire to have counsel present during an investigative procedure of the kind regulated here should be accommodated wherever practicable.[115]

Subsection (3), which stipulates that consent may be given orally or in writing, is similar to provisions found throughout this Code where consent to police investigative procedures may be given.

114. *Ibid.* at 37.

115. *Ibid.* at 27.

CHAPTER IV
EXERCISING POWER TO CARRY OUT INVESTIGATIVE PROCEDURES

DIVISION I
REQUIREMENTS FOR CARRYING OUT PROCEDURES

Competence of person carrying out procedure

74. (1) An investigative procedure shall be carried out by a person who, by virtue of training or experience, is competent to carry it out.

Report 25, rec. 12

Dental impressions

(2) Dental or bite impressions shall be taken by a person who is qualified under provincial law to take dental or bite impressions.

Medical procedures

(3) An investigative procedure that involves probing for or removing an object of seizure that is inside a person's body shall be carried out by a medical practitioner.

Report 25, rec. 4(*j*)

Exception

(4) A peace officer may probe for or remove an object of seizure concealed in a person's mouth if the officer is carrying out the procedure pursuant to section 71 (exigent circumstances).

COMMENT

Chapter IV sets out general directions, safeguards and accountability mechanisms that apply in relation to any investigative procedure covered in this Part.

The purpose of section 74 is to help ensure that authorized investigative procedures are carried out in the safest and most reliable manner possible. Some of the procedures authorized under this scheme could involve risks to health or safety if not carried out by qualified persons. Others (*e.g.*, gunshot residue tests) may pose less risk, but may still need to be conducted by qualified persons in order to preserve the integrity and validity of the procedure.[116] Where a warrant is sought, the application must specify "the name of a person or class of persons believed by the applicant to be competent, by virtue of training or experience, to carry out the procedure."[117] The justice who issues the warrant may require the investigative procedure to be carried out by a person so qualified.[118]

116. See Working Paper 34 at 9-10.

117. See s. 59(*j*).

118. See s. 61.

Whether a procedure has in fact been carried out by qualified personnel will be assessed and determined in the courtroom by the application of the same procedures and criteria used to assess the qualifications of any person claiming expertise.

Subsections (2) and (3) of section 74 are precise in indicating the classes of persons qualified to carry out the types of quasi-medical procedures to which they refer. Subsection (3), which refers to the probing for and removal of objects that are inside a person's body, is not designed to qualify the power to carry out, or have carried out, mere visual inspection of body cavities or the surface of a person's body. (See paragraphs 56(*a*) and (*b*) and section 72.)

Subsection (4) is included for clarity, to avoid an interpretation that an object in the mouth is "inside the body" and therefore that, by virtue of subsection 74(3), probing for and removing objects concealed in the mouth must be carried out by a medical practitioner. This provision enables a peace officer to carry out such probing and removal in exigent circumstances, as defined in section 71. This effectively preserves the right, now recognized at common law, of peace officers to prevent attempts to conceal evidence in the mouth or destroy it by swallowing it.[119]

Information required to be disclosed

75. (1) A person who is to be subjected to an investigative procedure carried out without the person's consent shall be

(*a*) given a description of the procedure, an explanation of its nature and the reasons for its being carried out; and

(*b*) told that the person is required by law to submit to the procedure and that such force as is necessary and reasonable in the circumstances may be used to carry it out.

Report 25, rec. 9

Time of disclosure

(2) The information shall be provided to the person before the procedure is carried out or, if that is impracticable, at the first reasonable opportunity.

Waiver of requirement

(3) The person may waive the requirement set out in paragraph (1)(*a*), orally or in writing.

COMMENT

Subsection (1) of section 75 clearly specifies the information to be given to an intended subject before any investigative procedure is carried out without consent. By ensuring that the intended subject understands what is about to be done, why, and what the extent of his or her legal obligation is, it helps foster both compliance with the law and the knowledge that the law is not operating arbitrarily. Although subsection (1) does not specify who must provide the information, it would necessarily be someone

119. This power is most frequently used in drug cases. See *R.* v. *Brezack* (1949), 96 C.C.C. 97 (Ont. C.A.); *Scott* v. *The Queen* (1975), 24 C.C.C. (2d) 261 (F.C.A.); *R.* v. *Collins*, *supra*, note 31.

knowledgeable about the things referred to in paragraphs (*a*) and (*b*). While a peace officer would generally be the person required to fulfil the obligation under paragraph (*b*), the proper person to make disclosure under paragraph (*a*) will vary with the procedure. In some cases, both the peace officer and the person carrying out the procedure may have to participate to make full and meaningful disclosure.

Subsection (2) is an addition to our original recommendation. It allows for flexibility in the timing of the disclosure.

As indicated, these disclosure requirements generally apply before any investigative procedure is carried out. Additional disclosure to the subject is required where procedures are conducted under warrant (section 69) and where consent is sought (subsection 73(2)).

Subsection (3) sets out the protections that may only be waived when the carrying out of the procedure does not depend on the subject's consent. Such waiver is not allowed where consent to the procedure is sought. This ensures the voluntary and informed nature of any consent.

Manner of carrying out procedure

76. (1) An investigative procedure shall be carried out in a manner that respects the dignity of the person and that, having regard to the nature of the procedure and the circumstances,

(*a*) involves as little discomfort as is reasonably practicable; and

(*b*) provides as much privacy as is reasonably practicable.

Report 25, recs. 11, 13

Waiver of requirements

(2) A person who is to be subjected to an investigative procedure may waive the requirement set out in paragraph (1)(*a*) or (*b*), orally or in writing.

COMMENT

Section 76, which parallels a similar rule in section 50, is designed to promote civility in the treatment of persons subjected to procedures authorized by this scheme. Requiring consideration of the nature of the procedure and surrounding circumstances is a pragmatic recognition of the realities of law enforcement and provides some needed flexibility. For example, while it would be preferable for procedures that require exposure of the subject's private parts to be carried out by persons of the same sex as the subject, this may prove impossible in remote areas or in circumstances where time is of the essence. The requirement that the subject be caused as little discomfort as is reasonably practicable is similarly flexible. The degree of discomfort must vary with the nature of the procedure and other considerations, such as the extent of the subject's co-operation.

Section 76 also embodies a fundamental principle, by requiring that the human dignity of the subject be respected. This requirement is not flexible. In practical terms, it

calls for simple decency and courtesy, and would prohibit behaviour that is calculated to degrade the subject.

Subsection (2) of this provision is largely self-explanatory. It states which of our statutory protections may always be waived.

Exemption from criminal liability

77. No person is guilty of a crime by reason of a failure or refusal to carry out an investigative procedure with respect to another person.

COMMENT

In Report 25 (at 29 and 43), we expressed the view that legislation governing investigative procedures in respect of the person should provide clearly that private citizens are not obliged to conduct or assist in conducting any investigative procedures. Conscription of private citizens into the field of criminal investigation would be an unjustified infringement of their individual rights. In particular, the conscription of physicians into such activity could amount to an unconscionable intrusion into the special relationship between doctor and patient.

Section 77 implements the policy of Report 25 in a manner consistent with the exemption from criminal liability of medical practitioners and technicians who refuse to take blood samples from suspected impaired drivers.[120]

DIVISION II
SCOPE OF POWER

Visual inspection and power to photograph

78. The authority to inspect visually a person's body cavities or the surface of a person's body without the person's consent includes the authority to take a photograph of any probative evidence revealed by the inspection.

COMMENT

Under this scheme, a peace officer may obtain a warrant to inspect the surface or cavities of a person's body visually (see paragraphs (*a*) and (*b*) of section 56). Non-consensual visual inspection may be accomplished without a warrant in certain circumstances (*e.g.*, incident to a lawful arrest) that are more fully described in sections 71 and 72 of this Part. Section 78 allows accurate and reliable records to be made of things discovered in the course of an inspection which appear to have some evidentiary value. This section, for purposes of accountability and to ensure that the best and most reliable evidence of things discovered in the course of an investigation finds its way to

120. See *Criminal Code*, s. 257(1). See also s. 119 and the accompanying comment.

court, allows photographs to be taken in limited circumstances. Under the section no separate authority need be obtained in order to take photographs if probative evidence is revealed. However, the power to photograph does not exist if no probative evidence is discovered.

Power to examine, test or analyze

79. (1) A peace officer may have anything taken or obtained in the course of carrying out an investigative procedure examined, tested or analyzed.

Safeguarding of evidence

(2) If probative evidence is revealed, the thing, or that portion of it remaining after the examination, test or analysis, shall be safeguarded so as to preserve it for use in subsequent proceedings.

Application of section

(3) This section does not apply to anything seized under this Part as an object of seizure.

COMMENT

A number of the procedures authorized in this scheme (*e.g.*, the taking of prints, impressions, photographs) enable physical evidence or information to be obtained without physically removing anything from the subject of the procedure. Other procedures, however, specifically include the removal of something for examination or analysis to determine its value as evidence. Subsection (1) of section 79 makes it clear, in both contexts, that the responsible peace officer need not delay in having anything taken or obtained examined, tested or analyzed to determine its probative value. No additional authorization or permission is required. This new statutory rule reflects the present practice.

Subsection (2) also codifies what, no doubt, is the current practice.

It is not intended that the custody or "restoration" procedures of Part Six (*Disposition of Seized Things*) apply to things taken or obtained by peace officers under this Part, unless they have been seized as objects of seizure (*e.g.*, objects seized from a body under paragraph 56(*b*)). A future Part of this Code, regulating disclosure by the prosecution, will establish requirements for the disclosure of the results of the testing or analysis conducted under this Part, while a further Part governing the judge and conduct of trial will contain provisions pertaining to the release, for scientific testing, of samples or things that become exhibits. In the interest of developing a coherent integrated scheme, we also defer, for the time being, questions relating to the return or disposal of things taken under this Part, and to the maintenance and disposal of records relating to them.

Where this Part authorizes the seizure of an object of seizure in the course of carrying out an investigative procedure (see paragraph 56(*b*)), subsection (3) stipulates that the disposition of that thing is not governed by this section. Rather, it is governed by the provisions of Part Six. Nevertheless, the reporting requirements of section 80 do apply. Thus, in addition to the investigative procedure report required by section 80, an inventory and a post-seizure report under Part Six must also be prepared and filed.

DIVISION III
REPORT OF PROCEDURES CARRIED OUT

Requirement for and contents of report

80. (1) Where an investigative procedure has been carried out pursuant to a warrant, section 71 (exigent circumstances) or 72 (incident to arrest), or where anything has been taken or obtained in the course of carrying out an investigative procedure with a person's consent, a peace officer shall, as soon as practicable, complete and sign a report that discloses

(*a*) the crime under investigation;

(*b*) the person who was subjected to the procedure;

(*c*) the procedure that was carried out and a description of anything that was taken or obtained;

(*d*) the time, date and place that the procedure was carried out;

(*e*) the name of the person who carried out the procedure; and

(*f*) the name of the peace officer.

Additional contents where procedure carried out in exigent circumstances

(2) Where the procedure was carried out pursuant to section 71 (exigent circumstances), the report shall disclose, in addition, the grounds for the peace officer's belief that carrying out the procedure would provide probative evidence of the person's involvement in the crime, that the delay involved in obtaining a warrant would result in the loss or destruction of the evidence and that there was no practicable and less intrusive means for obtaining the evidence.

Report 25, rec. 7(1), (2)

Additional contents where procedure carried out incident to arrest

(3) Where the procedure was carried out pursuant to section 72 (incident to arrest), the report shall disclose, in addition, the grounds for the peace officer's belief that carrying out the procedure would provide probative evidence of the person's involvement in the crime and that there was no practicable and less intrusive means for obtaining the evidence.

Additional contents where all authorized procedures not carried out

(4) Where the procedure was carried out pursuant to a warrant issued for more than one investigative procedure and not all of the authorized procedures were carried out, the report shall disclose, in addition, the reasons why each of the authorized procedures was not carried out.

Report 25, rec. 7

COMMENT

The purpose of this section is to ensure accountability and to facilitate a review of the legality of investigative procedures carried out under this Part.

Under subsection (1), a report must be completed as soon as practicable after an investigative procedure is carried out without consent or something has been taken or obtained. The matters to be disclosed under paragraphs (*a*) through (*f*) are self-explanatory. The matters specified in subsections 80(2) and (3) apply where no warrant was obtained. They are designed to elicit from the peace officer, after the fact, the grounds relied on as justification for carrying out the procedure, and for proceeding without a warrant. Thus, a peace officer is required to justify his or her actions regardless of whether a warrant is obtained or not. Where no warrant is obtained, the officer must also justify the failure to obtain a warrant.

The requirements of subsections (2) and (3) are self-explanatory. Their purpose is to ensure accountability and the maintenance of records for subsequent review.

Subsection (4) contains a requirement similar to that set out in relation to unexecuted search warrants in section 34. The rationale for that provision also applies here. The reporting requirements in relation to warrants that expire without any procedures being carried out are set out in section 67.

Providing copy of report and filing

81. The peace officer shall, as soon as practicable,

(*a*) give a copy of the report to the person who was subjected to the procedure; and

(*b*) have the report filed with the clerk of the court for the judicial district in which the procedure was carried out.

Report 25, rec. 7(3)

PART FOUR

TESTING PERSONS FOR IMPAIRMENT IN THE OPERATION OF VEHICLES

DERIVATION OF PART FOUR

LRC PUBLICATIONS

Investigative Tests: Alcohol, Drugs and Driving Offences, Report 21 (1983)

Investigative Tests, Working Paper 34 (1984)

Recodifying Criminal Law, Report 31 (1987)

LEGISLATION

Criminal Code, ss. 254-258, 487.1(11)

INTRODUCTORY COMMENTS

This Part regulates one aspect of the broader category of investigative procedures in respect of the person: the obtaining and testing of breath and blood samples to detect impairment in the operation of vehicles. While preserving and consolidating much of the present law, this Part also simplifies the law and puts in statutory form a number of important reforms previously recommended by us.

Recommendation 10(5) of our proposed Code of Substantive Criminal Law (Report 31) retains the current *Criminal Code* offences of operating or having care and control of a motor vehicle while impaired by alcohol or a drug (paragraph 253(*a*)), and operating or having care and control of a motor vehicle while having more than 80 milligrams of alcohol in 100 millilitres of blood (paragraph 253(*b*)). The present offence of failing or refusing to comply with a request by a peace officer to provide either breath or blood samples for analysis to determine the concentration of alcohol in the blood is also continued.[121] However, the offences of failing or refusing to provide a breath sample for a "roadside" test by an "approved screening device" and failing to accompany a peace officer to enable such a breath sample to be taken, now found in subsection 254(5) of the *Criminal Code*, are deleted.[122]

The law governing the procedure for investigation and proof of alcohol- and drug-related driving offences is unnecessarily complex. It is the product of fragmentary responses to scientific advances in the area as well as to hardening public attitudes demanding more effective detection and prosecution of offenders. Some provisions, we believe, have become virtually unreadable. Section 258 of the *Criminal Code*, which incorporates amendments supplementing breath test provisions along with complicated conditions for drawing evidentiary presumptions and permitting the admission of certificate evidence in relation to blood tests, is a good example. Provisions such as this convinced us that even where the basic goals of the present law ought to be pursued, some rewriting of the present *Criminal Code* is necessary simply to achieve clarity.

Changing public attitudes toward alcohol- and drug-related driving offences have been reflected in the decisions of higher courts. In one recent decision, the Supreme Court of Canada held that a random spot-check procedure authorized by statute, although amounting to an "arbitrary detention" in violation of section 9 of the *Charter*, was justified as a "reasonable limit" within the meaning of section 1 of the *Charter*. In the view of the Court, the legislative objective of the "limitation" (the detection and deterrence of driving offences involving alcohol or drugs) was, in effect, of sufficient "pressing and substantial concern"[123] to justify overriding the constitutional right. The nature and degree of the intrusion represented by a totally random stop was proportionate to the purpose to be served.

The legislative objectives identified by the Supreme Court were recognized in the reform proposals set out in our 1983 Report, *Investigative Tests: Alcohol, Drugs and*

121. Report 31, rec. 10(6) at 69.

122. *Ibid.*, comment at 69-70.

123. *R.* v. *Hufsky*, [1988] 1 S.C.R. 621 at 634-637.

Driving Offences. Those proposals, which form the basis of this Part, were designed to counter perceived impediments to the successful prosecution of offences involving drinking and driving.[124] They also reflected the need to ensure that any legislative infringement of constitutional rights was reasonable,[125] and that any increased intrusion into privacy or personal integrity authorized by changes to the law (as it then stood) was balanced by provisions that guaranteed, to the greatest degree possible, both the accuracy of the evidence obtained and the health and safety of the individual.[126]

Except as noted below, the provisions of this Part continue the general approach of the present law. The provisions, central to this Part, allowing peace officers to obtain breath or blood samples, may be summarized as follows.

1. A peace officer may request a person who is operating or has the care or control of a vehicle to give breath samples for analysis by a preliminary breath testing device. The officer need only reasonably suspect that the person has alcohol in his or her blood to make this request. The preliminary breath testing device does not measure the amount of alcohol in the subject's blood: it indicates whether alcohol is present in an amount that appears to go beyond permissible limits, thus indicating whether further testing is necessary. It will no longer be a crime not to comply with this request, or not to accompany the officer for the purposes of the test.[127] Rather, upon failure or refusal, the person may be arrested and taken to a place where a breath analysis instrument (commonly known as a breathalyser, but designated in the *Criminal Code* only as an "approved instrument") is available. Failure or refusal to provide samples for this device will be a crime under section 59 of our proposed Criminal Code. In order to encourage compliance with these provisions and better ensure that citizens are aware of their rights, the person must be warned, at each stage, of the consequences of refusal.
2. A peace officer who reasonably believes that a person, at any time within the previous two hours, has committed an alcohol-related crime under section 58 of our proposed Criminal Code[128] may bypass the preliminary screening procedure. Instead, the person may be immediately requested to go with the officer to a place where breath samples may be taken for analysis by a breath analysis instrument. Where the officer believes obtaining breath samples would be impracticable because of any physical condition of the person, the person may be

124. Report 21 at 1. Specifically cited was the prohibition of compulsory blood tests contained in what was then s. 237(2) of the *Criminal Code*.

125. *R.* v. *Oakes*, [1986] 1 S.C.R. 103; *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, *per* Dickson, C.J. at 768-769. "Limits" are "reasonable" if rationally connected to the objectives sought to be attained, impair constitutionally guaranteed rights as little as possible and do not so severely trench on individual rights as to outweigh the legislative objectives.

126. Report 21 at 17.

127. The present offences are set out in s. 254(5) of the *Criminal Code*. Refusing to accompany the officer is one mode of committing the offence of refusing to comply with a demand under s. 254. See *R.* v. *MacNeil* (1978), 41 C.C.C. (2d) 46 (Ont. C.A.).

128. These, in essence, are the crimes of operating or having the care or control of a vehicle with ability impaired or with more than 80 milligrams of alcohol in 100 millilitres of blood.

requested to go with the officer to a place where blood samples can be taken. At this stage, the officer must warn the person that failure or refusal to comply with this request for either breath or blood samples may cause the person to be arrested and taken to an appropriate place for obtaining the relevant samples. Once the person is taken there, the officer may request the person to provide breath or blood samples and must warn the person that failure or refusal to comply with this request is a crime under section 59 of our proposed Criminal Code. Once again, whenever the police make requests of this nature, they are also required to issue clear warnings as to the consequences of a failure to comply.

3. A peace officer may apply to a justice (either in person or, where circumstances make a personal appearance impracticable, by telephone or other means of telecommunication) for a warrant to take samples of a person's blood. The grounds justifying the issuance of a warrant are essentially those set out in section 256 of the current *Criminal Code*. The justice may issue the warrant if satisfied that it is reasonable to believe: (1) that the person, within the preceding two hours, has committed an alcohol-related crime under our proposed Criminal Code section 58 and was involved in an accident resulting in the death of, or bodily harm to, any person; and (2) that a doctor is of the opinion that the person is unable to consent to having blood samples taken, by reason of any physical or mental condition resulting from the consumption of alcohol or the accident, and that taking the samples will not endanger the person's life or health.

Because the taking of blood samples represents a more serious intrusion than the taking of breath samples, and may entail some risks to health or life, the provisions of this Part relating to the taking of blood samples contain a number of special safeguards. No more than two blood samples may be taken. A doctor must supervise the taking of the samples, and must be satisfied that taking the samples will not cause danger to the person's life or health. No criminal liability may result from the failure or refusal of a doctor, or of a technician acting under a doctor's direction, to take a blood sample. Moreover, in recognition that a request for samples — whether of blood or breath — may in itself disrupt the treatment of injured persons, we have included a provision that allows for the medical screening of requests in certain circumstances.

Other provisions in this Part: establish technical procedures and requirements relating to the application for, and issuance of, blood sample warrants (these are similar to those governing search warrants and warrants to conduct other investigative procedures in respect of the person); enable detained persons whose breath analyses are unfavourable to request that blood samples be taken; establish procedures for having blood samples released for independent analysis; and allow blood samples to be tested for the presence of drugs.

Our proposed legislation leaves intact the general thrust of the present *Code* provisions governing the admissibility of breath and blood analysis results, the presumptions to be applied to the results and the use in evidence of certificates prepared by analysts, technicians or doctors. One change worth noting, however, relates to the number of blood samples that must be taken and analyzed in order for the statutory presumption now contained in paragraph 258(1)(*d*) of the *Code* to apply. To improve the accused's

ability to "make full answer and defence,"[129] we have changed that number from one to two.

Also worth noting in Part Four is the absence of an equivalent to subsection 258(3) of the *Criminal Code*. That provision makes admissible in certain proceedings, and allows an adverse inference to be drawn from, evidence that an accused has unreasonably failed to provide breath or blood samples. It is our view that the admissibility and effect of such evidence should be a matter for the ordinary rules of evidence. If, in the circumstances, the fact of a failure or refusal to provide a blood sample is relevant in proving "consciousness of guilt," it should be admitted into evidence and given the weight it deserves; if not, there is no good reason in logic or policy to continue to make this fact artificially admissible while asserting that an adverse inference of guilt need not necessarily be drawn from it.[130]

CHAPTER I
INTERPRETATION

Definitions

82. In this Part,

"analyst" (*analyste*)

"analyst" means a person designated by the Attorney General as an analyst for the purposes of this Part;

"breath analysis instrument" (*analyseur d'haleine*)

"breath analysis instrument" means an instrument designed to receive and analyze a sample of a person's breath in order to measure the concentration of alcohol in the person's blood, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"container" (*contenant*)

"container" means

(*a*) in respect of breath samples, a container designed to receive a sample of a person's breath for analysis, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada, and

(*b*) in respect of blood samples, a container designed to receive a sample of a person's blood for analysis, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"operate" (*conduire*)

"operate" includes, in respect of a vessel or an aircraft, navigate;

129. *Criminal Code*, s. 650(3) in relation to indictable offences. See subsection 802(1) where the right to a "full answer and defence" in summary convictions is set out.

130. See *R.* v. *Mackenzie* (1984), 6 C.C.C. (3d) 86 (Alta. Q.B.); *R.* v. *Van Den Elzen* (1984), 10 C.C.C. (3d) 532 (B.C.C.A.).

"preliminary breath testing device" (*alcootest*)

"preliminary breath testing device" means a device designed to ascertain the presence of alcohol in a person's blood, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"technician" (*technicien*)

"technician" means

(*a*) in respect of breath samples, a person designated by the Attorney General as being qualified to operate a breath analysis instrument, and

(*b*) in respect of blood samples, a person or member of a class of persons designated by the Attorney General as being qualified to take a sample of a person's blood for the purposes of this Part;

"vehicle" (*véhicule*)

"vehicle" means a motor vehicle, train, vessel or aircraft, but does not include anything driven by, propelled by or drawn by means of muscular power.

Criminal Code, ss. 2, 214, 254(1)

COMMENT

Existing definitions in the *Criminal Code* have been adapted to this scheme. Section 82 incorporates the definitions "operate" and "vehicle" set out in section 56 of our proposed Criminal Code.[131] It also incorporates definitions now found in section 2 and subsection 254(1) of the *Criminal Code*.

In most cases, the basic meanings of the defined terms have not been changed. The definition "analyst" is essentially unchanged. The definition "breath analysis instrument" is largely the same as that for the current term "approved instrument"; the change in terminology is simply an attempt to identify more clearly the function of the instrument. The term "container" replaces "approved container," but the substance of the definition is unaltered. "Operate" is defined as it is in section 56 of our proposed Code, and is derived from paragraph (*c*) of the definition set out in what is now section 214 of the *Criminal Code*. "Preliminary breath testing device" replaces "approved screening device" (the former is a descriptive term that better conveys the function of the instrument), but the definition remains essentially the same. The same is true for "technician" which replaces "qualified technician." The definition "vehicle" (a term that replaces "motor vehicle") repeats the definition set out in section 56 of our proposed Code. This definition furthers our intention, expressed in Recommendation 10(5) of Report 31, to make the substantive Code's impaired driving provision and the provision on driving while having more than 80 milligrams of alcohol in 100 millilitres of blood applicable where any "means of transportation (other than one humanly powered [such as a bicycle]) . . ." is involved.

131. Report 31, Appendix B at 188. We note recent amendments to the definitions "operate" and "motor vehicle." See the *Railway Safety Act*, S.C. 1988, c. 40, ss. 55(1), 56. Some or all of these changes may be incorporated into this Code after further study.

CHAPTER II
PRELIMINARY BREATH TESTS

Request for preliminary breath sample

83. (1) Where a peace officer reasonably suspects that there is alcohol in the body of a person who is operating or has the care or control of a vehicle, the peace officer may request that the person

(*a*) provide, as soon as practicable, such a breath sample as the peace officer considers necessary to enable a proper analysis to be made with a preliminary breath testing device; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the breath sample to be taken.

Warning

(2) When making the request, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where a breath analysis instrument is available.

Criminal Code, s. 254(2), (5)

COMMENT

This section largely retains subsection 254(2) of the present *Criminal Code*. The term "request" has been substituted for "demand," as it more accurately conveys the initial approach that we believe peace officers should employ to secure the co-operation of the motoring public. As is currently the case with a demand, however, a request made under this Part has a mandatory character; the consequences of non-compliance are alluded to in subsection (2) and are elaborated upon in later provisions of this Part.

The threshold for permitting a peace officer to request a breath sample for a "roadside" preliminary breath testing device continues to be a reasonable suspicion that there is alcohol in the body of a person operating or having care or control of a vehicle. The *Criminal Code* term "forthwith," which tells how soon the person must comply with the request, is replaced by the expression "as soon as practicable"; this change takes account of case law holding that "forthwith" means "as quickly as possible," not "immediately."[132]

Our proposed legislation, unlike subsection 254(5) of the current *Criminal Code*, does not make it a crime to fail or refuse to comply with a demand to give a breath sample for a preliminary breath testing device. As our forthcoming provisions on arrest will make clear, failure or refusal provides grounds for arrest and for conveyance of the person to a place where a breath analysis instrument is available. Subsection (2)

132. See *R.* v. *Seo* (1986), 25 C.C.C. (3d) 385 at 409 (Ont. C.A.), and also the remarks of Le Dain, J., in *R.* v. *Thomsen*, [1988] 1 S.C.R. 640.

provides that this new consequence must be explained by the officer when making the request.

The procedural changes in this Part (and in our forthcoming arrest provisions) dealing with those who do not provide breath samples for "roadside screening" complement, and are explained by, the comment accompanying Recommendation 10(6) of Report 31.[133] The present law requires the courts to choose between accommodating the conferring of *Charter* rights (which may render it impossible to conduct roadside screening effectively) and refusing to accord these rights (which makes criminal conviction possible in circumstances where an individual under detention has been denied the right to counsel).[134] The Supreme Court of Canada has effectively chosen the latter option. In a recent case, it held that limiting the right to counsel at the roadside screening stage was reasonable under the *Charter*.[135] It also emphasized, however, that the means chosen to promote a legislative objective important enough to warrant overriding a constitutional right had to be proportional to that objective.[136] In our view, the objectives of roadside screening and the detection and deterrence of impaired driving can be as effectively achieved with less drastic effects on individual rights than is now the case. Under sections 83 and 84 of our legislation, the authorities retain all necessary powers to stop and test suspected drinking drivers. However, the method now used to enforce submission to the less accurate preliminary screening procedure (exposing to criminal liability roadside detainees who are denied the right to counsel) is eliminated.[137]

CHAPTER III
REQUEST FOR SAMPLES FOR BLOOD-ALCOHOL ANALYSIS

DIVISION I
REFUSAL TO PROVIDE PRELIMINARY BREATH SAMPLE

Request for breath samples

84. Where a person has been arrested for failure or refusal to provide a breath sample for a preliminary breath testing device or to accompany a peace officer for the purpose of enabling the breath sample to be taken, a peace officer may request that the person provide, as soon as practicable, such breath samples as a technician considers necessary to enable a proper analysis to be made with a breath analysis instrument.

133. Report 31 at 69-70. See *R.* v. *Thomsen*, *supra*, note 132.

134. See S.A. Cohen, "Roadside Detentions" (1986), 51 C.R. (3d) 34 at 41.

135. *R.* v. *Thomsen*, *supra*, note 132.

136. *Ibid.* at 653-654.

137. See *R.* v. *Therens*, [1985] 1 S.C.R. 613.

COMMENT

Under the present law, if a person fails or refuses, without reasonable excuse, to provide a breath sample for an "approved screening device," he or she commits a crime. The range of minimum punishments for this crime is set out in *Criminal Code* subsection 255(1). It is the same generally as that which applies to a conviction for the crimes of driving while impaired and driving while having more than 80 milligrams of alcohol in 100 millilitres of blood.

In effect, the legislative history of the crimes of drunk driving shows that Parliament, in an attempt to deal harshly with this harmful activity, has increased the scope of criminal liability. First, there is the crime of impaired driving. Second, there is a kind of deemed impairment crime, that of driving while having more than 80 milligrams of alcohol in 100 millilitres of blood. Third, there is the crime of refusal to provide breath or blood samples. As regards breath samples, it covers not only a failure to provide breath samples for a breathalyser, but also failure to provide a breath sample for a roadside screening device.

Although this legislation is by now familiar to police officers, lawyers and judges, in our view it contains serious defects, defects of a kind that may be easily rectified without disrupting a vigorous law enforcement policy. A breathalyser can accurately measure the amount of alcohol in a person's blood. An "approved screening device" cannot. Hence it is used preliminary to a breathalyser, not in place of one. Imposing criminal liability for a refusal to provide a breath sample into a roadside screening device extends the ambit of criminal liability forward in time to an event which merely assists a police officer in determining whether he or she should request that a person provide clear evidence of guilt against himself or herself by blowing into a breathalyser. This approach fails to give due weight to the fundamental principle of restraint in the use of the criminal law. In our view, the law should use alternative methods which help police investigate such crimes without over-extending the reach of the criminal law.

This section creates such an alternative method. If a person fails to provide a breath sample into a preliminary breath testing device, the police officer has the authority to request that the person provide breath samples for a breathalyser. Any criminal liability for failure to provide a breath sample arises only from failure to provide breath samples into a breathalyser.

DIVISION II
COMMISSION OF ALCOHOL-RELATED CRIME

Request for breath samples

85. (1) Where a peace officer believes on reasonable grounds that a person, at any time within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), the peace officer may, as soon as practicable, request that the person

(*a*) provide, as soon as practicable, such breath samples as a technician considers necessary to enable a proper analysis to be made with a breath analysis instrument; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the breath samples to be taken.

Warning

(2) When making a request that the person accompany the peace officer, the peace officer shall warn the person that in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where a breath analysis instrument is available.

Report 21, recs. 1, 8
Criminal Code, s. 254(3)(*a*)

COMMENT

Subsection (1) of this provision continues subsection 254(3) of the present *Criminal Code*. It sets out the second situation in which a peace officer is justified in making a request for breath samples for analysis by a "breath analysis instrument." Satisfaction of the threshold test in subsection (1) justifies the making of the request and dispenses with any need for a prior request or test involving a preliminary screening device.

The person, who will be under detention at this point,[138] has a right to consult with counsel and to be told of that right before complying with the request. Since the person in jeopardy has access to legal advice, making it a crime to fail or refuse unreasonably to comply with a request is justified.

Request for blood samples

86. (1) If the peace officer believes on reasonable grounds that, because of any physical condition of the person, it would be impracticable to obtain breath samples from the person or the person would be incapable of providing breath samples, the peace officer may, as soon as practicable, request that the person

(*a*) submit, as soon as practicable, to having blood samples taken for the purpose of determining the concentration of alcohol in the person's blood; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the blood samples to be taken.

Warning

(2) When making a request that the person accompany the peace officer, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where blood samples can be taken.

Report 21, recs. 3, 8
Criminal Code, s. 254(3)(*b*)

138. *Ibid.*

COMMENT

Subsection (1) of this section codifies most of what the present law now addresses in paragraph 254(3)(*b*) of the *Criminal Code*. It must be read in the light of subsection 103(1) below, which (unlike the current *Code*) limits the number of blood samples that may be requested to two.

Subsection (2) obliges the officer to provide a warning similar to that which must be given under subsection 85(2) when requesting breath samples.

DIVISION III
WARNING REGARDING REFUSAL

Warning

87. When making a request for breath samples or blood samples, the peace officer shall warn the person that it is a crime under section 59 (failure or refusal to provide breath sample) of the proposed Criminal Code (LRC) to fail or refuse, without a reasonable excuse, to comply with the request.

Report 21, rec. 8

COMMENT

This section is designed to ensure that persons to whom requests are made under section 84, 85 or 86 (*i.e.*, after arrest and transportation to a place where the samples can be taken) are made aware of their legal obligation to comply. The giving of a warning in these circumstances reflects prevailing police practice in Canada.

DIVISION IV
RESTRICTION ON REQUEST FOR SAMPLES

Request not prejudicial to medical treatment

88. A peace officer may not request that a person who has been admitted to hospital or is undergoing emergency medical treatment provide breath samples or submit to having blood samples taken unless the attending medical practitioner is of the opinion that making the request and taking the samples would not be prejudicial to the person's proper care or treatment.

Report 21, rec. 5

COMMENT

This section makes it clear that if a person has been admitted to hospital or is undergoing emergency medical treatment, the protection of the health and safety of the patient is to be given priority over the peace officer's ability to request that the person give breath or blood samples. Although subsection 254(4), subparagraph 256(1)(*b*)(ii)

and subsection 256(4) of the *Criminal Code* now provide some protection to the patient where blood samples are sought, we do not believe they go far enough. The *Code* provisions apply to the *taking* of blood samples but provide no mechanism for the screening of *requests*. Since the making of a request (whether for breath or blood samples) can be disruptive and adversely affect the well-being of the patient, this section limits the authorities' contact with the patient for this purpose.

DIVISION V
REQUEST FOR BLOOD SAMPLES AFTER DISCLOSURE OF BREATH ANALYSES RESULTS

Disclosure of results

89. (1) As soon as practicable after the results of breath analyses are known, a peace officer shall tell the person who provided the breath samples the results.

Request for blood samples

(2) A person who is detained in custody may, after being told the results of the breath analyses, request that blood samples be taken and, if a request is made, a peace officer shall arrange for the samples to be taken.

Report 21, recs. 9, 10

COMMENT

The analysis of blood to determine blood-alcohol concentrations in the body is recognized as more accurate than analysis of breath.[139] Section 89 is a new provision designed to facilitate access by detained persons to the more accurate procedure.

The key to providing this access lies in ensuring that all persons who provide breath samples for a "breath analysis instrument" are promptly advised of the analysis results. This requirement, now imposed clearly by subsection (1), causes no administrative difficulties, since a breath analysis result is known virtually as soon as the sample is taken. Persons who learn that they have failed a breath test and are then released have the ability to make their own arrangements for blood tests. If they have spoken to a lawyer, they may be advised to undergo a blood test. Subsection (2) simply seeks to ensure that detained persons, who may also wish to have blood tests done, have equal access to the more accurate procedure.

A majority of the Commission is of the view that the provisions that generally apply to blood samples given at the request of officers should also apply to samples taken following a request made under this section. By this approach, no privilege would arise in relation to the samples or analysis results. The samples should thus remain in the custody of the authorities and be safeguarded by them in the same manner as any

139. See P. Harding and P.H. Field, "Breathalyser Accuracy in Actual Law Enforcement Practice: A Comparison of Blood- and Breath-Alcohol Results in Wisconsin Drivers" (1987) 32 Journal of Forensic Sciences 1235.

blood samples taken under this Part would be safeguarded. The provisions of Chapter V incorporate the majority view and are, by section 101, specifically made applicable to samples taken under subsection 89(2).

A minority of the Commission takes a different view. Since the purpose of this section is to put the detained person in the same position as the person who has been released, it believes that the results of any analysis of blood samples taken following a request made under this section and provided to the detained person should be considered the privileged property of that person. The authorities, therefore, should not be able to have access to the results of the analysis of "their half" of a person's sample unless the person gives notice of an intention to adduce the analysis results at trial. This view is put into legislative form in the Alternative Draft contained in Chapter V.

An accused who wishes to tender at trial the results of an analysis done by an "analyst" (as defined in section 82) may do so by way of certificate, in accordance with section 123.

CHAPTER IV
WARRANT TO TAKE BLOOD SAMPLES

DIVISION I
APPLICATION FOR WARRANT

Applicant

90. A peace officer may apply for a warrant authorizing the taking of samples of a person's blood.

Report 21, rec. 4
Criminal Code, s. 256(1)

COMMENT

Section 90 states who may apply for a warrant authorizing the taking of blood samples. The present *Criminal Code* does not specifically exclude anyone from bringing ordinary warrant applications, although it does restrict telewarrant applications to peace officers. Having regard to the conditions for obtaining a warrant, set out in section 94, it is appropriate that only peace officers be permitted to make the application.

Application in person or by telephone

91. (1) An application for a warrant shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally and on oath, orally or in writing.

Form of written application

(3) An application in writing shall be in the prescribed form.

Criminal Code, s. 256(1), (3)

COMMENT

Section 91 says how an application for a blood sample warrant may be made. The procedure is similar to that for a search warrant.

Subsection (1) states the two methods currently provided for in subsection 256(1) of the *Criminal Code*.

Subsection (2), dealing with the manner in which the application must be made, requires that it be unilateral (*i.e.*, "without notice to any other party"). Unlike our other warrant application requirements, the requirement regarding this application does not stipulate that it be made in private, since the person from whom the samples may be taken will often be unconscious and there need be no concern that knowledge of the application may result in the loss or destruction of the evidence. Subsection (2) also expands upon the present law by allowing applications for blood sample warrants to be made orally as well as in writing. The reasons for this change have already been explained in the comment to subsection 22(2).

The *Criminal Code* now requires that written applications for blood sample warrants be made "on an information on oath in Form 1." However, Form 1 is designed for search warrant applications. Apart from its inherent imperfections,[140] the form is an inappropriate vehicle for making applications relating to a completely different subject. Subsection (3) prescribes a special form that allows for easy inclusion of the contents described in section 93.

Justice on application in person

92. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on application by telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

Criminal Code, s. 256(1)

COMMENT

The *Criminal Code* does not now specify where the application should be made. Owing to the urgent circumstances that normally attend these applications, subsection (1) of this provision gives considerable flexibility to the applicant in choosing where to apply. This will be of particular assistance in the case of applications arising out of accidents in remote areas.

140. See the comment to s. 24.

Subsection (2) is self-explanatory. It follows the current provisions of the *Criminal Code*, but is drafted to accord with the Unified Criminal Court system we have proposed (Working Paper 59).

Contents of application

93. An application for a warrant shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the person from whom the blood samples are to be taken;

(*e*) the applicant's grounds for believing that the person, within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC) and was involved in an accident resulting in the death of, or bodily harm to, someone;

(*f*) the applicant's grounds for believing that a medical practitioner is of the opinion that

(i) the person is unable to consent to the taking of the blood samples because of a physical or mental condition resulting from the consumption of alcohol, the accident or an occurrence related to or resulting from the accident, and

(ii) taking the blood samples would not endanger the person's life or health;

(*g*) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted; and

(*h*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

COMMENT

The application procedure for a blood sample warrant must be governed by the same general goals as search warrant application procedures: judiciality, particularity, accountability and strict regulation of discretionary intrusions upon individual rights. To achieve these goals, it is essential that the factors justifying any judicial authorization of such intrusions be stated clearly.

The present *Criminal Code* calls for applications to be made using Form 1, which is designed for search warrant applications; Form 1 is thus ill-suited to the purpose, creating the opportunity for blood sample warrants to be issued on vague or deficient criteria. Section 93 therefore sets out specifically the information to be included in an application for a blood sample warrant, separating the substantive and probative elements in the application. This kind of separation is now clearly seen only in section 487.1 of the *Criminal Code*, which sets out the statements to be included in a telewarrant application. Our Code expands on this approach.

DIVISION II
ISSUANCE OF WARRANT

Grounds for issuing warrant

94. (1) A justice may, on application, issue a warrant authorizing the taking of samples of a person's blood if the justice is satisfied there are reasonable grounds to believe that

(*a*) the person, within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC) and was involved in an accident resulting in the death of, or bodily harm to, someone; and

(*b*) a medical practitioner is of the opinion that

(i) the person is unable to consent to the taking of blood samples because of a physical or mental condition resulting from the consumption of alcohol, the accident or an occurrence related to or resulting from the accident, and

(ii) taking the blood samples would not endanger the person's life or health.

Additional ground if application by telephone

(2) If the application is made by telephone or other means of telecommunication, the warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

Report 21, rec. 4
Criminal Code, s. 256(1)

COMMENT

This section generally carries forward the conditions (set out in subsection 256(1) of the present *Criminal Code*) for the issuance of a warrant authorizing the taking of blood samples.

As a result of consultations, we have refined our previous recommendations in two respects. First, we have opted to limit the availability of blood sample warrants to situations in which an accident causing death or injury has occurred (see paragraph

94(1)(*a*)). The operative principle here is restraint. Second, we have not limited the availability of such warrants to cases in which the person is unconscious, but have recognized that there may be circumstances in which a conscious person will be unable to give consent (*e.g.*, owing to intoxication or injury).

In deciding whether to issue a warrant to take blood samples, the justice has the same kind of discretion as is exercised in issuing a search warrant.[141] The justice must be satisfied that the conditions set out in paragraphs (1)(*a*) and (*b*) are met. Note that, although paragraph (*b*) requires that the justice be "satisfied there are reasonable grounds to believe . . ." that a doctor has the opinion described in subparagraphs (i) and (ii), it does not contemplate the justice's considering independently the validity or weight of that opinion.

Subsection (2) of section 94 complements paragraph 93(*h*). The special basis on which a warrant for blood samples may issue when application is made by telephone or other means of telecommunication is identical to that in section 26 dealing with search warrants. The uniqueness of a warrant that is issued after such an application lies only in the manner in which it is obtained. Once issued, this warrant confers the same powers as a warrant issued after the applicant's personal appearance. As is the case when a search warrant is issued by means of a telewarrant application, the warrant must be completed by the justice and either two copies must be transmitted to the applicant or the applicant must complete two copies. (See section 12.)

Conditions relating to execution

95. A justice who issues a warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

COMMENT

This section gives the issuing justice a power identical to that given when search warrants are issued under section 27. This power is appropriate to the wider scope of inquiry permitted in the application proceedings. The obtaining of a more thorough understanding of all of the facts and circumstances surrounding the request for a warrant better enables the justice to set conditions ensuring that the purpose of the warrant is achieved in the safest, most efficient and least intrusive manner possible. Section 100 alludes to the fact that the issuing justice has the power, under this section, to impose a special condition that a copy or facsimile of the warrant be given to a named person other than the person from whom a blood sample is to be taken. This would most often be of use when the person from whom the sample is to be taken is unconscious. (See the comment to section 100 in this regard.)

Form of warrant

96. A warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

Criminal Code, s. 256(2)

141. See the comment to s. 25.

COMMENT

Subsection 256(2) of the *Criminal Code* now provides that a warrant to take blood samples "may be in Form 5 or 5.1 varied to suit the case." Both forms are, in fact, drafted for search warrants. The defects in these forms are discussed in the comments to sections 29 and 32. Our criticisms of these forms for search warrants have even greater force when the forms are to be used as authority to obtain blood samples. By requiring the use of a specific form relating only to the taking of blood samples, we have endeavoured to maximize and enhance the particularity of blood sample warrants.

Contents of warrant

97. The warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the person from whom the blood samples are to be taken;

(*d*) the time and date the application was made;

(*e*) any conditions imposed relating to its execution;

(*f*) the time and date it expires if not executed;

(*g*) the time, date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

COMMENT

This section sets out the details to be included in the warrant. The basic format of section 30 is followed.

DIVISION III
EXPIRATION OF WARRANT

Six-hour expiration period

98. A warrant authorizing the taking of blood samples expires six hours after it is issued or, if it is executed less than six hours after it is issued, on execution.

COMMENT

The general reasons for imposing fixed expiry periods on warrants have been discussed previously.[142] Section 98, which has no equivalent in the current *Criminal Code*, establishes an expiry period for blood sample warrants. It recognizes that the usefulness of blood samples diminishes after a point, and therefore is designed (along with other time-limit provisions of this Part) to prevent intrusions that are rendered unreasonable by the passage of time.

142. See the comments to ss. 31-33.

While the six-hour period is admittedly somewhat arbitrary, it allows reasonable time for a warrant to be executed.

Return of expired warrant

99. If a warrant expires without having been executed, a copy of the warrant shall have noted on it the reasons why the warrant was not executed, and shall be filed as soon as practicable with the clerk of the court for the judicial district in which it was issued.

COMMENT

This section is similar to, and justified on the same basis as, a requirement found in section 34.

DIVISION IV
PROVISION OF COPY OF WARRANT

Person to whom copy given

100. A peace officer shall, as soon as practicable after executing a warrant, give a copy of the warrant to the person from whom the blood samples were taken, unless the justice who issued the warrant imposed a condition requiring that the copy be given to another designated person.

COMMENT

As in the case of search warrants,[143] the Commission believes that copies of blood sample warrants should generally be given (without the need for a request) to the people they affect. Since the person affected may be unconscious, and since others (for example, family members) may have an interest in ensuring that blood samples are not taken from the person unless there is a medical necessity or valid legal authorization, section 100 provides for a copy to be given to any other person named by the issuing justice.

143. See the comment to s. 40.

CHAPTER V
TAKING, TESTING AND RELEASING BLOOD SAMPLES

DIVISION I
INTERPRETATION

Application of Chapter

101. This Chapter applies to blood samples taken pursuant to a warrant, a request made under paragraph 86(1)(*a*) (request by peace officer) or a request made in the circumstances described in subsection 89(2) (request by person detained in custody).

DIVISION II
TAKING AND TESTING BLOOD SAMPLES

Conditions for taking samples

102. (1) Blood samples shall be taken from a person

(*a*) as soon as practicable after the request for the samples has been made or the warrant has been issued;

(*b*) by a medical practitioner or a technician acting under the direction of a medical practitioner; and

(*c*) in a manner that ensures the least discomfort to the person.

Opinion of medical practitioner

(2) Blood samples shall not be taken unless the medical practitioner is of the opinion, before each sample is taken,

(*a*) that taking the sample would not endanger the person's life or health; and

(*b*) in the case of a blood sample taken pursuant to a warrant, that the person is unable to consent to the taking of the sample because of a physical or mental condition resulting from the consumption of alcohol, the accident with respect to which the warrant was issued or an occurrence related to or resulting from the accident.

Report 21, recs. 13, 14
Criminal Code, ss. 254(3), (4); 256(4)

COMMENT

Subsection 102(1) contains a number of safeguards for persons from whom blood samples are to be taken. The timeliness requirement of paragraph (*a*) (one undoubtedly observed in any event by most police officers, as any undue delay in taking the sample

will affect the value attributed to the analysis results) is designed to help ensure that blood samples are taken at a time when they are scientifically useful, and that persons are not subjected to the taking of such samples when their usefulness has diminished or disappeared. Paragraph (*b*) contains the essence of that part of subsection 254(4) of the present *Criminal Code* which ensures that blood samples are taken by a competent person in a competent fashion. Paragraph (*c*) is self-explanatory and is designed to minimize the intrusion occasioned by the taking of blood samples.

Subsection 102(2) also repeats parts of paragraph 254(3)(*b*) and subsection 254(4) of the present *Criminal Code*. It complements the requirements for obtaining the warrant set out in our paragraph 94(1)(*b*) and also makes it clear that the supervising doctor has the final word as to whether, when and how the samples may be taken, since the person's health and safety are to have paramount importance.

Number of samples

103. (1) No more than two separate blood samples may be taken from a person.

Size of sample

(2) Each blood sample shall be taken in such an amount as a medical practitioner considers necessary to enable the sample to be divided into two parts suitable for separate analysis for the purpose of determining the concentration of alcohol in the person's blood.

Report 21, recs. 3, 4
Criminal Code, ss. 254(3), 256(1)

COMMENT

Sections 103 to 105 set out certain requirements relating to the taking of blood samples. The *Code*'s current requirements (which are somewhat different) are less clearly articulated, and are largely discoverable only by reference to the evidentiary provisions of section 258.

Although section 258 creates a rebuttable presumption with reference to the analysis results of one blood sample, the present *Criminal Code* does not place a specific limit on the number of blood samples that may be taken. Subsection 254(3), for example, refers simply to "such samples of the person's blood . . . as in the opinion of the qualified medical practitioner or qualified technician taking the samples are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood." In a similar manner, subsection 256(1) refers to "such samples of the blood of the person as in the opinion of the person taking the samples are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood." Subsection (1) of section 103 now clearly authorizes the taking of a maximum of two blood samples. In doing so, it limits the power of the state to intrude upon the bodily integrity of the individual.

Subsection (2) is self-explanatory; it makes it the responsibility of the medical practitioner to determine the appropriate size of each sample.

Dividing and sealing samples

104. (1) Each blood sample shall be divided into two parts and each part shall be placed in a separate sealed container.

Custody and safeguarding of samples

(2) The peace officer investigating the crime in relation to which the blood samples were taken shall have custody of the samples, and shall take steps to ensure their preservation and safeguarding.

Criminal Code, s. 258(1)(*d*)(i), (iv)

COMMENT

Subsection (1) of section 104 retains the present requirement that blood samples be placed in sealed containers. Subsection (2) is a new provision, included for completeness and to place the responsibility for preserving and safeguarding the samples clearly on the person most logically suited for the task.

Analysis on behalf of peace officer

105. (1) The peace officer may have one part of each blood sample analyzed by an analyst for the purpose of determining the concentration of alcohol in the blood.

Retaining sample for separate analysis

(2) The peace officer shall retain the other part of each sample so as to permit an analysis to be made on behalf of the person from whom the samples were taken.

Report 21, rec. 11
Criminal Code, s. 258(1)(*d*)(i), (v)

COMMENT

Subsection (1) of this provision is included clearly to empower the police to have one part of each blood sample analyzed. Subsection (2) is designed to facilitate the exercise by accused persons of the right (in section 107) to have samples released for independent analysis. At present, subparagraph 258(1)(*d*)(i) of the *Criminal Code* requires (in order for the rebuttable presumption stated in that provision to apply) that, when a blood sample is taken, another sample also be taken and retained "to permit an analysis thereof to be made by or on behalf of the accused." Our provision states the requirement for retention more directly.

Preservation of breath samples and release of such samples for independent analysis are not features of our present law. Requirements that the accused be given extra samples of breath for independent analysis have been enacted and re-enacted in the *Criminal Code* over the years[144] but have not been brought into force. The failure to give the accused breath samples for independent analysis has been held not to infringe the *Canadian Bill of Rights*[145] or the *Charter*.[146] The apparent reason that the relevant

144. S.C. 1968-69, c. 38, s. 16; re-enacted by S.C. 1974-75-76, c. 93, s. 18(1) and (2); re-enacted by S.C. 1985, c. 19, s. 36; s. 258(1)(*d*)(i) to come into force on proclamation.

145. R.S.C. 1985, App. III.

146. See *Duke* v. *The Queen*, [1972] S.C.R. 917; *R.* v. *Potma* (1983), 31 C.R. (3d) 231 (Ont. C.A.). But see also *R.* v. *Bourget* (1987), 56 C.R. (3d) 97 (Sask. C.A.), holding that failure to disclose relevant material violated s. 7 of the *Charter*.

sections have not been brought into force relates to the technical difficulty in preserving breath samples. (This difficulty does not arise in the case of blood samples.) Given this problem, the Commission does not, at this time, propose that such a requirement should apply where breath samples are taken.

Testing blood sample for drugs

106. A blood sample may be tested for the presence of drugs.

Report 21, rec. 2
Criminal Code, s. 258(5)

COMMENT

Section 106 is modelled on subsection 258(5) of the current *Criminal Code*. If blood samples are obtained following a request or under a warrant, they will be analyzed to determine the concentration of alcohol in the blood. If the analyses prove negative or an unexpectedly low concentration of alcohol is found, it may be reasonable in some cases to suspect that erratic driving or unusual behaviour has been caused by the use of drugs. Section 106 enables this possibility to be explored.

DIVISION III
APPLICATION TO RELEASE BLOOD SAMPLES

Applicant and notice

107. A person from whom blood samples are taken may, on reasonable notice to the prosecutor, apply for an order to release one part of each sample for the purpose of analysis or testing.

Criminal Code, s. 258(4)

Time and manner of making application

108. The application shall be made in writing to a justice within three months after the day on which the blood samples were taken.

Criminal Code, s. 258(4)

Contents of application

109. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) the date the blood samples were taken; and

(*e*) the nature of the order requested.

Affidavit in support

(2) The application shall be supported by an affidavit.

Service of notice

110. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on the prosecutor.

Hearing evidence

111. A justice to whom an application is made may receive evidence, including evidence by affidavit.

Service of affidavit

112. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on the prosecutor.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

113. The evidence of any person shall be on oath.

Recording evidence

114. (1) Any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of oral evidence shall be certified as to time, date and accuracy.

Order to release samples

115. The justice shall, on application, order the release of one part of each sample, subject to any conditions that the justice considers necessary to ensure its preservation for use in any proceeding.

Report 21, rec. 11
Criminal Code, s. 258(4)

Form of order

116. The order shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of order

117. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) the date the blood samples were taken;

(*d*) any conditions imposed by the justice;

(*e*) the date and place of issuance; and

(*f*) the name and jurisdiction of the justice.

Filing application, evidence, order

118. The justice shall, as soon as practicable after the hearing, have the following filed with the clerk of the court for the judicial district in which the application was made:

(*a*) the notice of the application;

(*b*) the application;

(*c*) the record of any oral evidence heard by the justice or its transcription;

(*d*) any other evidence received by the justice; and

(*e*) the original of the order.

COMMENT

The provisions of Division III (sections 107 to 118) in essence embody subsection 258(4) of the current *Criminal Code*. Designed to promote the right to "make full answer and defence,"[147] they provide for an application to enable the accused to obtain the release of one part of each blood sample taken, in order to challenge the analysis results. Release must be ordered by the justice if an application, by or on behalf of the person from whom blood samples have been taken, is made within the time period specified in section 108.

These provisions replace the ill-defined "summary application," now specified in subsection 258(4) of the *Criminal Code*.[148]

For ease of reference, all of the procedural requirements for this application are now included in this Part and Division without further comment on the individual sections. However, when this Code is complete and consolidated, these requirements will appear in a general Part setting out common procedures governing all applications for orders.

DIVISION IV
EXEMPTION FROM CRIMINAL LIABILITY

Refusal to take blood sample

119. No medical practitioner or technician is guilty of a crime because of a failure or refusal to take a blood sample from a person and no medical practitioner is guilty of a crime because of the practitioner's failure or refusal to have a blood sample taken from a person by a technician acting under the practitioner's direction.

Report 21, rec. 16
Criminal Code, s. 257(1)

147. See *Criminal Code*, ss. 650(3), 802(1).

148. See the criticisms of summary applications in the comments to s. 214 (disposition of seized things).

COMMENT

Section 119 is similar to subsection 257(1) of the current *Criminal Code*. It reflects the view of the Commission that the conscription of physicians or technicians into the area of criminal investigation and law enforcement would be an unjustified infringement of the individual rights of those persons; in some cases, it would be an unconscionable intrusion into the doctor-patient or nurse-patient relationship. This provision makes it clear that failure or refusal to take a blood sample or to have one taken does not amount to breach of a legal duty,[149] and does not render a doctor or technician guilty of obstruction.

Section 119 does not incorporate subsection 257(2) of the current *Criminal Code*, which purports to prevent criminal or civil liability from arising if doctors, and technicians acting under their direction, take blood samples with reasonable care and skill. It is questionable whether a pronouncement on civil liability is constitutionally appropriate in a criminal statute.[150] Moreover, the *Criminal Code* provision merely states an obvious proposition of civil or tort law that must be applied by civil courts in any event.[151] The reference to criminal liability is unnecessary since section 102 directs that blood samples taken under the authority of this Part must be taken either by medical practitioners or technicians acting under their direction and section 23 of our proposed Criminal Code[152] would apply to protect from criminal liability persons who take samples under section 102 with reasonable care and skill.

[Alternative — A minority of the Commission would propose an alternative draft of Chapter V.

As in the majority draft, subsections 102(1) to 104(1) would apply to blood samples taken pursuant to a warrant or pursuant to a request made by a peace officer under paragraph 86(1)(a) or a request made by a detained person in the circumstances described in subsection 89(2). Section 119 would also be of general application.

Subsection 104(2) to section 118 would be made applicable only to blood samples taken pursuant to a warrant or pursuant to a request made by a peace officer.

The following provisions would be added and made applicable to blood samples taken pursuant to a request made by a detained person in the circumstances described in subsection 89(2):

Providing sample to person

119.1 (1) One part of each blood sample shall be given to the person from whom the samples were taken.

149. See Report 31, rec. 25(1) and comment at 116.

150. See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 412-413; *R.* v. *Zelensky*, [1978] 2 S.C.R. 940, *per* Laskin C.J.C. at 963.

151. See A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) Chapter 5, generally, and the particular discussion at 142-143.

152. Section 23 provides that "no person is guilty of a crime who performs any act that is required or authorized to be performed by or under an Act of Parliament . . . and uses such force . . . as is reasonably necessary to perform the act and as is reasonable in the circumstances."

Results confidential and privileged

(2) The results of any analysis or test carried out with respect to that part of a blood sample are confidential and privileged with respect to the person from whom the samples were taken.

Notice of intention to tender results

(3) If the person intends to tender the results in evidence in any proceeding, reasonable notice shall be given to the prosecutor of that intention.

Custody and safeguarding of samples

119.2 (1) The peace officer investigating the crime in relation to which the blood samples were taken shall have custody of the other part of each blood sample, and shall take steps to ensure its preservation and safeguarding.

Analysis and testing on behalf of peace officer

(2) The peace officer may have that part of each blood sample analyzed by an analyst for the purpose of determining the concentration of alcohol in the blood and tested for the presence of drugs.

Disclosure of results

(3) The results of the analysis or test shall not be disclosed by the analyst or individual who carried out the test unless the person from whom the samples were taken has given notice under subsection 119.1(3).

Inadmissibility of evidence

119.3 If a person from whom blood samples were taken has not given notice under subsection 119.1(3), the fact that blood samples were taken and the results of any analysis or test carried out with respect to them are not admissible in evidence in any proceeding, and the fact that blood samples were taken shall not be the subject of comment by anyone in the proceeding.]

CHAPTER VI
EVIDENTIARY RULES

DIVISION I
ABSENCE OF ORIGINAL OF WARRANT

Original warrant absent

120. In any proceeding in which it is material for a court to be satisfied that the taking of a blood sample was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the taking of the blood sample was not authorized by a warrant.

Report 19, Part Two, rec. 2(12)
Criminal Code, s. 487.1(11)

COMMENT

This section is the same as section 41 and is based on the same reasoning as is stated in the comment to that section.

DIVISION II
RESULTS OF ANALYSES

Presumption relating to breath sample results

121. (1) In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), where samples of a person's breath have been taken and analyzed in accordance with the conditions set out in subsection (2),

(*a*) if the results of the analyses are the same, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the concentration determined by the analyses; and

(*b*) if the results of the analyses are different, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the lowest of the concentrations determined by the analyses.

Conditions for presumption to apply

(2) The conditions for the purposes of subsection (1) are as follows:

(*a*) at least two samples of the person's breath were taken;

(*b*) the samples were taken pursuant to a request made by a peace officer under section 84 or paragraph 85(1)(*a*);

(*c*) the samples were taken as soon as practicable after the crime was alleged to have been committed;

(*d*) the first sample was taken not more than two hours after the crime was alleged to have been committed;

(*e*) an interval of at least fifteen minutes passed between the taking of the samples;

(*f*) each sample was received from the person directly into a container or into a breath analysis instrument operated by a technician; and

(*g*) an analysis of each sample was made with a breath analysis instrument operated by a technician.

Presumption inoperative

(3) Subsection (1) does not apply if a peace officer failed to tell the person who provided the breath samples the results of the breath analyses in accordance with subsection 89(1) or

failed to arrange for the taking of samples of the person's blood in accordance with subsection 89(2).

Criminal Code, s. 258(1)(*c*)

COMMENT

This section (among other things) restructures and simplifies paragraph 258(1)(*c*) of the current *Criminal Code*, which deals with the conclusions to be drawn from analyses of breath samples. It does not incorporate the unproclaimed provision in subparagraph 258(1)(*c*)(i), which would require that the accused be given samples of his or her breath "in an approved container . . .," owing to the technical difficulties that have prevented this *Code* provision from being proclaimed. (See the comment to section 105.)

Subsection (1) creates a rebuttable presumption. A failure to satisfy the conditions of subsection (2) does not necessarily make the results of an analysis inadmissible; however, the presumption may not be applied and expert evidence interpreting the results will be required. Subsection (3), which has no equivalent in paragraph 258(1)(*c*) of the current *Code*, makes the presumption inapplicable where the requirements of section 89 have not been fulfilled.

Presumption relating to blood sample results

122. (1) In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), where samples of a person's blood have been taken and analyzed in accordance with the conditions set out in subsection (2),

(*a*) if the results of the analyses are the same, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the concentration determined by the analyses; and

(*b*) if the results of the analyses are different, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the lower of the concentrations determined by the analyses.

Conditions for presumption to apply

(2) The conditions for the purposes of subsection (1) are as follows:

(*a*) the blood samples were taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*);

(*b*) two samples of the person's blood were taken;

(*c*) the samples were taken as soon as practicable after the crime was alleged to have been committed;

(*d*) the first sample was taken not more than two hours after the crime was alleged to have been committed;

(*e*) an interval of at least fifteen minutes passed between the taking of the samples;

(*f*) each sample was taken by a medical practitioner or a technician acting under the direction of a medical practitioner;

(*g*) at the time each sample was taken, the individual taking the sample divided it into two parts;

(*h*) both parts of each sample were received from the person directly into, or placed directly into, containers that were subsequently sealed;

(*i*) one part of each sample was retained to permit an analysis to be made by or on behalf of the person;

(*j*) an analyst made an analysis of one part of each sample that was contained in a sealed container; and

(*k*) if an order to release one part of each sample has been made pursuant to section 115, that order has been complied with.

Criminal Code, s. 258(1)(*d*)

COMMENT

This section, which is similar to section 121, is designed in part to simplify paragraph 258(1)(*d*) of the current *Code*. Subsection (1) sets out a presumption, similar to that in subsection 121(1), that applies to the results of analyses of blood if the conditions set out in subsection (2) are met. Although analysis of blood is considered to be more accurate than analysis of breath, paragraph 258(1)(*d*)'s provision that only one blood sample need be taken in order for the presumption to apply is changed. As with breath samples, two samples of blood must now be taken.[153] The *Code*'s requirement for a division of the blood samples, and the retention of one part of each divided sample for possible testing by the accused, is retained.

Paragraph (*k*) of subsection (2) rephrases subparagraph 258(1)(*d*)(i) of the current *Criminal Code* so as to remove a possible problem in interpretation of the present provisions. As now worded, paragraph 258(1)(*d*) appears to allow the operation of the presumption to be defeated if the accused does not seek the release of a retained sample within three months.

153. See R.E. Erwin, *Defense of Drunk Driving Cases: Criminal/Civil*, vol. 2, 3d ed. (New York: M. Bender, 1971) at 16-4 to 16-6, demonstrating the improvement in the probative value of evidence obtained if two samples are taken.

DIVISION III
CERTIFICATE EVIDENCE

Proof of facts alleged in certificate

123. In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), each of the following certificates is evidence of the facts alleged in the certificate without proof of the signature or the official character of the individual appearing to have signed the certificate:

(*a*) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with a breath analysis instrument and that the sample of the standard so analyzed is suitable for use with a breath analysis instrument;

Criminal Code, s. 258(1)(*f*)

(*b*) where samples of a person's breath have been taken pursuant to a request made by a peace officer under section 84 or paragraph 85(1)(*a*), a certificate of a technician stating

(i) that the analysis of each of the samples has been made with a breath analysis instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with a breath analysis instrument,

(ii) the results of the analyses so made, and

(iii) if the technician took the samples,

(A) the time and place each sample was taken, and

(B) that each sample was received from the person directly into a container or into a breath analysis instrument operated by the technician;

Criminal Code, s. 258(1)(*g*)

(*c*) a certificate of an analyst stating that the analyst has made an analysis of one part of each sample of a person's blood that was contained in a sealed container identified in the certificate, the date and place it was analyzed and the result of the analysis;

Criminal Code, s. 258(1)(i)

(*d*) where samples of a person's blood have been taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner or a technician, stating

(i) that the medical practitioner or technician took the samples,

(ii) the time and place each sample was taken,

(iii) that, at the time the samples were taken, the medical practitioner or technician divided each sample into two parts, and

(iv) that both parts of each sample were received from the person directly into, or placed directly into, containers that were subsequently sealed and that are identified in the certificate;

Criminal Code, s. 258(1)(*h*)

(*e*) where samples of a person's blood have been taken by a technician pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner stating that the technician was acting under the practitioner's direction;

Criminal Code, s. 258(1)(*h*)

(*f*) where samples of a person's blood have been taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner stating that before each sample was taken the practitioner was of the opinion that taking the blood sample would not endanger the person's life or health; and

Criminal Code, s. 258(1)(*h*)

(*g*) where samples of a person's blood have been taken pursuant to a warrant, a certificate of a medical practitioner stating that before each sample was taken the practitioner was of the opinion that the person was unable to consent to the taking of the blood sample because of a physical or mental condition resulting from the consumption of alcohol, the accident with respect to which the warrant was issued or an occurrence related to or resulting from the accident.

Criminal Code, s. 258(1)(*h*)

COMMENT

Section 123 reworks and simplifies paragraphs (*e*) through (*i*) of subsection 258(1) of the present *Criminal Code*. The provision allows certain evidence of analysts, technicians and doctors to be given by certificates rather than personal appearance. The use of certificate evidence is appropriate, because routinely requiring the personal presence in court of analysts, technicians and medical practitioners would add little, if anything, to the probative value of their evidence, while causing inconvenience, creating difficult administrative problems and adding unnecessary complexity to trials. Therefore, provided that the conditions established in this section are strictly observed (and provided that the proceeding is one "in respect of a crime committed under section 58 of our proposed Criminal Code . . ."), section 123 continues to allow certificates to be used.

The ability to require the analyst, technician or doctor to attend for cross-examination, now provided by *Criminal Code* subsection 258(6), is preserved. (See subsection 124(2).)

Notice of intention to tender certificate

124. (1) No certificate is admissible in evidence in a proceeding unless the party intending to tender it has, before the proceeding, given to the other party reasonable notice of that intention and a copy of the certificate.

Leave to cross-examine on certificate

(2) A party against whom a certificate is tendered may, with leave of the court, require the attendance of the medical practitioner, analyst or technician for the purpose of cross-examination.

Criminal Code, s. 258(6), (7)

COMMENT

Section 124 reproduces the essence of subsections 256(6) and (7) of the current *Criminal Code*. The object of this provision is fairness. Since the accused is normally entitled to expect that there will be a right to cross-examine any witness who testifies for the Crown, fairness dictates that reasonable notice should be given of any intended derogation from that right. Upon being given such notice (together with a copy of the certificate) the accused who wishes to question the validity of the certificate may seek leave to have the witness attend at court for cross-examination.

PART FIVE

ELECTRONIC SURVEILLANCE

DERIVATION OF PART FIVE

LRC PUBLICATIONS

Writs of Assistance and Telewarrants, Report 19 (1983)

Electronic Surveillance, Working Paper 47 (1986)

Classification of Offences, Working Paper 54 (1986)

Public and Media Access to the Criminal Process, Working Paper 56 (1987)

Recodifying Criminal Law, Report 31 (1987)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, ss. 183-196

INTRODUCTORY COMMENTS

Part VI of the present *Code*, entitled *Invasion of Privacy*, describes how private communications may be lawfully intercepted. The choice of this title is somewhat misleading because Part VI protects only one aspect of privacy.

The Ontario Commission on Freedom of Information and Individual Privacy[154] has identified three sorts of privacy: territorial, personal and informational. Territorial privacy is privacy in a spatial sense and involves the right to be free from uninvited entries or unwarranted intrusions into one's home. Privacy of the person protects the dignity of the person and encompasses freedom from physical assault. Privacy in the information context concerns a person's claim to control over personal information.

The criminal law has for centuries protected certain privacy interests, for example, by limiting the police power to search a person's home and by forbidding murder and assault. Until recently, however, the *Criminal Code* did not protect the privacy interest inherent in a person's oral communications. In large part, this was because such protection was unnecessary. It is only since the turn of this century that the technology has been developed by which private communications can be readily intercepted.[155] This development, in turn, has increased the public's awareness of the need to better protect privacy. Thus, in 1974, Parliament enacted what is now Part VI of the *Criminal Code*, which generally prohibits the interception, by means of a surveillance device, of private (generally oral) communications, subject to limited exceptions. In addition, advances in protecting privacy have been made in other areas of law.[156]

The present law on wiretapping mixes both crimes and procedural sections. The crimes set out in the present *Criminal Code* are: unlawful interception of a private communication (s. 184); unlawful disclosure of an intercepted private communication (s. 193); and unlawful possession, sale or purchase of a device knowing that its design renders it primarily useful to intercept surreptitiously a private communication (s. 191).

Some procedural sections provide that a judge may authorize an interception of a private communication. They cover: who may apply for the authorization; the grounds on which a judge may grant an authorization; the contents of an authorization; the time period for which an authorization is valid; and how an authorization may be renewed for a longer period.

Other procedural sections cover:

(a) the sealing in a packet of the documents in support of the application for an authorization;

(b) the granting of emergency authorizations having a limited time span of up to thirty-six hours;

(c) the admissibility of the intercepted private communications as evidence;

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154. The Report of the Commission on Freedom of Information and Individual Privacy, *Public Government for Private People*, vol. 3, *Protection of Privacy* (Toronto: The Commission, 1980) at 498-500.

155. A.F. Westin, *Privacy and Freedom* (New York: Atheneum, 1970) at 330-349.

156. See, *e.g.*, the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 5; the *Privacy Act*, S.C. 1980-81-82-83, c. 111, Sch. II; the *Access to Information Act*, S.C. 1980-81-82-83, c. 111, Sch. I.

(d) the trial judge's power to order particulars of the private communication;
(e) forfeiture of a surveillance device on conviction for unlawful possession of it or for unlawful interception of a private communication;
(f) damages on conviction for unlawful interception or disclosure of a private communication;
(g) annual reports made by the appropriate minister about the number of authorized wiretaps; and
(h) the notification of a person whose private communications were intercepted under an authorized wiretap.

We have examined the present law on wiretapping in three previous publications. In Report 31 (at 72 to 74), we proposed crimes relating to the unlawful interception of private communications that were modelled largely, but not exclusively, on the present law.[157] Then, in Working Paper 47 on *Electronic Surveillance*, and Working Paper 56 on *Public and Media Access to the Criminal Process*, we proposed numerous reforms to the present *Code* procedures.[158] These were designed to better protect the fundamental value of privacy. Many of these changes are in this draft legislation.

This draft legislation also takes into account Supreme Court of Canada decisions that have examined the present wiretap law in light of the *Canadian Charter of Rights and Freedoms*. Most notable in this regard are the recent decisions of *R.* v. *Duarte*[159] and *R.* v. *Wiggins*,[160] which ruled that an interception of private communications, even if made with the prior consent of a party to the communications who is a peace officer or an informer acting on behalf of the police, requires prior judicial authorization in order to meet constitutional requirements.

The structure of this draft legislation is modelled on that found in other Parts of this Code, in particular Part Two (*Search and Seizure*). In the interest of clarity, this legislation uses simpler language and avoids cross-references wherever possible.

However, there are four important matters that this legislation does not presently address. First, there are no provisions regulating the installation of optical devices. The extent to which the criminal law should prohibit or regulate the use of optical devices is an issue that requires further study. Second, the draft legislation contains no

157. The Commission's proposed crimes are as follows:
(*a*) intercepting a private communication without the consent of a party to it or without prior judicial authorization;
(*b*) entering private premises to install, service or remove a surveillance or optical device without the consent of the owner or occupier or without prior judicial authorization;
(*c*) searching such premises while installing, servicing or removing the device;
(*d*) using force against a person for the purpose of gaining entrance onto, or exiting from, such premises; and
(*e*) possession of a device capable of being used to intercept a private communication.

158. For other works examining the present law on electronic surveillance and offering proposals for reform, see S.A. Cohen, *Invasion of Privacy: Police and Electronic Surveillance in Canada* (Toronto: Carswell, 1983); D. Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell, 1979); D.A. Bellemare, *L'écoute électronique au Canada* (Montreal: Les Éditions Yvon Blais, 1981).

159. [1990] 1 S.C.R. 30.

160. [1990] 1 S.C.R. 62.

provisions on the admissibility of evidence. The rules governing the admissibility of evidence for the entire Code of Criminal Procedure will be studied separately later. We will determine in that study to what extent special admissibility provisions are needed in this context. Third, there are no provisions regarding the forfeiture of a surveillance device or the payment of damages when a person is convicted for some of these crimes. These issues will be explored more fully in forthcoming Parts of this Code dealing with remedies. Fourth, this legislation, like the present law, does not cover the interception of private communications made in the course of investigating a threat to the security of Canada.[161]

CHAPTER I
INTERPRETATION

Definitions

125. In this Part,

"federally designated" (*désigné par les autorités fédérales*)

"federally designated" means designated by the Solicitor General of Canada for the purpose of applying for warrants under this Part or intercepting private communications under a warrant;

Criminal Code, ss. 185(1)(*a*), 186(5), (6), 188(1)(*a*)

"general interception clause" (*clause d'interception d'application générale*)

"general interception clause" means a clause in a warrant authorizing the interception of private communications of persons who are not individually identified or authorizing the interception of private communications at unknown places;

"intercept" (*intercepter et interception*)

"intercept", in relation to a private communication, means listen to, record or acquire the contents, substance or meaning of the communication;

Criminal Code, s. 183

"private communication" (*communication privée*)

"private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for a party to it to expect that it will not be intercepted by a person other than a party to the communication, even if any party to it suspects that it is being intercepted by such a person;

Working Paper 47, recs. 4, 5
Criminal Code, s. 183

"provincial minister" (*ministre provincial*)

"provincial minister" means, in the Province of Quebec, the Minister of Public Security and, in any other province, the Solicitor General of the province or, if there is no Solicitor General, the Attorney General of the province;

161. Such interceptions continue to be governed by the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 21-28.

"provincially designated" (*désigné par les autorités provinciales*)

"provincially designated" means designated by a provincial minister for the purpose of applying for warrants under this Part or intercepting private communications under a warrant;

Criminal Code, ss. 185(1)(*b*), 186(5), (6), 188(1)(*b*)

"solicitor" (*avocat*)

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

Criminal Code, s. 183

"surveillance device" (*dispositif de surveillance*)

"surveillance device" means any device capable of being used to intercept a private communication.

Report 31, s. 65
Working Paper 47, rec. 7
Criminal Code, s. 183

COMMENT

Section 183 of the present *Code* contains many terms, the meanings of which must be understood before an understanding of how private communications may be lawfully intercepted is achievable. Most of these terms are now set out in this interpretation section.

Throughout this Part, the term "warrant" replaces the term "authorization" which is now employed in the *Criminal Code*.[162] This is consistent with our use of the term "warrant" throughout this Code. "Warrant" is a term that describes the authority, conferred on the police by judges or justices in the course of criminal investigations, to intrude on or invade privacy interests. Because there is no difference in terms of form or function between an "authorization" or a "warrant", in some places in this text the term "warrant" will be used instead of the term "authorization" in order to avoid the needless repetition of the two terms together. There is no reason to define a warrant to intercept private communications because its meaning will be clear from its use in other sections of this Part.

The term "federally designated" is also new. It is part of a plan to set out more simply the power that the federal Solicitor General has under present *Code* paragraph 185(1)(*a*) and subsection 186(5), respectively, to designate: (a) persons who may apply for authorizations (warrants) to intercept private communications; or (b) persons who may intercept private communications under authorizations (warrants).

The term "general interception clause" is new. It is preferable to the pejorative term "basket clause" that is in common usage in discussions of the wiretap law. The general rule is that an authorization to wiretap should identify the persons whose private communications are to be intercepted under it or name the specific place or places where those private communications are to be intercepted. However, under the present law and, indeed, under this legislation, an authorization can, subject to certain

162. It is of interest to note that the *Canadian Security Intelligence Service Act*, *supra*, note 161, also employs the term "warrant" in preference to the *Criminal Code* term "authorization."

limitations, contain a "basket" clause allowing either the interception of "unknown" persons or the interception of private communications at any unspecified place that a known person resorts to or uses. (This latter basket clause is sometimes referred to as an "itinerant interception clause.")

The term "intercept" has a definition similar to that in the present *Code.*

The term "provincial minister" is new. It describes the provincial minister who is responsible for the conduct of police forces within each province. The purpose of this definition is to clarify the present law. The present *Code*, in paragraph 185(1)(*b*) and subsection 186(5), sets out the authority of the Attorney General of a province personally to designate agents who may apply for an authorization to intercept private communications and who may intercept private communications under warrants. By section 2 of the present *Code*, the provincial Attorney General may be the Attorney General or the Solicitor General. This is ambiguous where, as in Ontario, a province has both an Attorney General and a Solicitor General.[163] At the stage when an application to intercept a private communication is made, the aim is to investigate the impending or actual commission of a crime. Therefore, the minister responsible for choosing these agents should be the minister responsible for the investigation of crimes, rather than the minister responsible for prosecuting crimes.

The term "provincially designated" is to be read with the term "provincial minister."

The definition "private communication" has been significantly altered from that appearing in the current *Code*. The present definition focuses on the expectation of the originator of a private communication that the communication will not be listened to by any person other than the intended recipient.[164] This definition has created problems, since its effect is to break a conversation between two people into a series of private communications. The interpretation clause presented here avoids this somewhat artificial distinction. Instead of referring to the reasonable expectation of privacy of the "originator" of the communication, it makes a communication private if it is made under circumstances in which it is reasonable for a "party" to expect that it will not be intercepted by someone other than a party. The effect is to clarify that a private communication means not the individual statements that together make up a conversation, but the conversation as a whole.

Further, this interpretation clause more clearly adopts an objective test to determine if the communication is private. Despite the reference in the present definition to the originator's reasonable expectation of privacy, the case law focuses initially on the originator's subjective expectation of privacy. The person must first be found to have a subjective expectation of privacy before a determination may be made as to whether that expectation is objectively reasonable.[165] Specifically, this raises the issue of

163. Quebec recently changed the title of its Solicitor General to the Minister of Public Security. This change came into effect by the *Décret Concernant le Ministre et le Ministre de la Sécurité Publique* (1988), 120 G.O. II, 4704.

164. See *Goldman* v. *The Queen*, [1980] 1 S.C.R. 976.

165. *R.* v. *Sanelli* (1987), 38 C.C.C. (3d) 1 (Ont. C.A.), appeal dismissed on other grounds by the Supreme Court of Canada in *R.* v. *Duarte*, *supra*, note 159.

whether a suspicion, held by one party to a private communication, that the communication is being intercepted should be allowed to defeat any claim to a reasonable expectation of privacy. The danger in requiring a subjective expectation of privacy as an initial threshold to be met is that it permits the subjective fears of a person to erode any reasonable expectation of privacy. For example, if the government were to announce tomorrow that it would monitor all private communications to discover who intended to commit crimes, it would then be possible to argue that no one could reasonably expect that telephone conversations are private. To prevent such a result, this interpretation clause clearly provides that a reasonable expectation of privacy is not made unreasonable "even if one party to the communication suspects that the communication is being intercepted."

The definition "solicitor" is identical to that in the present *Code*.

The term "surveillance device" replaces the definition "electro-magnetic, acoustic, mechanical or other device" found in the present *Code*. While many elements of the present definition are retained, our term is broader. Hearing-aids are no longer excluded. The ordinary use of hearing-aids would not be a crime. However, if a hearing-aid were used purposely to intercept a private communication surreptitiously, that act would be criminal under section 66 of our proposed Criminal Code.

One term, defined in the present *Code*, that is not defined here is "sell." The definition of this term aids in the interpretation of present section 191, creating the crime of possessing, selling, or purchasing a surveillance device. (Selling such a device amounts to the furthering or attempted furthering of the crime of unlawful possession of a surveillance device under paragraph 84(*b*) of our proposed Criminal Code.)

CHAPTER II
INTERCEPTING PRIVATE COMMUNICATIONS WITHOUT A WARRANT

Interception with consent

126. A peace officer or agent of a peace officer may, by means of a surveillance device, intercept a private communication without a warrant if all the parties to the communication consent to the interception.

COMMENT

Both the present *Code*, in section 184, and our proposed Criminal Code, in subsection 66(1), make the interception of private communications by means of a surveillance device a crime. However, one broad and noteworthy exemption from criminal liability provides that it is not a crime to intercept communications in this way if the interception is made with the consent of a party to the private communication.

A separate issue from that of criminal liability, however, is that of the admission in evidence of private communications that have been obtained by means of an inter-

ception by a single party impliedly consenting to the interception of the communications. Here, one important aspect of our legislative scheme should be noted. We do not seek to regulate interceptions of private communications made by a party who is a private citizen acting independently and without police involvement. Our legislative scheme regulates only the activities of state officials seeking to employ electronic surveillance techniques in the investigation of crime.

Until recently, the *Criminal Code* provided for a course of action whereby, if a surreptitious interception of private communications was to be made by a party at the behest of the police, there was no need to go before a judge to obtain an authorization to wiretap. This meant that the police had a largely unfettered discretion as to how and when to intercept the private communications. Although this state of affairs has persisted for many years, it was, on occasion, criticized:

> Judicial review and control over the official resort to electronic surveillance techniques and technology lies at the very core of the legislation. Consent, in the legislation as presently structured, is a vehicle whereby judicial oversight may be avoided. As such it has from the outset possessed a clear potential for exploitation and abuse. It has been alleged that these statutory provisions "encourage the police to use 'consenting agent provocateurs' under a tacit grant of immunity from prosecution." The consent provisions allow for *ex post facto* validation of unauthorized electronic eavesdropping and as such are inconsistent with the overall scheme of the legislation.[166]

These criticisms have been given apparent approval by the Supreme Court of Canada in the cases of *R.* v. *Duarte*[167] and *R.* v. *Wiggins*.[168] These cases hold that the simple consent of one party to the interception of his or her private communications cannot serve as a device for bypassing the need to obtain prior judicial approval in the form of an authorization. Failure to obtain the necessary authorization constitutes unreasonable search and seizure under section 8 of the *Charter*.

Our draft legislation conforms to the holding in *Duarte* and *Wiggins*, and addresses a number of important policy implications raised by those cases. Section 126 answers the policy question, When may a peace officer or an agent of a peace officer intercept private communications by means of a surveillance device without having to obtain a warrant? The answer is that this is permissible if *all* parties to the private communications consent to their interception. If an interception by means of a surveillance device is sought to be made with the consent of just one party to the communications, a warrant must first be obtained, subject to the limited exception set out in section 127. The requirements for obtaining a warrant are set out in Chapter III of this Part.

Interception to protect life or safety

127. A peace officer may, without a warrant, use a surveillance device to listen to but not record a private communication to which a peace officer or agent of a peace officer is a

166. Cohen, *Invasion of Privacy, supra*, note 158 at 176-177. See also G. Killeen, "Recent Developments in the Law of Evidence" (1975) 18 C.L.Q. 103 at 108.

167. *Supra*, note 159.

168. *Supra*, note 160.

party if it is reasonable to believe that the life or safety of the officer or agent may be in danger.

COMMENT

In the cases of *Duarte* and *Wiggins*, the Supreme Court of Canada rejected consent interceptions of private communications made in the absence of a prior judicial warrant. According to the Court, the surreptitious recording by the state of a person's private communications is an unjustifiable invasion of privacy. In both cases, the avowed purpose of the surreptitious interceptions was to obtain reliable evidence of the commission of a crime.

However, the Supreme Court did not consider in the cases before it the possibility that it might on occasion prove necessary to listen to private communications, not for evidentiary purposes, but in order to protect the life or safety of an undercover peace officer or an informer. This might occur, for example, where a peace officer is working undercover to investigate the activities of drug traffickers and a meeting is suddenly arranged between the officer and the traffickers. This is a highly dangerous circumstance that might emerge without sufficient time to arrange for the obtaining of a judicial warrant. In our view, in such emergency circumstances, legitimate concern for the peace officer's safety should preclude the need to obtain a warrant, in order to monitor for protective reasons the conversations between the undercover operative and the drug traffickers. However, the section is carefully drafted to be consistent with the concern for privacy expressed by the Supreme Court. The authority to intercept is restricted here to one kind of interception only – that of *listening* to the private communications. There is no authority to *record* the communications. For this, a warrant is required, since the purpose of recording communications is evidentiary and not protective. (As noted previously, rules governing the admission of evidence – and a rule will be required here – will be examined separately in a future volume of this Code.)

CHAPTER III
WARRANT TO INTERCEPT PRIVATE COMMUNICATIONS

DIVISION I
GENERAL RULE FOR WARRANTS

1. Application for Warrant

Federal applicant

128. (1) A federally designated agent designated in writing personally may apply for a warrant to intercept, by means of a surveillance device, a private communication if the crime under investigation is one in respect of which proceedings may

be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada.

Criminal Code, s. 185(1)(*a*)

Provincial applicant

(2) A provincially designated agent designated in writing personally may apply in the province of designation for a warrant to intercept, by means of a surveillance device, a private communication if the private communication is to be intercepted in that province and the crime under investigation is one in respect of which proceedings may be instituted at the instance of the government of a province and conducted by or on behalf of the Attorney General of a province.

Working Paper 47, rec. 20
Criminal Code, s. 185(1)(*b*)

COMMENT

This section sets out the general rule as to who may apply for a warrant to intercept a private communication by means of a surveillance device. It is modelled in large part on the procedure set out in paragraphs 185(1)(*a*) and (*b*) of the present *Code*, albeit with necessary changes.

Subsection (1) focuses on the "federally designated agent," that is, an agent designated in writing personally by the Solicitor General of Canada. Such an agent may apply for a warrant so long as the crime in relation to which the application is sought may be prosecuted by the federal Attorney General.

Subsection (2) focuses on the "provincially designated agent," that is, an agent designated in writing personally by (in Quebec) the Minister of Public Security or (in any other province) the Solicitor General or otherwise the Attorney General. It is designed to fill a major gap in the present law. As we noted in Working Paper 47, the wording of present paragraphs 185(1)(*a*) and (*b*) permits provincial authorities to apply for an authorization only when a crime is being committed or was committed in the province in which the application was sought. However, there is no power enabling provincial authorities to apply for an authorization to intercept a private communication in their province where the crime is being committed in another province, even though the suspects are living in their province.[169] Subsection (2) implements Recommendation 20 of Working Paper 47 (at 34) that remedies this problem.

These two subsections alter the present law in another way. Since it is unlikely that a responsible minister would ever personally apply for a warrant (although the *Code* presently allows such personal applications), these subsections state that only the agents whom the minister designates may bring applications.

Manner of making application

129. (1) An application for a warrant shall be made unilaterally, in person and in private, orally or in writing.

169. Working Paper 47 at 33.

Form of written application

(2) An application in writing shall be in the prescribed form.

Working Paper 47, rec. 18
Criminal Code, s. 185(1)

COMMENT

To understand the warrant application procedure that governs wiretaps, it is necessary to read these provisions with the application procedures for other warrants set out in sections 10 to 12. These procedures relate to the evidence to be heard or received at the application, the recording of evidence and the procedure on issuing a warrant after an application has been made by telephone or other means of telecommunication.

Section 129, to some extent, changes the present *Code*'s application procedures for regular authorizations under Part VI. Currently, applications must be made in writing. In this legislation, consistent with the approach adopted in Part Two (*Search and Seizure*), Part Three (*Obtaining Forensic Evidence*) and Part Four (*Testing Persons for Impairment in the Operation of Vehicles*), electronic surveillance warrant applications may be made either orally or in writing. Because there will be a record made of the application in all cases,[170] there is no need to require these applications to be in writing. However, where an application is made in writing it must be in the prescribed form.

Applications for wiretap warrants would generally be made in person to the judge. Under our regime, "telewarrant" applications are not ordinarily permitted. (The only time such applications are allowed is when a warrant is urgently needed. This eventuality is dealt with in section 160.)

Place of application

130. An application for a warrant shall be made to a judge of the province in which the private communication is to be intercepted.

Criminal Code, s. 185(1)

COMMENT

This provision has two salient aspects. First, an application must be made to a judge, not to a justice of the peace. The judge would be a judge of the proposed Unified Criminal Court.[171] Second, the application may be made to any judge in any province in which the private communication is to be intercepted.

Presentation of application

131. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

170. See s. 11.

171. See Working Paper 59.

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation, and the facts and circumstances of that crime and their seriousness;

(*d*) the type of private communication to be intercepted;

(*e*) a general description of the means of interception to be used;

(*f*) the names of all persons whose private communications are to be intercepted or, if the names cannot be ascertained, a description or other means of identifying those persons individually or, if that is not possible, the class of those unidentified persons;

(*g*) the places, if known, at which the interception would occur;

(*h*) whether any privileged communications are likely to be intercepted;

(*i*) the grounds for believing that the interception may assist in the investigation of the crime;

(*j*) the period for which the warrant is requested;

(*k*) any other investigative method that has been tried without success or, if no other method has been tried, the reasons why no other method is likely to succeed or why the urgency is such that no other method is practicable;

(*l*) a list of any previous applications for a warrant in respect of the same crime and the same persons or class of persons indicating the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted;

(*m*) if the applicant requests authority to make a surreptitious entry to install, service or remove a surveillance device,

(i) why the entry is required and why other less intrusive means of installation, service or removal are unlikely to be effective, and

(ii) the place where the entry would be made; and

(*n*) if the applicant requests an assistance order referred to in section 139, the nature of the assistance required.

Working Paper 47, recs. 24, 33, 40
Criminal Code, s. 185(1)

COMMENT

Under subsection 185(1) of the present *Code*, the application made by the designated agent is a separate document from the affidavit that is sworn by a peace officer or public officer in support of the application. Under our proposed Code, however, the application itself, rather than any accompanying affidavit, becomes the primary means by which to present evidence that supports the issuance of a warrant. Subsection (1) provides that the contents of the application must be sworn by a peace officer, and only appropriate designated agents may actually present the application. In addition, we propose that only a "peace officer" (a more restricted category than a "public officer") may swear to such contents.[172]

Subsection (2) states what the application must disclose. Paragraphs (*a*) and (*b*) are self-explanatory. Paragraph (*c*) replaces paragraph 185(1)(*c*) of the current *Code* which requires that the application disclose "the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence." This is too ambiguous. The issue is not whether the peace officer believes that a warrant should be issued. It is whether the peace officer has provided sufficient information to satisfy the judge that a warrant should be granted. Critical to this issue are the facts and circumstances of the crime under investigation, and how serious the particular crime is, given those circumstances.

The other paragraphs in subsection (2) require other relevant information that enables the judge to decide whether to issue the warrant.

Paragraph 185(1)(*e*) of the present *Code*, which states (among other things) that the police should give the names (if they know them) of persons whose private communications they want to intercept, has been altered somewhat for greater clarity. Our paragraph (*f*), instead of referring to "known" persons, refers to persons who can be identified by any means, such as by name or description. It is designed to avoid the confusion inherent in talking, as the case law pertaining to the present *Code* provision does, about "known" unknown persons.[173] Paragraph (*f*) also refers specifically to a class of unidentified persons. This phrase is designed to describe those who fall within a general interception clause (*i.e.*, a basket clause) as to persons.

Paragraphs (*d*), (*e*), (*g*) and (*i*) continue the law as set out in paragraphs 185(1)(*d*) and (*e*) of the present *Code*. It should be noted that paragraph (*e*) takes an additional meaning where a warrant is being asked for in situations in which has consented to the interception of the private communications. Here, it is our view that the "general description of the means of interception to be used" should include not only the type of device to be used in order to carry out the interception, but also the fact that a party to the communications has consented to the interception.

172. By s. 10(1) of this Code, the peace officer can swear to the contents of the application on information and belief.

173. See S.D. Frankel, "The Relationship of 'Known' and 'Unknown' Persons to the Admissibility of Intercepted Private Communications" (1978-79) 21 C.L.Q. 465; M. Rosenberg, "Chesson: Implications for Privacy in the Supreme Court's Latest Plunge into the Unknown of Wiretap Law" (1988), 65 C.R. (3d) 211.

Paragraph (*h*) is new. The present law, in subsections (2) and (3) of section 186 of the *Code*, sets out a procedure to protect privileged communications between solicitor and client. This, however, raises a question of policy. Should other privileged communications also be protected, assuming that the issuing judge is satisfied that a valid ground of privilege is engaged? We have decided that they should be. Accordingly, to alert the judge that a question of privilege may arise, the application should, if circumstances warrant it, contain a statement that privileged communications are likely to be intercepted. The measures that a judge may take to prevent the interception of privileged statements is addressed in later sections.

Paragraph (*j*) continues the present law set out in paragraph 185(1)(*g*) of the *Code*.

Paragraph (*k*), with minor wording changes, continues the present law set out in paragraph 185(1)(*h*) of the *Code*.

Paragraph (*l*) continues the present law set out in paragraph 185(1)(*f*) of the *Code* with one important change. It is now clearly worded so as to require the applicant to disclose whether each previous relevant application was allowed, rejected or withdrawn, in order to afford better judicial accountability.

Paragraph (*m*), in the main, is new.[174] It relates to the power of a judge expressly to grant the police, in a warrant to intercept, authority to enter a place surreptitiously to install, service or remove a surveillance device. This power is more fully described and justified in section 138. We believe it to be desirable that this power of entry be subject to restrictions similar to those imposed on the power to intercept private communications. In order to obtain the authority to enter for purposes of installing, servicing or removing a surveillance device, the applicant must now provide the judge with all relevant information at the time of application.

Paragraph (*n*) is also new. Working Paper 47 had recommended that a judge be able to order that any person provide reasonable assistance to the police in order to accomplish the interception pursuant to the warrant.[175] This recommendation now finds expression in section 139 of this Part. To give effect to this proposal, the applicant would, at the time of application, specify what kind of assistance is required, so that the judge would have information available to him or her upon which to make this order.

Procedure on hearing application

132. Sections 10 and 11 apply to an application for a warrant under this Division.

Criminal Code, s. 185(1)

2. Issuance of Warrant

Grounds for issuing warrant

133. (1) A judge may, on application, issue a warrant authorizing the interception of a private communication by means of a surveillance device if the judge is satisfied that

174. See, in this regard, Working Paper 47, rec. 31 at 48.

175. Recommendation 75 at 95.

(*a*) there are reasonable grounds to believe that

(i) a crime punishable by more than two years' imprisonment, or a conspiracy to commit, an attempt to commit, a furthering of or an attempted furthering of such a crime, has been or is being committed, and

(ii) the interception of the private communication will assist in the investigation of the crime;

(*b*) other investigative methods have been tried without success, no other method is likely to succeed or the urgency is such that no other method is practicable; and

(*c*) it would be in the best interests of the administration of justice, having regard to the seriousness of the facts and circumstances of the crime under investigation.

Undercover investigation

(2) The judge shall not refuse to issue a warrant on the basis that a peace officer or an agent of a peace officer will be a party to the communication.

Working Paper 47, recs. 19, 21
Criminal Code, s. 186(1)

COMMENT

Subsection 133(1) sets out the things in respect of which a judge must be satisfied before issuing a warrant. As already noted, the requirement to obtain a warrant now generally applies to surreptitious interceptions made with the consent of a party to the private communications, where the party is a peace officer or an agent of a peace officer.

Paragraph (*a*) changes the present law in two major ways. The first change is seen in subparagraph (1)(*a*)(i). It replaces the definition "offence" in section 183 of the present *Code*. One of the most perplexing tasks, when trying to understand the present wiretap legislation, is to discern an underlying principle justifying the long list of wiretappable crimes.[176]

Our Working Paper 47, while accepting most of this list of crimes, criticized and urged the deletion of the organized crime definition (*i.e.*, "part of a pattern of criminal activity . . .") on the ground that it adds little to the established definition of conspiracy. It also recommended that some of the present crimes be deleted from the list (*e.g.*, advocating genocide), while some new crimes be added to it (*e.g.*, criminal interest rate).[177]

176. "Offence" under s. 183 of the *Code* is now defined as including numerous *Criminal Code* crimes ranging from high treason to pool-selling and some non-*Code* crimes such as trafficking (under the *Narcotic Control Act*, *supra*, note 21) and spying (under the *Official Secrets Act*, R.S.C. 1985, c. O-5). It also applies to any crime under the *Code* for which a punishment of five years or more in jail may be imposed or a crime in s. 20 of the *Small Loans Act*, R.S.C. 1970, c. S-11 where "there are reasonable grounds to believe [that the crime] is part of a pattern of criminal activity planned and organized by a number of persons acting in concert." Finally, it also applies to conspiracy, attempt, being an accessory after the fact or counselling in relation to these crimes.

177. Working Paper 47, recs. 1 to 3 at 16.

Subparagraph (1)(*a*)(i) is based on a simpler, equally sound policy. It dispenses with the need to adopt a long list of crimes. This limit on the crimes for which a warrant may be obtained is largely adapted from the Commission's plan for the classification of offences.[178]

The second change is seen in subparagraph (1)(*a*)(ii). It sets out the condition that an interception may only be authorized if it is reasonably believed that the interception will assist in the investigation of the crime. This marks a change from both the present statutory law and the recommendations in Working Paper 47.

The present law was clarified in the seminal case of *R.* v. *Finlay and Grellette.*[179] The "will assist" standard was first articulated in that case by Martin, J.A., in the context of a constitutional challenge to then Part IV.1 (now Part VI) of the *Code*, based on an alleged violation of section 8 of the *Charter* (unreasonable search or seizure). In *Finlay*, the validity of the impugned *Code* provision (allowing an authorization to be granted if, among other things, the judge to whom the application is made is "satisfied . . . that the granting of the authorization would be in the best interests of the administration of justice to do so . . .") was upheld. Speaking for the Court, Martin J.A. expressed the view that this *Code* provision imports "at least" the American Title III standard of "reasonable ground [probable cause] to believe that communications concerning the particular offence will be obtained through the interception sought,"[180] a standard that he appeared to equate with the "will assist" standard.[181]

Thus, our statutory formulation in subparagraph (*a*)(ii), employing the "will assist" criterion, now corresponds with the entrenched common law standard.

The standard articulated in subparagraph (*a*)(ii) also seeks to clarify some of the ambiguity with respect to basket clauses (what we refer to as "general interception clauses") that was engendered by the recent Supreme Court of Canada decision in *R* v. *Chesson.*[182] To appreciate the significance of the proposed reform, it is first necessary to say a few words about these clauses and the interception of the communications of unknown persons. In *Chesson*, the Court had ruled that the communications of one particular accused, gathered under the ostensible authority of a basket clause allowing the

178. *Supra*, note 108. The punishment for attempting, conspiring or attempted furthering may be imprisonment for less than two years. By virtue of the proposals at 45-46 of Report 31, the maximum penalty for such conduct would be one-half the penalty for the complete crime.

179. (1985) 48 C.R. (3d) 341 (Ont. C.A.)

180. *Ibid.* at 366.

181. *Ibid.* These formulations have now been approved by the Supreme Court of Canada in the recent case of *R.* v. *Duarte*, *supra*, note 159 at 45, where La Forest, J., per majority, summarizes the *Finlay* standard as requiring the issuing judge to be "satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of [the] offence."

182. [1988] 2 S.C.R. 148.

interception of communications of "unknown persons,"[183] were inadmissible as evidence against her because she had not been specifically named in the authorization. According to the Court, she should have been named in it because her identity was known to the police and because the police were aware, when applying for the authorization, that the interception of her private communications in the circumstances "might" (not would) be of assistance in the investigation of the crime.

Superficially, since the applicant was successful in challenging the admission of the intercepted conversations, the decision in *Chesson* seems to protect individual rights. However, the decision has been criticized for the standard it was thought to have set on authorizing interceptions. This standard, it has been argued, is too low.[184] In *Chesson*, the Court seemingly held that the interception of private communications can be authorized where it is possible that the interception "may" provide evidence.

There is some question as to whether the critics are correct in their reading of *Chesson*. The Court's reference to the "may assist" standard may have been limited simply to an assertion of what an applicant must disclose when seeking an authorization, rather than to the standard that a judge must address when granting an authorization. In any event, in our view there is sufficient uncertainty to justify clarification and reform. Our standard for the issuing judge in subparagraph (*a*)(ii) is higher than that which the critics have attacked as the creation of the Court in *Chesson*.[185] As in other areas of police powers, judicial grants of power to the police should be based on a reasonable probability of criminal activity, not on a mere suspicion or possibility of such activity. Thus, subparagraph 133(1)(*a*)(ii) requires that the judge be satisfied that there are reasonable grounds to believe that the interception of the private communication will assist in the investigation of the crime.

183. Lawfully to authorize the interception of the private communications of an "unknown" person, a warrant must contain a specific clause allowing such interception. For example, a warrant may state that interceptions may be made of the private communications of "any other persons" residing at the specific addresses set out in it. This clause is commonly called a "basket clause" and under this legislation is referred to as a "general interception clause." The case law has had to sort out the extent to which these basket clauses are valid. A major issue is whether a basket clause can be used only to intercept the private communications of "known unknowns", *i.e.*, persons who are known to exist but whose identity is unknown. In *R.* v. *Samson* (1983), 36 C.R. (3d) 126 (Ont. C.A.) it was held that basket clauses should not be restricted in this manner and could be used to intercept the private communications of persons of whose existence the police later became aware.

184. See Rosenberg, *supra*, note 173.

185. Note that this standard is a lower one than that proposed in Working Paper 47. There we recommended (in recs. 26 and 27 at 42) that an interception of private communications authorized by a judge should be restricted to occasions when it is reasonably believed that the interception may assist the investigation of the crime by reasons of the person's "involvement" in the crime. In fact, the Commission forcefully argued that a lower standard may violate Canada's obligations under the *International Covenant on Civil and Political Rights* and even sections of the *Canadian Charter of Rights and Freedoms*. (See Working Paper 47 at 35.) However, this point was made in discussing minimization. Such concerns are addressed in s. 140 of this legislation, which proposes a list of conditions that a judge may impose in order to better ensure that only relevant private communications will be intercepted. However, a problem was identified with respect to the term "involvement." Consultants pointed out that this test was too narrow since there may be occasions when private communications should be intercepted even though the person is not involved in committing a crime. For example, the person could be an innocent agent passing on or receiving information from a person involved in the crime.

Subparagraph 133(1)(*a*)(ii) restricts the scope of basket or general interception clauses. It applies the same standard for obtaining a warrant in relation to "unknown" persons (for greater clarity, referred to in this draft as unidentified persons) as for "known" persons (referred to now as identified persons) — *i.e.*, whether interception of the private communications will assist in the investigation of the crime. This means that an unidentified person must be someone whose existence is known to the police at the time of the application, not someone whose existence the police later become aware of. This in effect accepts the reasoning of Judge Borins of the Ontario District Court in *R.* v. *Samson (No. 4),*[186] in preference to the position articulated by the Ontario Court of Appeal[187] when reversing that decision.

Paragraph (1)(*b*) continues the present law set out in paragraph 186(1)(*b*) of the *Code*.

Paragraph (1)(*c*) is based on paragraph 186(1)(*a*) of the *Criminal Code*, which provides that the judge can authorize the interception if satisfied "that it would be in the best interests of the administration of justice to do so."[188] In Working Paper 47,[189] we observed that, given the wide range of crimes for which an authorization may be obtained, authorizations should not be granted in relation to minor manifestations of those crimes. Paragraph (1)(*c*) is consistent with this policy. In considering whether or not it would be in the best interests of the administration of justice, the judge is directed by this paragraph to have regard to the seriousness of the facts and circumstances of the crime under investigation. In effect, the issuing judge must determine, in each case, whether the interest in protecting society from harmful criminal activity outweighs the interest in protecting the privacy of the individual.

Subsection 133(2) addresses a possible interpretation difficulty that may arise where a warrant is applied for in circumstances in which a party is prepared to consent to the interception of private communications. One arguable interpretation of subsection 133(1) is that the grounds set out there effectively preclude obtaining a warrant to intercept in those circumstances. It may be argued that, where the police have a consenting party, they will be unable to obtain a judicial authorization to tap because under the legislation other investigative techniques (*i.e.*, the use of unwired or untapped informants) will not have been tried or failed. In our view, the mere fact that a peace officer or an agent is a party to the private communications should not preclude the issuance

186. (1982), 37 O.R. (2d) 26 (Co. Ct).

187. *Supra*, note 183.

188. In *R.* v. *Finlay and Grellette*, *supra*, note 179 at 366, Martin, J.A. discussed this standard in the following terms which also explain our use of the same phrase in this legislation:

> "The judge must . . . be satisfied that the granting of the authorization would be in the 'best interests of the administration of justice.' The language used by Parliament, as previously indicated, requires the judge to balance the interests of effective law enforcement against privacy interests and, in my view, imports at least the requirement that the judge must be satisfied that there is reasonable ground to believe that communications concerning the particular offence will be obtained through the interception sought. The 'particular offence,' of course, includes the inchoate offences of conspiracy, attempt or incitement to commit the offence."

189. Recommendation 19 at 32-33.

of a warrant. Subsection 133(2) is designed to prevent needless litigation over this point of interpretation.

Office of solicitor

134. A judge shall not issue a warrant to intercept a private communication at the office of a solicitor or any place ordinarily used by a solicitor for the purpose of consulting with clients, unless the judge is satisfied, in addition, that there are reasonable grounds to believe that the solicitor or any of the solicitor's partners, associates or employees

(*a*) is or is about to become a participant in the crime under investigation; or

(*b*) is the victim of the crime under investigation and has requested that the interception be made.

Criminal Code, s. 186(2)

COMMENT

See the comment to section 135.

Home of solicitor

135. A judge shall not issue a warrant to intercept a private communication at the home of a solicitor, unless the judge is satisfied, in addition, that there are reasonable grounds to believe that the solicitor or any member of the solicitor's household

(*a*) is or is about to become a participant in the crime under investigation; or

(*b*) is the victim of the crime under investigation and has requested that the interception be made.

Criminal Code, s. 186(2)

COMMENT

The power to intercept private communications has the serious potential to erode the protection provided by the law of solicitor-client privilege. This important privilege safeguards the confidentiality of communications made between lawyers and their clients.

Subsection 186(2) of the present *Code* takes special measures (repeated here in paragraphs 134(*a*) and 135(*a*)) to protect solicitor-client privilege. To ensure clarity, we have divided the *Code* provision into two parts. Paragraph 134(*a*) deals with interceptions of private communications at a solicitor's office or any place ordinarily used by a solicitor for the purpose of consulting with clients. Paragraph 135(*a*) deals with interceptions of private communications at a solicitor's home. In both cases, there is no protection available to a solicitor who is involved in committing the crime under investigation.

Paragraphs 134(*b*) and 135(*b*) are new. They are added as a result of the general requirement that a warrant be obtained even when a party to the private communications consents to their interception. Without this provision it would be impossible for a lawyer to obtain the assistance of the police to wiretap or trace an extortionist's telephone calls or other communications. Thus, paragraphs 134(*b*) and 135(*b*), in a carefully drafted manner, allow the police, at the request of a lawyer who is the intended victim of a crime, to obtain a warrant to intercept private communications at the office or home of the lawyer.

It should be noted that section 140 permits a judge to impose minimization conditions. In the context of wiretaps at a lawyer's office or home, we expect that a judge would impose conditions to minimize the intrusions so that, as much as possible, the interception of private communications would be restricted to relevant communications. For example, one condition which could be imposed is live-monitoring, which is explained in the comment to section 140.

Unknown places

136. A judge shall not issue a warrant to intercept private communications at unknown places, unless the person whose private communications are to be intercepted is individually identified in the warrant.

Working Paper 47, rec. 29

COMMENT

The courts, in the absence of statutory guidance, have had to struggle to place effective limits on an "itinerant interception" clause. This is a basket clause that permits the interception of private communications at places other than those specifically named in the warrant — *i.e.*, at any place used by or resorted to by the person whose private communications may be intercepted pursuant to the warrant. The courts have ruled that such a clause is valid only as regards identified persons. If it were otherwise, the power given to the police to intercept private communications would be very nearly unfettered.

This provision adopts the policy set out in Working Paper 47,[190] and limits the use of the "itinerant interception" basket clause (referred to as a "general interception clause" in this legislation) to persons identified in the warrant.

Unidentified persons

137. A judge shall not issue a warrant to intercept private communications of persons who are not individually identified, unless the places at which the interception is to occur are identified in the warrant.

Working Paper 47, rec. 28

190. Recommendation 29 at 42.

COMMENT

This provision directly addresses the issue of whether a "general interception clause" as to places is available to assist in the interception of private communications of unidentified persons. It adopts the policy of the present law that it is unlawful to authorize the interception of the private communications of unknown persons at unspecified locations.[191]

However, to permit flexibility in the use of a warrant to intercept, section 157 allows a warrant to be amended from time to time during an investigation, to specify places previously unnamed.

Authority to make surreptitious entry

138. At the request of the applicant, the judge may, by the warrant, grant authority to enter any place surreptitiously to install, service or remove a surveillance device, if the judge is satisfied there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective.

Working Paper 47, recs. 31, 32

COMMENT

The present *Code* expressly authorizes only the interception of private communications. It does not expressly authorize the police to enter a place surreptitiously in order to install, service or remove a surveillance device. In the cases of *Lyons* v. *The Queen*[192] and *Wiretap Reference,*[193] the Supreme Court of Canada ruled that the authority to intercept private communications includes the ancillary power to enter a place surreptitiously to install a surveillance device. These decisions apply even in the post-*Charter* era.[194]

We accept that there is a legitimate need to permit surreptitious entry in order to install, service or remove a surveillance device. However, because this power presently exists only by implication through the decisions of the courts, it has been inadequately structured. Entering a person's premises without consent, for example, is a serious invasion of the person's privacy. Consequently, any power to enter surreptitiously should be subject to prior express judicial approval. Section 138 ensures this. Before the authority to enter a place covertly (for example, a person's house or car) is to be conferred, the judge must be satisfied there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective. This approach, in our view, strikes the appropriate balance between crime prevention and the protection of privacy, and does so in a manner that is consonant with the demands of the rule of law.

191. See *R.* v. *McLeod* (1988), 63 C.R. (3d) 104 (N.W.T.C.A.).

192. [1984] 2 S.C.R. 631.

193. [1984] 2 S.C.R. 697.

194. See *R.* v. *Chesson, supra,* note 182.

Assistance order

139. (1) When issuing a warrant, the judge may, at the request of the applicant, make an order directing any person engaged in providing a communication or telecommunication service, or the owner of or any person engaged in managing or taking care of the place in which a surveillance device is to be installed, to give such assistance as the judge may specify in the order.

Compensation

(2) The order may provide that reasonable compensation be paid for the assistance.

Working Paper 47, rec. 75

Form of order

(3) The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

(4) The order shall be directed to a named person or organization and shall disclose

(*a*) the applicant's name;

(*b*) the nature of the assistance to be given;

(*c*) the date and place of issuance; and

(*d*) the name and jurisdiction of the judge.

Warning in order

(5) The order shall contain a warning that failure to obey the order is a crime under paragraph 121(*b*) of the proposed Criminal Code (LRC) (disobeying a court order).

COMMENT

In Working Paper 47 (at 95), we reported that there have been occasions when, although an authorization was obtained to intercept a private communication, the interception could not be carried out because the necessary assistance was not forthcoming from the appropriate communications company. This section remedies this problem. Subsection (1) empowers a judge separately to order appropriate persons to assist the police in setting up the surveillance device.

Subsection (2) is self-explanatory.

Subsections (3) and (4) state the form and content of an order to assist, and are self-explanatory.

Failure to comply with an order would constitute the crime of disobeying a lawful court order under paragraph 121(*b*) of our proposed Criminal Code. Because it is appropriate, in our view, that the order contain a warning to that effect, it is provided in subsection (5).

Imposition of conditions to minimize intrusion

140. A judge who issues a warrant may include in it any of the following conditions:

(*a*) that the interception be monitored by a person at all times;

(*b*) that, so far as is reasonably practicable, only the communications of persons individually identified or encompassed by a general interception clause in the warrant be intercepted;

(*c*) where private communications at a telephone available to the public will be intercepted, that the interception be monitored by a person at all times and that, where practicable, the telephone be observed at all times;

(*d*) that reasonable steps be taken not to intercept communications between persons in such privileged or confidential relationships as may be specified by the judge;

(*e*) that the interception stop when the objective of the investigation, as disclosed in the application for the warrant, is attained;

(*f*) where private communications on a party line will be intercepted, that the interception be monitored by a person at all times;

(*g*) where authority is given to enter a place surreptitiously, that the entry be made or not be made by certain means;

(*h*) that periodic reports be made to the judge identifying any person who is not individually identified in the warrant but whose private communications are being intercepted;

(*i*) that periodic reports be made to the judge identifying any place that is not identified in the warrant but where interceptions are occurring;

(*j*) that any application for a renewal of the warrant, for an amendment to the warrant or for a separate warrant in respect of the same investigation be made to the same judge who issued the original warrant; and

(*k*) any other conditions that the judge considers advisable to minimize interceptions that would not assist in the investigation of the crime.

Working Paper 47, recs. 22, 23, 25, 30, 36
Criminal Code, s. 186(3)

COMMENT

This section focuses on the issue of minimization. "Minimization" is "the procedure by which only those communications which are the proper subject of the investigation are intercepted and recorded."[195]

195. Working Paper 47 at 34.

The present *Code* contains no express provisions to guide a judge in deciding whether terms or conditions are necessary to minimize the extent of the interception of the private communication or the recording of it.

In Working Paper 47 (at 35) we objected to the absence of any minimization provisions in the present *Code*. We argued that failure to include such provisions raised serious questions about Canada's meeting its obligations to protect privacy under international law, and perhaps even under the *Canadian Charter of Rights and Freedoms*. Nonetheless, the Working Paper was sensitive to criticisms that mandatory minimization would result in too costly a process and would frustrate criminal investigations. Consequently, a compromise was recommended: judges would have the discretion to impose certain minimization conditions where it was considered necessary to do so.

The list set out in section 140 covers a broad range of conditions. The broadest is that set out in paragraph (*k*). Other conditions are more specific. For example, paragraph (*c*) addresses minimization in the context of intercepting private communications at a public telephone booth.

While most of these conditions are self-explanatory, two of them merit special mention. Paragraph (*a*) permits a judge to require live-monitoring of the private communication. This means that a person must listen to the live private communication and decide whether continued listening is justified and whether it should be recorded. Thus, the condition, if imposed, prevents prolonged overhearing as well as the recording of irrelevant private communications. Paragraph (*d*) is designed to ensure that privileged or confidential private communications are not intercepted. If the judge believes that the communications to be intercepted may be privileged or confidential, he or she may order that reasonable steps be taken not to intercept them. This protects not only solicitor-client privilege, but also other potentially privileged communications, such as those between husband and wife. This better ensures the confidentiality of all privileged communications (even those that are not currently recognized but that may be legally recognized in the future) than does the present law.

Form of warrant

141. A warrant shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of warrant

142. The warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the type of private communication that may be intercepted;

(*d*) a general description of the means of interception that may be used;

(*e*) as precisely as possible, the persons or class of persons whose private communications may be intercepted;

(*f*) the places, if known, at which the interception may occur;

(*g*) if authority to make a surreptitious entry is being granted, the place that may be entered;

(*h*) any conditions imposed by the judge;

(*i*) the date the warrant expires;

(*j*) the date and place of issuance; and

(*k*) the name and jurisdiction of the judge.

Working Paper 47, recs. 26-29
Criminal Code, s. 186(4)

COMMENT

Subsection 186(4) of the present *Code* sets out what an authorization must contain: the crime in respect of which the private communication may be intercepted; the type of private communication that may be intercepted; the identity of the persons, if known, whose private communications are to be intercepted; a general description, if possible, of the places at which the private communications may be intercepted; a general description of the means of interception that may be used; such terms and conditions as the judge considers advisable in the public interest; and a specified period of validity not exceeding sixty days.

The contents of a warrant in this Part, although altered for purposes of clarity and consistency, are modelled largely on subsection 186(4). However, additional information is included in order to correspond more fully to the judge's authority to issue the warrant. For example, paragraph 142(*e*), by using the phrase "class of persons," now refers to a basket clause as to persons. Also, paragraph 142(*g*) provides that, if a judge decides to authorize surreptitious entry in order to install, service or remove a surveillance device, the warrant must contain a clause to that effect. Since the warrant must specify the known places at which interceptions of private communications are to be made, it is logical for the warrant also to specify the places at which a surreptitious entry is authorized.

Expiration period

143. The judge shall set out in the warrant an expiry date not more than sixty days after the date of issue.

Criminal Code, s. 186(4)(*a*)

COMMENT

By paragraph 186(4)(*e*) of the present *Code*, the maximum period of an authorization is sixty days. This section continues that policy.

3. Renewal of Warrant

INTRODUCTORY COMMENT

Although a warrant to intercept is valid for the period not exceeding sixty days specified in it, if the investigation is ongoing, that period may prove to be inadequate. For this reason, present *Code* subsections 186(6) and (7) and now the following provisions provide for the renewal of the warrant to intercept a private communication.

Applicant

144. An application to renew a warrant may be made by the designated agent who applied for the warrant or any other agent of the same designation.

COMMENT

Section 144 states who may make an application to renew. The designated agent who made the original application for the warrant to intercept would be able to apply for a renewal. In addition, a different agent would be able to apply for a renewal so long as that agent had been designated as a person capable of applying for a warrant by the same federal or provincial minister who had designated the agent making the original application.

Manner of making application

145. (1) The application shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

(2) An application in writing shall be in the prescribed form.

Working Paper 47, rec. 18
Criminal Code, s. 186(6)

COMMENT

Subsection 186(6) of the present *Code* provides a cursory description of the application process for obtaining a renewal. In contrast, this section clarifies the procedure by providing more elaborate details of the manner and form of the application for a renewal.

Time and place of application

146. An application to renew a warrant shall be made before the warrant expires, and shall be made to a judge of the province in which the warrant was issued.

Criminal Code, s. 186(6)

COMMENT

This section states when and to whom the application must be made. The application for a renewal must be brought before the warrant expires. Otherwise, there is nothing to renew.

Presentation of application

147. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the reasons for requesting a renewal of the warrant;

(*e*) full particulars, including dates and times, of any interception made or attempted under the warrant;

(*f*) any information that was obtained by interception under the warrant;

(*g*) a list of any previous applications to renew the warrant, including the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted;

(*h*) whether the warrant being renewed contains a general interception clause;

(*i*) whether an application to amend the warrant is being brought, together with the application for a renewal, to add new persons whose private communications may be intercepted or new places at which interceptions may occur;

(*j*) the period for which the renewal is requested; and

(*k*) if the applicant requests that the warrant be renewed for a period exceeding thirty days, the grounds for believing that the longer period is necessary.

Working Paper 47, rec. 18
Criminal Code, s. 186(6)

COMMENT

Subsection (1) applies, to an application for a renewal of a warrant to intercept private communications, the same procedure as exists for presenting and swearing an application for a warrant to intercept private communications.

Subsection (2) sets out the contents of a renewal application. Paragraphs (*d*) to (*g*) and (*j*) reflect what the present law, in paragraphs 186(6)(*a*) to (*c*) of the *Criminal Code*, states must be disclosed. However, instead of making a vague reference to "such other information as the judge may require" as the present law does, this section provides greater detail. Paragraph (*h*) requires the peace officer to disclose whether the

warrant being renewed contains a "general interception clause." This information is necessary so that a judge may ascertain in respect of this application whether persons or places previously unidentified must now be identified in the renewed warrant. (See section 150, which requires that a renewed warrant identify such persons or places where possible.) Paragraph (*i*) relates to paragraph 157(*d*), which permits an amendment to the warrant to add persons or places not encompassed by the original warrant. Where such an amendment is sought at the renewal stage, it must be disclosed in the application. Paragraph (*k*) is also new. It relates to the power of the judge under subsection 151(2) to allow the warrant to be renewed for a period longer than the usual thirty-day validity period.

Procedure on hearing application

148. Sections 10 and 11 apply to an application to renew a warrant.

COMMENT

By virtue of this provision, the same rules governing the hearing and recording of evidence on an application for a warrant to intercept private communications also apply at the application for a renewal of a warrant.

Grounds for renewal

149. A judge who, on application, is satisfied that the grounds on which a warrant was issued still exist may renew the warrant by endorsing it, signing the endorsement and indicating the date and place of renewal.

Criminal Code, s. 186(7)

COMMENT

Clearly, a renewal should only be granted if the circumstances that gave rise to the granting of the warrant still apply. Subsection 186(7) of the *Criminal Code* provides that a renewal may be given if the judge to whom the application is made is satisfied that any of the circumstances justifying the issuance of a warrant under subsection 186(1) still obtain. Section 149 adopts this policy but uses clearer language. We anticipate that the renewal will be made by simply endorsing the original warrant with the new period during which it is valid, then signing it and indicating the date and place of renewal.

Restriction on renewal of warrant containing general interception clause

150. A warrant that contains a general interception clause may not be renewed unless the warrant is amended, in accordance with the amendment procedure, to specify the identities of persons or locations of places previously encompassed by the clause but since ascertained.

COMMENT

The case law in this area suggests that if a warrant authorizes interception of the private communications of persons who are unidentified, or permits the interception of private communications made at unspecified places, those persons or places should be disclosed at the time of an application for a renewal of the warrant if they have since been identified or specified.[196] Section 150 codifies and thus endorses this approach.

Expiration period

151. (1) A warrant expires thirty days after the date of renewal.

Extending expiration period

(2) A judge who is satisfied that the investigation will probably take more than thirty days to complete and that it would be impracticable for the applicant to apply for a further renewal may renew the warrant for a period of more than thirty days but not more than sixty days after the date of renewal.

Working Paper 47, rec. 45
Criminal Code, s. 186(7)

COMMENT

The total maximum period allowed by the present *Code* for an authorization (sixty days) and just one renewal (sixty days) is one hundred and twenty days. In Working Paper 47[197] we argued that, given the increasingly intrusive nature of such ongoing police investigations, greater judicial scrutiny was required. Thus, we recommended that the normal time period for a renewal should be thirty days. Subsection (1) implements this proposal. However, to permit flexibility in circumstances where it is obvious that the thirty-day period is inappropriate, we also proposed giving the judge the power, where special cause is shown, to extend this period to a maximum of sixty days. Subsection (2) permits this longer period of renewal. In such cases, we expect that the judge would endorse on the appropriate document the reasons for the extension.[198]

4. Amendment of Warrant

INTRODUCTORY COMMENT

At present, one cannot amend an authorization at the renewal stage. In *R.* v. *Badovinac*,[199] it was held that a renewal could not be used to modify or extend the terms of an authorization beyond extending the period for which it is effective. Even for minor changes to the authorization, a new authorization must be obtained.

196. *R.* v. *Blacquiere* (1980), 57 C.C.C. (2d) 330 (P.E.I.S.C.); *R.* v. *Crease* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.).

197. Recommendation 45 at 51.

198. *Ibid.*

199. (1977), 34 C.C.C. (2d) 65 (Ont. C.A.).

In Working Paper 47,[200] we proposed allowing greater powers to amend an authorization. We advocated a power to amend an authorization during its currency so as to allow for the identification of persons or places not previously identified. We also supported allowing minor amendments to an authorization at the renewal stage. These included: naming persons previously provided for in the authorization (*e.g.*, as "unknowns") but unnamed in it and including additional places at which interceptions of persons provided for in the authorization may be made; providing different or more accurate descriptions of persons or places; describing different or additional means of interception to be employed; as well as stipulating different or additional crimes (provided they are clearly related to the crimes in the original authorization and part of the same investigation).[201] We also supported the inclusion of a power, available at the renewal stage, to insert conditions designed to minimize the interception of the private communication.[202]

Such a power to amend a warrant to intercept private communications would assist peace officers in their investigations and would assist the court in carrying out the limited, but important, supervisory role entrusted to it under this legislation. However, we would emphasize that the renewal is not the appropriate device for securing an amendment. This is the proper function of amendment rules. Amendment should be obtained by means of a separate application. Thus, under our scheme a renewal would continue to be restricted to expanding the time period for which a warrant is valid.

Applicant

152. An application to amend a warrant may be made by the designated agent who applied for the warrant or any other agent of the same designation.

COMMENT

Consistent with the way in which an application for a renewal is made, an application to amend must be brought by the designated agent who applied for the warrant or any other agent designated as a person who may apply for a warrant by the same federal or provincial minister who designated the original applicant.

Manner of making application

153. (1) The application shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

(2) An application in writing shall be in the prescribed form.

200. See at 42, 51.

201. Working Paper 47, recs. 41-43 at 51-52.

202. *Ibid.*, rec. 44 at 51.

Time and place of application

154. An application to amend a warrant shall be made before the warrant expires, and shall be made to a judge of the province in which the warrant was issued.

Presentation of application

155. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the amendment being requested;

(*e*) the reasons for requesting the amendment;

(*f*) full particulars, including dates and times, of any interception made or attempted under the warrant;

(*g*) any information that was obtained by interception under the warrant; and

(*h*) a list of any previous applications to amend the warrant, including the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted.

Procedure on hearing application

156. Sections 10 and 11 apply to an application to amend a warrant.

COMMENT

This section ensures that the provisions on hearing and receiving evidence of the application and making a record of the application in sections 10 and 11 apply to an application to amend a warrant to intercept private communications.

Grounds for and nature of amendment

157. A judge may, on application, amend a warrant to provide for any of the following if the judge is satisfied that the amendment relates to the investigation of the same crime disclosed in the warrant:

(*a*) a more accurate description of individually identified persons whose private communications may be intercepted under the warrant;

(*b*) the identity of persons, previously encompassed by a general interception clause but since ascertained, whose private communications may be intercepted under the warrant;

(*c*) the places, previously encompassed by a general interception clause but since ascertained, at which the interception may occur under the warrant;

(*d*) the addition of new persons whose private communications may be intercepted or new places at which interceptions may occur, if the judge is satisfied, in addition, that the grounds for issuing a warrant to intercept private communications of such persons or at such places exist;

(*e*) the deletion of persons whose private communications may be intercepted or places at which the interception may occur;

(*f*) authority to enter a place surreptitiously to install, service or remove a surveillance device, if the judge is satisfied, in addition, that there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective;

(*g*) a change in the means of interception that may be used;

(*h*) changes in the conditions of the warrant; and

(*i*) any condition that a judge may include when issuing a warrant.

Working Paper 47, recs. 29, 41-44

COMMENT

Section 157 sets out the power of a judge to grant an amendment. This power is limited. An amendment must relate to the investigation of the same crime as that for which the warrant to intercept was granted. It cannot be used as a pretext to investigate other crimes.

Section 157 also describes the kinds of amendments that the judge may make. Paragraphs (*a*) and (*b*) deal with amendments to better identify persons. Paragraph (*a*) permits a more accurate identification of persons who were previously identified in the warrant. For example, a person may have been identified earlier by means of a description, but without being named. Once that person's name is known, an amendment can be used to name him or her in the warrant.

Paragraph (*b*) permits the identification of persons previously unidentified whose private communications were allowed to be intercepted under a "general interception clause." After so identifying the person, the police would be able to use any "general interception clause" as to places to expand their authority to wiretap. (See section 136 and the comment thereto.)

Paragraph (*c*), paralleling paragraph (*b*), permits a description of places that were previously encompassed by a "general interception clause" as to places.

Paragraph (*d*), subject to certain safeguards, permits the amendment power to be used to add new persons or places in relation to whom or to which private

communications could not have been intercepted at all under the previous warrant. Such an amendment power is, in our view, more efficient than requiring that a new warrant be obtained for adding new persons or places.

Paragraph (*e*) allows an amendment to delete persons or places previously named but which have been found to be of little or no assistance, while paragraph (*f*) permits amending a warrant to allow a surreptitious entry onto a place to install, service or remove a surveillance device.

Paragraphs (*g*) to (*i*) permit various kinds of amendments that involve changing the means of interception, changing any conditions previously imposed or adding new conditions.

While this section permits the use of an amendment to change the terms or conditions of a warrant, it is not designed to be the exclusive means by which such a change may be accomplished. If the applicant believes that obtaining a new warrant is preferable, this is permissible under our scheme.

Making the amendment

158. A judge may amend a warrant by endorsing an amendment on it and signing the endorsement, or by signing an amendment and appending it to the warrant, and indicating the date and place of the amendment.

COMMENT

Section 158 describes how an amendment is to be documented. Where practicable, the amendment should be endorsed on the warrant and then signed by the judge. However, where an endorsement is impracticable (for example, where the amendments are lengthy or numerous), the amendment may be set out on a separate page, signed by the judge and appended to the warrant.

Assistance order

159. On an application to amend a warrant, a judge may, at the request of the applicant, make an assistance order pursuant to section 139.

DIVISION II
WARRANT UNDER URGENT CIRCUMSTANCES

INTRODUCTORY COMMENT

Section 188 of the current *Criminal Code* permits a judge to grant an emergency authorization if the urgency of the situation requires interceptions to be made before a regular authorization could, with reasonable diligence, be obtained. It may only be applied for by specially designated peace officers and is only valid for a period up to thirty-six hours. Sections 160 to 165 of this legislation deal with such urgent cases. Those sections largely retain the present law but alter it, where necessary, to promote efficiency and accountability.

Grounds for urgent warrant

160. (1) A judge of the province in which a private communication is to be intercepted who is designated by the Chief Justice of the Criminal Court to hear applications for warrants in urgent circumstances may, on application, issue a warrant authorizing the interception, by means of a surveillance device, of the private communication if the judge is satisfied that the grounds for issuing a warrant exist and that there are reasonable grounds to believe that the warrant is urgently required and cannot with reasonable diligence be obtained under Division I.

Additional ground if application by telephone

(2) The judge may issue the warrant on an application made by telephone or other means of telecommunication if the judge is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person.

Criminal Code, s. 188(1), (4)

COMMENT

Subsection (1) sets out before which judge an application for this warrant may be made. Present *Code* subsection 188(1) requires that this application be brought before a judge of a superior court of criminal jurisdiction or a judge referred to in section 552. This section of our Code requires, instead, that the application be made to a judge of the Criminal Court of the province in which the private communication is to be intercepted who is designated as a judge who may hear these applications by the Chief Justice of that Court. As noted, this reflects our support for the concept of a Unified Criminal Court (Working Paper 59). Subsection (1) also incorporates the grounds for issuing this warrant which are at present set out in subsection 188(2) of the *Criminal Code*. In addition to the grounds required for a regular warrant, the judge must have reasonable grounds to believe that the warrant is urgently required and cannot otherwise be obtained with reasonable diligence.

Subsection (2), in the interests of efficiency, changes the present law by allowing a judge, in an emergency, to receive an application made by telephone or other means of telecommunication.[203]

Federal applicant

161. (1) A federally designated peace officer designated in writing may make the application if the crime under investigation is one in respect of which proceedings may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada.

203. This adopts the policy in Working Paper 47, which suggested that the telewarrant procedure be used here. See rec. 53 at 65-66.

Provincial applicant

(2) A provincially designated peace officer designated in writing may make the application in the province of designation if the private communication is to be intercepted in that province and the crime under investigation is one in respect of which proceedings may be instituted at the instance of the government of a province and conducted by or on behalf of the Attorney General of a province.

Working Paper 47, rec. 20
Criminal Code, s. 188(1)

COMMENT

Section 161 sets out the power of a federally or a provincially designated peace officer to apply for this kind of warrant.[204] This section provides that the power of a specially designated peace officer to apply for this kind of warrant is the same as that given specially designated agents in relation to regular warrants. This section also reflects the policy of the present law that the designation of these peace officers must be made in writing by an appropriate official.

Application in person or by telephone

162. (1) The application shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made orally, unilaterally, in private and on oath.

Working Paper 47, rec. 53
Criminal Code, s. 188(1)

COMMENT

Subsection (1) of this provision is self-explanatory. Subsection (2) states that, unlike other unilateral applications made in private, this one must be made orally. This is justifiable in light of the urgent circumstances that require the bringing of these special applications.

Additional contents of application

163. In addition to disclosing the information required to be disclosed in an application for a warrant under subsection 131(2), the application shall disclose

(*a*) the time the application is made;

(*b*) the grounds for believing that the warrant is urgently required and cannot with reasonable diligence be obtained under Division I; and

204. See the definitions "federally designated" and "provincially designated" in s. 125.

(c) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person.

Working Paper 47, rec. 53

COMMENT

Section 163 sets out the additional information that the designated peace officer must provide to the judge when applying for an urgent warrant. It must be read with subsection 131(2), which sets out the contents of an application for a regular warrant. It adds clarity to the law by more fully describing the information that the peace officer must provide.

Application of general rules for warrants

164. Sections 10 to 12 apply to an application for a warrant under this Division and sections 134 to 142 apply to the issuance of a warrant.

COMMENT

This section makes it clear that the procedure on hearing applications for warrants set out in sections 10 to 12 and the safeguards applicable to the issuance of regular warrants to wiretap set out in sections 134 to 142 apply as well to these urgent warrants.[205]

Expiration period

165. (1) The judge shall set out in the warrant an expiry date and time not more than thirty-six hours after the time of issue.

Renewal or amendment of warrant

(2) The warrant may not be renewed or amended.

Criminal Code, s. 188(2)

COMMENT

This section sets out the policy of the present law that these warrants have a life span of up to thirty-six hours. They cannot be renewed or amended. Instead, a regular warrant must be obtained if the police wish to intercept the private communications over a longer period.

205. This procedure changes the present law in one important way. Working Paper 47 pointed out that a major problem with the present law is the absence of a record of what has taken place. As a result, it was impossible subsequently to review this application. The Working Paper therefore recommended (rec. 53 at 66) the creation of a record of the application. This is accomplished by incorporating here s. 11, which requires that oral information provided by the applicant be recorded verbatim.

Some subsections of present *Code* section 188 have been omitted. Subsection (3) of section 188 provides that, for the purposes of admissibility of evidence, an interception of a private communication under this kind of warrant is deemed not to be lawfully made unless the issuing judge (or, if that judge is unable to act, a judge of the same jurisdiction) certifies that if the application had been made in relation to a regular authorization he or she would have given the authorization. However, because subsection 160(1) of this legislation requires the judge to be satisfied that the grounds for granting a regular warrant exist, and because a record is to be made of the application proceedings, the certification requirement is no longer necessary.

Also, subsection (5) of section 188 is not incorporated here. That subsection provides that, where an emergency authorization was issued after an earlier, regular authorization was issued, the trial judge may deem inadmissible the evidence obtained under the emergency authorization if it is based on the same facts and involved the interception of the same person or persons, or related to the same crime, as the original authorization. This is a matter going to admissibility of evidence which, as noted, will be addressed in another Part of this Code, pertaining to remedies.

CHAPTER IV
CONFIDENTIALITY OF MATERIALS AND OBSCURING INFORMATION

Confidential documents

166. The following material is confidential:

(*a*) a warrant;

(*b*) an order extending the time for giving notice of an interception or a surreptitious entry;

(*c*) an application to issue, renew or amend the warrant or to make the order extending time, or the record of the application and its transcription;

(*d*) any evidence received by a judge when hearing the application, and the record of any oral evidence received and its transcription;

(*e*) an assistance order made pursuant to section 139; and

(*f*) an order to obscure information.

Criminal Code, s. 187(1)

COMMENT

Because of the need for secrecy when covertly intercepting a person's private communications, the present *Criminal Code*, in subsection 187(1), protects the confidentiality of the authorization documents. It provides that all of the documents relating to an application for a regular authorization, for a renewal or for an extension of time to give a person notice that an interception of his or her private communications was made are confidential. Section 166 pursues the same policy and extends it to other material which

we feel should be treated as confidential. It should be noted that the reference to "warrant" in this provision means that it has application to urgent as well as regular warrants. This contrasts with the present law which, owing to the informal and often undocumented nature of emergency applications, makes no such provision. Since *all* applications under our scheme must be recorded, it was thought necessary to extend confidentiality to emergency applications. Moreover, this provision improves on the present law by more clearly and precisely stipulating exactly which materials are to be treated as confidential.

Order to obscure information

167. (1) A judge may, on the request of an applicant at the time an application to issue, renew or amend a warrant or to make an order extending the time for giving notice of an interception or a surreptitious entry is made, obscure or order obscured any information contained in confidential material.

Grounds for obscuring information

(2) The judge may obscure the information or order it obscured if the judge is satisfied that the information, if revealed, would

(*a*) pose a risk to anyone's safety;

(*b*) frustrate an ongoing police investigation;

(*c*) reveal particular intelligence gathering techniques that ought to remain secret; or

(*d*) cause substantial prejudice to the interests of innocent persons.

Working Paper 47, rec. 50
Working Paper 56, rec. 9(5)

COMMENT

The present law on how an accused is to obtain access to the confidential documents contained in the sealed packet is explained in more detail in the comment to paragraph 194(2)(*c*). Essentially that section changes the present law by requiring what is, in effect, full disclosure, unless the court orders otherwise. At the time that a person is given notice of the prosecutor's intention to adduce evidence of the person's private communications, he or she must also be given a copy of (a) the warrant (as renewed or amended), and (b) any material relating to an application to issue, renew or amend the warrant.

Under this provision a judge may prevent a person's receiving a full copy of that material by obscuring the material or ordering that certain information be obscured.[206]

Subsection (1) allows an applicant, at the time of an application to issue, renew or amend a warrant or for an order extending the time for giving notice of an interception

206. This section is based largely on recommendations made in both Working Paper 47 (rec. 50 at 65) and Working Paper 56 (rec. 9(5) at 60).

or surreptitious entry, to request that the judge obscure information contained in any confidential material received at or resulting from the application hearing.

Subsection (2) states (as alternatives) the things of which the judge must be satisfied before obscuring the information.[207] Paragraph (*a*) would apply, for example, to prevent disclosure of the identity of police informers. Paragraph (*b*) protects ongoing police investigations which ordinarily would continue after the interception of a private communication has been accomplished. Paragraphs (*c*) and (*d*) add grounds which have been approved in recent Ontario decisions as valid reasons for refusing access to the documents in the packet.[208]

Should the judge refuse to obscure the information, the applicant has two options: to continue with the application and later, as required, serve the person whose private communications have been intercepted with the notice to tender evidence, accompanied by the information formerly in the sealed packet that is required to be disclosed; or to withdraw the application.

Form and contents of order

168. An order to obscure information shall be in writing, in the prescribed form and signed by the judge who issues it, and shall disclose

(*a*) the applicant's name;

(*b*) the information to be obscured;

(*c*) the date and place of issuance; and

(*d*) the name and jurisdiction of the judge.

Copy of material

169. (1) Where information is to be obscured, a copy shall be made of the material that contains the information.

Obscuring information on copy

(2) The information shall be obscured on the copy, leaving the information on the original material unobscured.

COMMENT

This section sets out the procedure to be followed once a judge has decided that certain material should be obscured. For obvious and practical reasons, the original material should not be obscured. Under this provision, if it is necessary to obscure material, this is to be done on a copy made for that purpose.

207. The grounds described in s. 167(2)(*a*) and (*b*) were first proposed in Working Paper 56, rec. 9(5) at 60.

208. See *R.* v. *Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.) at 281-282; *R.* v. *Rowbotham* (1988), 63 C.R. (3d) 113 (Ont. C.A.) at 150-151.

Sealed packet

170. (1) Immediately after determining an application to issue, renew or amend a warrant or to make an order extending the time for giving notice of an interception or surreptitious entry, the judge shall seal in a packet

(*a*) the original of all the confidential material; and

(*b*) the copy of any material on which information has been obscured.

Working Paper 47, rec. 18
Criminal Code, s. 187(1)

Custody of packet

(2) The sealed packet shall be kept in the custody of the court in a place, specified by the judge, to which the public has no access.

Criminal Code, s. 187(1)

COMMENT

Subsection 187(1) of the current *Criminal Code* provides in part that, with the exception of the authorization, all documents relating to an application for a regular authorization, a renewal or an extension of the time to give notice of an interception must be placed in a packet and sealed immediately after the application is determined. In addition, the packet must be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize.

Subsections (1) and (2) largely adopt the present law. Subsection (1) re-creates the judge's duty to seal in a packet all information in support of an application. However, there are modifications consistent with our proposed application procedures. This section applies to all applications made unilaterally and in private pursuant to this Part, including an application for a warrant in urgent circumstances. Although not expressly stated, it also applies to requests for orders made ancillary to an application, such as a request for an assistance order or an order to obscure. The original of the warrant or of any order made by the judge must be included in the packet. (However, an official copy of the warrant or order issued by the judge would be retained by the police for purposes of execution. This is the effect of section 171.) A copy of any material on which information has been obscured must also be sealed.

Subsection (2) ensures that the sealed packet is, at all times, kept in the custody of the court in a place to which the public does not have access.

Copy of packet

171. The applicant may keep a copy of all the materials contained in the sealed packet.

Working Paper 47, rec. 48(*b*)

COMMENT

Section 171 expands upon a recommendation, made in Working Paper 47,[209] that the special agent applying for a warrant or for a renewal of it should be able to retain

209. Recommendation 48(*b*) at 64.

a true copy of all documents relating to any of those applications. This section applies to all applications in this Part made unilaterally and in private. The applicant needs a copy of the material for two reasons. First, he or she needs to keep a full record of events. Second, the applicant needs the material in order to carry out his or her duty properly. For example, as already noted, a copy of the warrant is needed in order to be able to execute it. Also, a copy of all the material in support of the application (meaning a copy of the material on which information has been obscured if there has been a decision to obscure) must be given to the person whose private communications have been intercepted if the person has been notified of an intention to tender evidence of the interception.

Prohibition

172. No one shall open or remove the contents of a sealed packet except as directed by a judge.

Criminal Code, s. 187(1)

COMMENT

Section 172 incorporates part of subsection 187(1) of the present *Code*. Its object is to preserve secrecy.

Examining contents on hearing other applications

173. A judge may have the sealed packet opened and may examine the contents in dealing with any application if the judge considers it necessary to do so in order to determine the application.

Working Paper 47, rec. 48(*a*)
Criminal Code, s. 187(1)

COMMENT

Section 173 states when a judge may have a packet opened. A judge may open the packet to deal with any application made pursuant to this Part. The need for the section is obvious. For example, on an application to renew a warrant, access to the material in support of the original warrant is needed in order to consider properly whether a renewal should be granted.[210]

Opening packet to prepare transcript

174. A judge may direct that the sealed packet be opened and the contents removed to have a transcript prepared of any oral record contained in the packet.

210. The section also incorporates a recommendation, made in Working Paper 47 at 48, that access to the material in the sealed packet be allowed to deal with an application for an authorization in related investigations.

COMMENT

This section ensures that the packet may be opened in order to prepare a transcript of the record of any application made in this Part.

This Chapter, however, does not incorporate paragraph 187(1)(*b*) of the present *Code*, which provides that the contents of a sealed packet must not be destroyed, except by order of a judge. This is unnecessary because such conduct would already be prohibited by the general crime of obstructing justice in section 125 of our proposed Criminal Code.[211]

CHAPTER V
INTERCEPTING AND ENTERING

Person who may intercept

175. Where the interception of a private communication is authorized under a warrant, the communication may be intercepted by

(*a*) a federally designated person, if the application for the warrant was made by a federally designated applicant;

(*b*) a provincially designated person, if the application for the warrant was made by a provincially designated applicant; or

(*c*) a person who is a party to the communication.

Criminal Code, s. 186(5)

COMMENT

Subsection 186(5) of the present *Code* provides that the Solicitor General of Canada or the Attorney General, as the case may be, may designate a person or persons who may intercept private communications under authorization. Section 175, in paragraphs (*a*) and (*b*), continues this policy with appropriate modifications to ensure that any designation will be made by the appropriate federal or provincial minister. Paragraph 175(*c*) is new. It is needed in the interests of completeness and because, as noted, surreptitious interceptions of private communications made with the consent of a party on the basis of recent Supreme Court of Canada jurisprudence now require the prior issuance of a warrant. In investigations involving the use of wired informants, situations may arise where the only person accomplishing the actual interception of the communications is the consenting informant and not some third-party applicant.

Repair and compensation for entry

176. Where, as a result of an entry to install, service or remove a surveillance device, property is damaged, the govern-

211. See Report 31 at 204.

ment or agency whose servant or agent caused the damage shall take prompt and reasonable steps to repair it and, after notice of the entry is given, compensate the owner of the property for any unrepaired damage.

Working Paper 47, rec. 38

COMMENT

This section largely implements Recommendation 38 of Working Paper 47 (at 49), which was made in the context of surreptitious entry. This provision ensures accountability, in the form of repair or compensation or both, for any entry, whether or not the entry is made surreptitiously or with consent.

CHAPTER VI
NOTIFICATION OF INTERCEPTION AND SURREPTITIOUS ENTRY

DIVISION I
GIVING NOTICE

Written notice

177. The Solicitor General of Canada or the provincial minister on whose behalf an application for a warrant was made shall notify in writing

(*a*) any person who was the object of an interception made pursuant to the warrant unless the person has already been given notice of an intention to tender evidence of the interception; and

(*b*) any person whose place was entered surreptitiously pursuant to the warrant.

Working Paper 47, recs. 37, 69
Criminal Code, s. 196(1)

COMMENT

Section 196 of the *Criminal Code* provides, in effect, that the Attorney General of the province in which the application for the authorization was made, or the Solicitor General of Canada, as the case may be, must give written notice to any person who has been the object of an interception made pursuant to the authorization. There are a variety of periods within which this notification must be made. The general rule under subsection 196(1) is that the notification must be made within ninety days after the period for which the authorization was issued or renewed. However (by subsections 185(2) and (3)), at the time the application for the original authorization was made, or (by subsections 196(2) and (3)) after an authorization or renewal has been

granted,[212] the applicant may apply to substitute for this time period a longer period of up to three years. There are various grounds of which the judge must be satisfied before granting an extension under these provisions. The fact that the person has received such notice must be certified to the court in a manner prescribed by regulations.

The courts have ruled that the only notice to be given under this section 196 is the fact that an interception was made. It does not require that the person receive notice of the date or period of the interception or a copy of the authorization or have access to the tape recordings.[213]

Section 177 sets out to whom notice should be given. It alters the present law in two ways. First, it requires that notice be given of any surreptitious entry to install a surveillance device.[214] This promotes accountability in the use of this power.

Second, paragraph (*a*) provides that a notice of interception need not be given where a person has already received notice of the prosecutor's intention to adduce evidence.[215] The person in such a case would have received earlier notice and fuller details than would be the case under this notice.

Time of notice

178. The notice shall be given within ninety days after the warrant expires.

Criminal Code, s. 196(1)

COMMENT

Section 178 clarifies the present law by setting out the general rule that service must be made within ninety days after the period for which the warrant (or any renewal of it) was valid. However, sections 181 to 183 allow for this ninety-day period to be extended by order of the court.

Contents of notice of interception

179. (1) A notice of an interception, shall disclose the date of the interception, and shall be accompanied by a copy of the warrant.

Working Paper 47, rec. 69

Contents of notice of entry

(2) A notice of a surreptitious entry shall disclose the place that was entered and the date of the entry, and shall be accompanied by a copy of the warrant.

212. Where the extension is sought, it must be brought before the statutorily fixed time periods expire.

213. *Re Zaduk and The Queen* (1979), 46 C.C.C. (2d) 327 (Ont. C.A.).

214. This policy was recommended by Working Paper 47, rec. 37 at 49.

215. *Ibid.*, rec. 69 at 93.

COMMENT

Section 179 requires that interception and entry notices supply more information than is the case under present law. The notice should disclose, not just the fact that interceptions of the person's private communications were made, but also the date of the interceptions. As well, it should be accompanied by a copy of the warrant authorizing the interception. (The warrant may be obscured to prevent the person from knowing about other persons whose private communications were also authorized to be intercepted). As we stated in Working Paper 47 (at 91), this better accords with the principles of reviewability and accountability. Since section 40 requires the police to give a copy of a search warrant to a person whose property has been searched (or to leave a copy), in our view it is logical to require that a "search" for private communications be treated in a similar manner.

Service of notice

180. (1) Service of the notice shall be made and proof of its service shall be given in accordance with such regulations as the Governor in Council may make for the purpose.

Criminal Code, s. 196(1)

Inability to serve notice

(2) Where the notice cannot be served, a peace officer with knowledge of the facts shall provide the court with an affidavit setting out the reason why the notice was not served and the efforts that were made to locate the person.

Working Paper 47, rec. 73

COMMENT

Section 180 describes how interception and entry notices must be served. Subsection (1) re-enacts subsection 196(1) of the present *Code* and sets out the power to prescribe by regulation the manner and proof of service.

Subsection (2) is self-explanatory.[216]

DIVISION II
APPLICATION TO EXTEND TIME FOR NOTICE

Power to extend time of notice

181. (1) A judge who, on application, is satisfied that

(*a*) the investigation of the crime to which a warrant relates, or a subsequent investigation of another crime referred to in subparagraph 133(1)(*a*)(i) commenced as a result of the earlier investigation, is continuing, and

(*b*) it would be in the best interests of the administration of justice

216. *Ibid.*, rec. 73 at 93.

may order that the time for giving notice of an interception or surreptitious entry be extended.

Successive extensions

(2) A judge may grant more than one extension of time as long as the total extra time granted does not exceed three years.

Working Paper 47, rec. 72
Criminal Code, s. 196(3)

COMMENT

Sections 181 to 183 set out the power to extend the time for giving notice. Subsection 181(1) lists the grounds on which a judge must be satisfied in order to grant such an extension. With minor changes in wording, these grounds are the same as those set out in subsection 196(3) of the present *Code*.

Subsection 181(2) sets out the maximum time period of extension. The present law appears to allow the notice period to be extended indefinitely, provided each separate period of extension is itself not longer than three years.[217] This is inconsistent with a policy which favours accountability. Thus, subsection 181(2) puts a cap of three years on the period of successive extensions.[218]

Applicant

182. An application for extension may be made by the Solicitor General of Canada or the provincial minister who is required to give notice of the interception or surreptitious entry.

Criminal Code, s. 196(2)

Manner of making application

183. (1) The application shall be made to a judge unilaterally, in person and in private, orally or in writing, before the ninety-day period or an extension of that period ends and shall be supported by an affidavit of a peace officer.

Criminal Code, s. 196(2), (4)

Contents of affidavit

(2) The affidavit shall disclose

(*a*) the facts relied on to justify the granting of an extension; and

(*b*) a list of any previous applications for extensions in respect of the same warrant indicating the date each previous application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted.

Criminal Code, s. 196(4)

217. See Watt, *supra*, note 158 at 193.

218. See Working Paper 47, rec. 72 at 93.

COMMENT

Section 183 describes the nature and timing of an application to extend time for giving notice of an interception or surreptitious entry. These sections change the present law in one important way. Under them there is no longer the power (presently found in subsections 185(2) and (3) of the *Code*) to apply for an extension, or to grant it, at the time the application for a warrant is made. Under this provision, an extension may be applied for only after a warrant is issued. The application for extension of the notice should ordinarily be based on circumstances that can only be known or would only arise after the granting of a warrant. Privacy is better protected by proceeding in this way, since the court will have a more informed basis upon which to decide that the extension is truly necessary. Nevertheless, in unusual or extremely complex investigations, we recognize that the applicant for the warrant will be better positioned to predict that an extension will be required, and to justify that prediction to a judge. In such cases, the wording in this provision can accommodate extension applications brought immediately after the warrant is granted.

CHAPTER VII
APPLICATION FOR DETAILS OF INTERCEPTION

Applicant and notice

184. An accused who discovers that a private communication to which the accused was a party has been intercepted by means of a surveillance device may apply in writing to a judge on two clear days' notice to the prosecutor for an order requiring the prosecutor to disclose details of the intercepted private communication.

Working Paper 47, rec. 70

COMMENT

See the comment to section 191 for a full explanation of this kind of application.

Contents of application

185. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime with which the applicant is charged;

(*d*) the nature of the order requested; and

(*e*) the reasons for requesting the order.

Affidavit in support

(2) The application shall be supported by an affidavit.

COMMENT

This section sets out the contents of an application to disclose details of a private communication and requires that the application be accompanied by an affidavit in support. This is consistent with the procedure used for applications for orders brought on notice to other persons appearing elsewhere in this Code — for example, in Part Six (*Disposition of Seized Things*).

Service of notice

186. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on the prosecutor.

COMMENT

This section, modelled on section 216 of this Code, requires that a notice of the application, together with the application itself and supporting affidavit, be served on the prosecutor.

Hearing evidence

187. A judge to whom an application is made may receive evidence, including evidence by affidavit.

COMMENT

This section is modelled on paragraph 218(*c*) (disposition of seized things).

Service of affidavit

188. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on the prosecutor.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

189. The evidence of any person shall be on oath.

Recording evidence

190. (1) Any oral evidence heard by the judge shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of oral evidence shall be certified as to time, date and accuracy.

Disclosure of further details

191. A judge who, on application, is satisfied that details of an intercepted private communication are relevant to the crime with which the applicant is charged and are necessary for the applicant to make full answer and defence may order the prosecutor to disclose such details as can be ascertained by due diligence.

Working Paper 47, rec. 70

COMMENT

The police ordinarily intercept private communications with the intention of obtaining evidence against a person for eventual use at that person's trial on a charge involving the crime for which the warrant to intercept was granted. However, not all targets of interceptions end up being prosecuted for that crime. The private communication may reveal that the person was not involved in committing a crime at all, or was committing a different crime, or that someone else entirely was involved.

For example, the private communication of "A," an innocent conduit, may be evidence that "B," not "A," was involved in committing a crime. Consequently "A" would not be charged with a crime as a result of the electronic surveillance. Since no evidence of the private communications would be tendered in evidence against "A," "A" would not receive a notice of intention to tender evidence under section 194. However, it is conceivable that "A" may need to obtain a record of the private communications in order to make full answer and defence to a different charge for which the prosecutor did not intend to tender the intercepted communications as evidence. "A" might nevertheless still wish to have access to the wiretapped evidence, since it might provide corroboration of his or her alibi or support some other aspect of the defence.

Accused persons who do not receive notice of an intention to introduce private communications in evidence against them may become aware, either formally or informally, of the fact that their private communications have been intercepted. The formal method is that set out in paragraph 177(*a*), by which the person would receive a notice of any authorized interceptions of his or her private communications. However, this notice need not include the contents of the intercepted communications. The informal or unofficial method occurs where the person learns, or is informed, usually from a reliable source, that an interception took place.

Sections 184 to 193 codify the proposals that we first set forth in Working Paper 47 [219] to rectify the shortcomings of the present *Criminal Code* provisions. Section 184 states that an application for this order may be made by an accused who was a party to the intercepted private communication on two clear days' written notice to the prosecutor. Sections 185 to 190 detail certain procedural elements of the application such as the contents of the application, service of the application, notice of the application and what evidence will be heard on the application. Section 191 sets out the grounds on which a judge must be satisfied to order disclosure of details of the private communication.

219. Recommendation 70 at 93.

Form of order

192. The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

193. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime with which the applicant is charged;

(*c*) the decision of the judge;

(*d*) the date and place of issuance; and

(*e*) the name and jurisdiction of the judge.

CHAPTER VIII
PROCEDURE FOR TENDERING EVIDENCE AND OBTAINING ADDITIONAL INFORMATION

DIVISION I
NOTICE OF INTENT TO TENDER EVIDENCE

Notice

194. (1) A prosecutor who intends to tender evidence of a private communication that was intercepted by means of a surveillance device shall give the accused reasonable notice of that intention.

Working Paper 47, rec. 57
Criminal Code, s. 189(5)

Accompanying documents

(2) The notice shall contain

(*a*) a transcript of any private communication that will be tendered in the form of a recording, or a statement giving full particulars of any private communication that will be tendered by a witness;

(*b*) the time, date and place of the private communication and the names of all parties to it, if known; and

(*c*) if the private communication was intercepted pursuant to a warrant, a copy of the warrant and any material relating to an application to issue, renew or amend the warrant.

Working Paper 47, rec. 49
Criminal Code, s. 189(5)

COMMENT

Subsection 189(5) of the *Criminal Code* requires, as a condition of admissibility of a lawfully intercepted private communication, that the party intending to adduce it as evidence give the accused reasonable notice of such intention, together with: (a) a transcript of the private communication (where it will be adduced in the form of a recording) or a statement setting out full particulars of the private communication (where evidence of the private communication will be given orally); and (b) a statement respecting the time, place and date of the private communication and the parties to it, if known.[220]

Section 194 incorporates many aspects of the present *Code* provision, but it also introduces reforms designed to promote better disclosure to the accused.

Subsection (1) requires that notice be given whenever the prosecutor intends to tender evidence of an intercepted private communication. This is meant to cover not only private communications that are lawfully intercepted pursuant to this Part (under a warrant or with the consent of all parties), but also private communications that are unlawfully intercepted, but that may nevertheless be admissible in the overall interests of justice in the case. Under the present law, the notice requirement is not applicable where the evidence is adduced with the consent of one of the parties.[221] In Working Paper 47 we observed that this restriction was inconsistent with full disclosure, which requires that notice be given in all these situations.[222]

Subsection (1) is not drafted in terms of excluding evidence where a failure to give proper notice occurs. Rather, the likely remedy would be an adjournment of the proceedings.

Paragraphs (*a*) and (*b*) of subsection (2) in large measure reflect the present law. However, paragraph (*c*) is new. It reflects a policy of disclosure to the accused of most of the material contained in the sealed packet (including the information in support of the application for a warrant, its renewal or amendment, as well as the warrant or, if separate, the amendment itself). Under the present law, such information, with the exception of the authorization and any renewal, is sealed and the accused must seek a court order to obtain access to it. Although the courts are now more readily recognizing the accused's right to have access to material in the sealed packet in order to make full answer and defence, the procedure is complicated and the onus is still on the accused to seek access. We have concluded that better disclosure would be achieved by obliging the prosecutor to disclose all such matters, subject to the prosecutor's obtaining a judge's order allowing material to be obscured as provided for in section 167. (Note that an order obscuring information is reviewable under Division III of this Chapter on

220. The requirement to give notice is not restricted, under *Code* s. 189, to situations where the prosecutor wishes to tender evidence of the private communications against the accused directly. It also applies where the prosecutor tries indirectly to have the private communications tendered in evidence against the accused — for example, where the prosecutor wishes to use the private communications as part of the cross-examination of the accused's witness in order to destroy the accused's alibi defence. See *R.* v. *Nygaard*, [1989] 2 S.C.R. 1074.

221. See *R.* v. *Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224 (Ont. H.C.).

222. Working Paper 47 at 73; rec. 57 at 87.

grounds that access to the information is believed necessary in order to make full answer and defence.)

DIVISION II
APPLICATION FOR FURTHER PARTICULARS

Applicant and notice

195. An accused who has received notice of the prosecutor's intention to tender evidence of an intercepted private communication may apply in writing to a judge on two clear days' notice to the prosecutor for further particulars of the private communication.

Criminal Code, s. 190

COMMENT

Section 190 of the present *Code* allows a judge of the court in which the trial of the accused is being or is to be held to order that further particulars be given of the private communication intended to be adduced in evidence pursuant to the notice given the accused. Sections 195 to 197 incorporate this policy in a more logical manner by specifying separately the procedure by which the application is made (sections 195 and 197) and the power of the judge to grant the application (section 196).

Order for further particulars

196. A judge who, on application, is satisfied that further particulars are necessary for the accused to make full answer and defence may order that further particulars be given.

Criminal Code, s. 190

Additional procedures

197. Sections 185 to 190, 192 and 193 apply to this application.

COMMENT

This section incorporates, for purposes of these applications, the same procedural mechanisms that govern applications for orders to obtain details (see sections 185 to 190 and sections 192 to 193). These relate to the contents of the application, service of the notice of the application and the application itself. Also these procedures regulate what evidence is to be heard, how the evidence is to be recorded and the form and contents of any resulting order.

DIVISION III
APPLICATION TO REVEAL OBSCURED INFORMATION

Applicant

198. An accused who has received notice of the prosecutor's intention to tender evidence of an intercepted private communication may apply in writing for an order to reveal information obscured in the material that accompanied the notice.

Working Paper 56, rec. 9(6)

COMMENT

If a decision has been made to obscure information, the accused, on receiving notice of the prosecutor's intention to adduce evidence under section 194, would receive a copy of the information in its obscured state.

In Working Paper 56, *Public and Media Access to the Criminal Process*,[223] we recommended that there be a mechanism for revealing obscured information in order for the accused to make full answer and defence to the charge. This policy of better facilitating the right to make full answer and defence has been recently recognized in several cases involving access to sealed material.[224] Section 198 thus permits applications to reveal obscured information and describes who may apply for this order.

Manner of making application

199. The application shall be made in person to a judge on two clear days' notice to the prosecutor.

Hearing the application

200. On hearing the application, the judge shall examine the material contained in the sealed packet in the presence of the accused and the prosecutor without allowing the accused to examine it.

Order to reveal information

201. A judge who, on application, is satisfied that information that has been obscured in any material given to the accused relating to the warrant is necessary for the accused to make full answer and defence may order that the information be revealed to the accused.

Working Paper 56, rec. 9(6)

223. Recommendation 9(6)(*a*) at 61.

224. See, *e.g.*, *R.* v. *Rowbotham*, *supra*, note 208; and *R.* v. *Parmar*, *supra*, note 208.

Additional procedures

202. Sections 185 to 190, 192 and 193 apply to this application.

Appeal

203. The judge's decision may be appealed to a judge of the court of appeal.

CHAPTER IX
EVIDENTIARY RULES

Affidavit evidence

204. Evidence of the following matters may be tendered by affidavit:

(*a*) the times when and the places at which a private communication was intercepted;

(*b*) the means by which a private communication was intercepted;

(*c*) the history of the custody of any recording of an intercepted private communication; and

(*d*) service of a notice of intention to tender evidence.

Working Paper 47, rec. 66

COMMENT

Wiretap cases have the potential to become quite protracted. Much technical but often non-contentious evidence, such as testimony as to installation of the device, monitoring of the device, preparation of tapes and transcripts, and so forth, has to be called. In Working Paper 47[225] we proposed, in the interests of making proceedings more efficient and expeditious, that these non-contentious matters be more easily received in evidence. This section gives expression to our proposals.

Status of applicant

205. The recital in a warrant that a person is a designated agent or a designated peace officer is, in the absence of evidence to the contrary, proof of that fact.

Working Paper 47, rec. 68

COMMENT

Section 205 dispenses with the need to prove, as a matter of course, that a person described as such in a warrant is in fact a special agent or a designated peace officer.

225. Recommendations 66 and 67 at 89.

Absence of original warrant

206. In any proceeding in which it is material for a court to be satisfied that an interception of a private communication was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the interception was not authorized by a warrant.

Report 19, Part Two, rec. 2(12)
Criminal Code, s. 487.1(11)

COMMENT

Section 206 is a provision similar to that found in other Parts of this Code (such as section 41 in Part Two (*Search and Seizure*)). It again emphasizes our preference for the production of original warrants (rather than copies) where the warrants have been applied for by telephone or other means of telecommunication, since the original warrants clearly establish that the authority to act has been conferred.

CHAPTER X
ANNUAL REPORT

Preparation of report

207. (1) The Solicitor General of Canada and each provincial minister shall, as soon as possible after the end of each year, prepare a report on the electronic surveillance activity conducted on each of their behalf during the year.

Criminal Code, s. 195(1), (5)

Laying before Parliament

(2) The Solicitor General of Canada shall have the report laid before Parliament without delay.

Criminal Code, s. 195(4)

Publication

(3) Each provincial minister shall publish the report or otherwise make it available to the public without delay.

Criminal Code, s. 195(5)

COMMENT

To create a measure of political accountability for the use of this wiretap legislation, section 195 of the *Criminal Code* requires that the Solicitor General of Canada or the provincial Attorney General, as the case may be, must annually publish a detailed report on the wiretapping applications and authorizations made on his or her behalf during each year. Sections 207 and 208 continue these reporting requirements, with minor alterations to promote readability and to ensure consistency with other proposals in this Part.

Contents of annual reports

208. The annual reports shall set out

(*a*) the number of applications for warrants, renewals and amendments, listed separately;

(*b*) the number of warrants, renewals and amendments that were issued, refused or issued with judicially- imposed conditions;

(*c*) the number of persons identified in warrants who were prosecuted by the Attorney General of Canada or of the province, as a result of interceptions made under warrants, for

(i) a crime specified in the warrant,

(ii) a crime referred to in subparagraph 133(1)(*a*)(i) that was not specified in the warrant, and

(iii) a crime other than a crime referred to in subparagraph 133(1)(*a*)(i);

(*d*) the number of persons not identified in warrants who, because of information obtained from intercepted private communications made under warrants, were prosecuted by the Attorney General of Canada or of the province for

(i) a crime specified in a warrant,

(ii) a crime referred to in subparagraph 133(1)(*a*)(i) that was not specified in a warrant, and

(iii) a crime other than a crime referred to in subparagraph 133(1)(*a*)(i);

(*e*) the average period for which warrants and renewals were issued;

(*f*) the number of warrants that, when renewed, were valid for periods of

(i) sixty to one hundred and nineteen days,

(ii) one hundred and twenty to one hundred and seventy-nine days,

(iii) one hundred and eighty to two hundred and thirty-nine days, and

(iv) two hundred and forty days or more;

(*g*) the crimes specified in warrants and the number of warrants, renewals and amendments issued for each crime;

(*h*) a description of all classes of places specified in warrants and the number of warrants issued for each class of place;

(*i*) a general description of the means of interception specified in warrants;

(*j*) the number of persons arrested because of information obtained from a private communication intercepted under a warrant;

(*k*) the number of notices of interception of private communications or of surreptitious entry given;

(*l*) the number of criminal proceedings, commenced by the Attorney General of Canada, or of the province, in which private communications intercepted under a warrant were tendered as evidence and the number of those proceedings where the accused was convicted;

(*m*) the number of investigations in which information obtained from a private communication intercepted under a warrant was used, although the private communication was not adduced in evidence in criminal proceedings;

(*n*) the number of prosecutions commenced against officers or servants of Her Majesty for crimes under section 66 (interception of private communications), 67 (entry to install instrument) or 68 (disclosure of private communications) of the proposed Criminal Code (LRC); and

(*o*) a general assessment of the importance of the interception of private communications for the investigation, prevention and prosecution of crimes in Canada or the province.

Criminal Code, s. 195(2), (3)

COMMENT

See the comment to section 207.

PART SIX

DISPOSITION OF SEIZED THINGS

DERIVATION OF PART SIX

LRC PUBLICATIONS

Search and Seizure, Report 24 (1984)

Post-Seizure Procedures, Working Paper 39 (1985)

Disposition of Seized Property, Report 27 (1986)

Public and Media Access to the Criminal Process, Working Paper 56 (1987)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, ss. 487-492, 605

INTRODUCTORY COMMENTS

This Part establishes a largely comprehensive scheme to govern the handling, detention and disposition of "objects of seizure"[226] after they have been seized in accordance with Part Two (*Search and Seizure*) or Three (*Obtaining Forensic Evidence*). (In the latter case, this Part has application only if the thing seized is an object of seizure removed from inside a person's body.) The means of determining a claim of privilege and of disposing of seized things that are found to be privileged (such as documents seized from a lawyer's files) are not described here but rather are governed by the procedures in Part Seven (*Privilege in Relation to Seized Things*) of this Code.

Post-seizure procedures leading to the ultimate disposition of seized things are currently governed by complex *Criminal Code* provisions and, particularly in the case of things seized without warrant, by the diverse administrative policies and practices of individual police forces. In contrast, this Part establishes clear, uniform and simple rules to govern these matters.

Persons having an interest in seized things are given the means to locate them, track their movement and be informed of the person or persons responsible for their custody. The authorities are encouraged to consider promptly whether detention of anything seized is necessary. If it is determined at an early stage that detention is not required, and no conflicting claims to ownership or possession are apparent, the administrative requirements of this Part may be avoided and the things may be expeditiously returned to those persons entitled to possession. The process as a whole is subject to judicial supervision. Those responsible for a seizure are made fully accountable.

Accountability is promoted by requiring those responsible for a seizure to prepare a detailed inventory of the things seized, give copies to specified persons affected and attach a copy to a detailed post-seizure report that is submitted to a justice. Initial responsibility for the preservation and safeguarding of seized things rests with the peace officer making the seizure, but justices in the judicial district where the post-seizure report is filed have overall power to supervise and control the detention, conditions of custody and disposition of anything seized.

If detention of a seized thing is required, victims and others who claim a right to ownership or possession are provided with understandable, accessible and effective restoration procedures.

At the same time, the broader public interests in the effective enforcement of criminal laws and conduct of criminal trials are preserved. Investigators and prosecutors are given the powers reasonably necessary to detain, safeguard and ultimately tender evidence in criminal proceedings.

Special procedures are established to deal with seizures of things that are dangerous or perishable.

This Part completes the reforms begun with the proclamation in force, on December 2, 1985, of the *Criminal Law Amendment Act*.[227] That Act, in turn, was partly

226. The meaning of "objects of seizure" is set out in section 2.

227. S.C. 1985, c. 19.

modelled on our draft recommendations in Working Paper 39. The 1985 reform did not purport comprehensively to regulate the area. Rather, its provisions were expressly made subject to the provisions of any other Act of Parliament,[228] and so the post-seizure provisions in, for example, the *Narcotic Control Act*[229] and the *Food and Drugs Act*[230] continued in force. In contrast, this Part of our Code is far more comprehensive. It governs the detention and disposition of all things seized as "objects of seizure" (*a*) under Part Two (*Search and Seizure*) or (*b*) under Part Three (*Obtaining Forensic Evidence*) where the objects have been removed from inside a person's body, and in the result affects the manner in which seized things will be dealt with under all federal crime-related statutes.

While more complete in its coverage than the present *Code* and related statutes, this Part does not purport to regulate the handling and disposition of: (1) body samples, residues or things taken under Part Three, unless, as mentioned, the things have been seized as "objects of seizure" by removing them from inside a person's body (for example, drugs hidden in a person's body cavity); (2) things seized in relation to which a claim of privilege has been made; (3) breath or blood samples taken under Part Four; (4) things seized for purposes unrelated to criminal investigations or prosecutions (for example, things that are found); (5) things seized (otherwise than as the "objects of seizure" set out here) under the rules and regulations of custodial institutions; (6) things seized for the purpose of determining the legality of their possession without reference to specified crimes or the title of individual claimants;[231] or (7) "proceeds of crime."[232]

CHAPTER I
INTERPRETATION

Application of Part

209. (1) This Part applies to anything seized under Part Two (*Search and Seizure*) as an object of seizure or seized under Part Three (*Obtaining Forensic Evidence*) as an object of seizure that was removed from inside a person's body.

Exception if privilege claimed

(2) If a claim of privilege is made in respect of the seized thing or information contained in it, the seized thing shall be

228. See, *e.g.*, s. 489.1(1) of the *Criminal Code*.

229. *Supra*, note 21.

230. R.S.C. 1985, c. F-27.

231. This refers to *in rem* proceedings applicable to weapons, etc. (*Criminal Code*, s. 103), hate propaganda (*Criminal Code*, s. 320) and crime comics and obscene publications (*Criminal Code*, s. 164). We have elsewhere recommended that sections 103, 164 and 320 of the *Code* be moved into federal regulatory legislation. See Report 24 at 51-54.

232. Inclusion of rules designed to regulate their seizure and disposition is temporarily deferred while we carefully consider recent legislation on this subject. See *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, *supra*, note 13. Our conclusions as to the extent to which this new legislation should be incorporated into this Code will be set out in forthcoming papers.

dealt with in accordance with Part Seven (*Privilege in Relation to Seized Things*).

COMMENT

The purpose of this provision is to specify clearly the scope of application of this Part. "Objects of seizure" is defined in section 2.

Rules relating to the disposition of things (other than "objects of seizure" removed from inside a person's body) obtained under the forensic evidence regime of Part Three will be addressed in a later volume to this Code, while the rules relating to the disposition of blood and breath samples taken under Part Four (*Testing Persons for Impairment in the Operation of Vehicles*) are to be partially found in that Part. If a claim of privilege is made in relation to a seized thing or information contained in it, the procedure for access to and disposition of the thing is governed by Part Seven (*Privilege in Relation to Seized Things*).

CHAPTER II
DUTIES OF PEACE OFFICER ON SEIZURE

DIVISION I
INVENTORY OF SEIZED THINGS

Preparation and offer of inventory

210. (1) A peace officer shall, at the time of seizure or as soon as practicable after the seizure,

(*a*) prepare and sign an inventory of any seized things that describes them with reasonable particularity; and

(*b*) offer to provide a copy of the inventory to any person who was in apparent possession of the seized things at the time of the seizure, and shall, at the person's request, provide a copy of the inventory.

Inventory for copied information

(2) If a copy of information contained in a seized thing is taken by a peace officer, the inventory shall indicate that fact.

Posting copy of inventory

(3) If no one was in apparent possession of the seized things, the peace officer may post a copy of the inventory where the seizure was made.

Copy to person with ownership or possessory interest

(4) A peace officer who seizes anything shall, where practicable, offer to provide a copy of the inventory to any other

person who the officer believes has an ownership or a possessory interest in the seized thing and shall, at the person's request, provide a copy of the inventory.

Report 27, rec. 2(1)
Criminal Code, ss. 487.1(9), 489.1

COMMENT

Under section 489.1 of the present *Code*, if a thing seized under a warrant is not returned to the person lawfully entitled to possession,[233] the peace officer or other person who made the seizure is required to take the thing before "the justice who issued the warrant or some other justice for the same territorial division."[234] As an alternative to transporting the seized thing, the officer or other person may report the seizure and detention to the justice.[235] If no warrant has been issued and the thing has not been returned, the thing must be brought before, or the report made to, "a justice having jurisdiction in respect of the matter."[236] In the case of a seizure under a telewarrant, the officer must file a report of the seizure "with the clerk of the court for the territorial division in which the warrant was intended for execution."[237]

The *Code*'s current provisions do not require the preparation of a post-seizure report in all cases where something has been seized and has not been returned. Nor do they require that an inventory be prepared and offered to persons having an interest either in the thing itself or in premises or vehicles from which the thing is seized.

The provisions in this Chapter differ from those of the present *Code*.

Section 210 enhances accountability by requiring the timely preparation and attempted distribution of an inventory of seized things. It enables inventory recipients to take action to protect their own interests by, for example, seeking access to the thing, applying for restoration or challenging the validity of the seizure itself.

DIVISION II
RETURN OF SEIZED THINGS BY PEACE OFFICER

Return to person lawfully entitled to possession

211. (1) A peace officer may, before a post-seizure report is given to a justice, return a seized thing to the person who is believed to be lawfully entitled to possession if, to the knowledge of the peace officer, there is no dispute as to possession

233. Under paragraph 489.1(1)(*a*).

234. *Criminal Code*, s. 489.1(1)(*b*)(i), (2)(*a*).

235. *Criminal Code*, s. 489.1(1)(*b*)(ii), (2)(*b*). Subsection 489.1(3) requires the report to be in Form 5.2 which specifies that the report contain, among other things, a description of each thing seized.

236. *Criminal Code*, s. 489.1(1)(*b*), (2).

237. *Criminal Code*, s. 487.1(9). Subsection 489.1(3) also prescribes use of Form 5.2 with the addition of the statements referred to in subsection 487.1(9).

and the thing is no longer required for investigation or use in any proceeding.

Receipt

(2) The officer shall get a receipt for anything returned.

Report 27, rec. 2(6), (7)
Criminal Code, s. 489.1(1)(*a*)

COMMENT

Section 211 continues the essence of paragraph 489.1(1)(*a*) of the *Criminal Code*.

The basic common law power that allows investigators a reasonable amount of time to assess whether an investigation will be enhanced by the continued detention of a seized thing, or whether it will provide useful evidence in subsequent proceedings,[238] continues. Often, investigators come to realize soon after a seizure that further detention of a seized thing for such purposes is unnecessary. If a post-seizure report has not yet been presented to a justice and there is no apparent dispute as to who is entitled to possession, subsection 211(1) allows for its prompt return to the person who the officer believes is lawfully entitled to possession.

This power is not intended to involve the peace officer in assessing the legal validity of claimed property rights in a seized thing. Return under this section does not create or extinguish such rights. If, to the knowledge of the officer, there is a dispute as to who is entitled to possession, the formal requirements of this Part should be followed.

Where something is returned under the authority of subsection 211(1), the administrative and accountability requirements are simply that a receipt be obtained (subsection 211(2)) and attached to any post-seizure report prepared (subsection 212(3)).

DIVISION III
POST-SEIZURE REPORT

Preparation of report

212. (1) A peace officer shall prepare a post-seizure report for anything that was seized and not returned.

Contents of report

(2) The post seizure report shall disclose

(*a*) the time and place of seizure;

(*b*) the name of the officer who made the seizure and the name of the police force or other organization that the officer acted for when making the seizure;

238. See *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.); *Lavie* v. *Hill* (1918), 29 C.C.C. 287 (N.S.S.C.). See also the remarks of Galligan, J., in *In Re Famous Player's Ltd.* v. *Director of Investigation and Research* (1986), 29 C.C.C. (3d) 251 at 263 (Ont. H.C.).

(*c*) the name of any person who was given a copy of the inventory;

(*d*) where anything not referred to in a search warrant was seized in the course of executing the warrant, or where anything was seized without a warrant, the reasons for seizing it;

(*e*) the names of any persons who, to the officer's knowledge, may have an ownership or a possessory interest in anything seized; and

(*f*) where the search was carried out pursuant to a warrant issued for more than one object of seizure, and not all of the objects of seizure were searched for, the reasons why a search was not carried out for each object of seizure.

Inventory and receipt to be attached

(3) The peace officer shall attach to the report the inventory of seized things and the receipt for anything that was returned.

Report 27, rec. 2(2) to (4)
Criminal Code, ss. 487.1(9), 489.1

COMMENT

Before 1985, the *Criminal Code* did not provide for the submission of a written report as an alternative to bringing before a justice things seized under (or incidental to) a warrant. Under the *Code*, seized things generally had to be physically taken before either the justice who issued the warrant or some other justice within the same territorial division. The 1985 reform introduced the report as an alternative[239] to taking the things seized with or without warrant before a justice. The *Narcotic Control Act* and the *Food and Drugs Act* still do not require returns or reports in relation to things seized under those Acts.

Section 212 implements our view that, whenever a peace officer officially seizes something (*i.e.*, when it is seized and is not returned), a report that briefly but accurately details the facts and circumstances surrounding the seizure should be made to a judicial official.[240]

To simplify administration, sections 212 and 213 do not give the officer an initial option of carrying seized things before the justice; rather, they require the preparation, submission and filing of a post-seizure report in all cases in which seized things are retained. Subsection 212(2) clearly specifies the information the report must contain. Subsection 212(3) requires the inventory prepared under section 210 to be attached to it. If something seized has been returned under section 211, subsection 212(3) requires the receipt for it to be attached as well.

239. The alternative to a report is not always available under the *Code*. See *Criminal Code*, ss. 102(3), 199(1), (2), 395(2), 447(2).

240. Report 27 at 12-13.

The report and inventory both serve the goal of accountability.

Return of post-seizure report

213. (1) A post-seizure report shall be given, as soon as practicable after the seizure, to a justice in the judicial district in which the seizure was made.

Receipt and filing of post-seizure report

(2) The justice who receives the post-seizure report shall have it filed with the clerk of the court for the judicial district in which the seizure was made.

Report 27, rec. 2(5)
Criminal Code, ss. 487.1(9), 489.1(1)

COMMENT

Subsection 489.1(1) of the *Criminal Code* now states, in part, that where a seizure is made by a peace officer, where no warrant has been issued and the seized thing is not returned, the officer must bring the seized thing or the report of seizure to a "justice having jurisdiction in respect of the matter." This may reasonably be interpreted as applying to seizures made without a warrant. However, the identity of "a justice having jurisdiction in respect of the matter" may not always be clear.

We have concluded that all seizures should be reported and that, after a seizure occurs, public access to documents relating to the seizure and related disposition proceedings would not significantly interfere with criminal investigations or effective law enforcement. Accordingly, with certain exceptions, such access should be permitted.[241] The goal of all filing requirements in this Code is to facilitate, wherever possible, access to the material and documents recording and justifying intrusions against the privacy and security of persons and property.[242] This goal may be realized only if the place of filing of relevant material is clearly specified and easily ascertained. Section 213 sets out this filing procedure.

241. Working Paper 56, rec. 11 and comment at 71-72.

242. This is subject, of course, to any overriding public or law enforcement interest in maintaining the confidentiality or security of documents relating to the conduct of criminal investigations and protecting legally recognized privileges. Where such interests are important, this Code clearly recognizes and protects them. See, for example, ss. 166 to 174 requiring confidentiality and sealing of material relating to wiretap applications; s. 53 (search and seizure); and Part Seven which regulates the manner of handling and disposing of material with respect to which a privilege is claimed.

CHAPTER III
CUSTODY AND DISPOSAL OF SEIZED THINGS

DIVISION I
GENERAL PROVISIONS DEALING WITH ORDERS

1. Making an Application

Manner of making application

214. An application for an order shall be made in writing to a justice in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

COMMENT

Under this Part, applications may be made for a variety of orders in relation to seized things. These applications should be distinguished from applications for warrants. Warrant applications are unilateral applications not requiring notice to interested parties. The applicant for a warrant must present reasonable grounds for belief in facts justifying the warrant's issuance, but need not have personal knowledge of those facts. In contrast, most of the applications for orders under this Part require that interested parties be given notice. These applications may be contested and the decision to issue an order must be based on evidence on oath deriving from the personal knowledge of witnesses or deponents.

The present *Criminal Code* allows most of these orders to be obtained by way of "summary application" on notice to specified parties.[243] Others, for example subsections 490(5) and (6), involve "applications" on notice (in which case the *Code* provides that, before making an order, the judge or justice must give specified persons an "opportunity to establish" certain matters). The distinction between "applications" and "summary applications" is far from clear.[244]

243. *Criminal Code*, s. 490(2)(*a*), (3)(*a*), (7), (10), (15).

244. In addressing this matter, we asked whether the term "summary" is intended to signify that the proceedings are to be characterised by abruptness, expedition or informality. Or is it intended to signify restrictions on the kinds of evidence that can be tendered? In the view of the British Columbia Court of Appeal, "summarily" signifies an intention to give a right to proceed *ex parte*: *Suttles* v. *Cantin*, [1915] 8 W.W.R. 1293 (B.C.C.A.). In the view of another court, the words "summary application" do not mean without notice, but simply signify that the proceedings are not to be conducted in the "ordinary" way, but in a concise way: *Re Freeman Estate*, [1923] 1 D.L.R. 378 at 380-381 (N.S.S.C.A.D.). Perhaps "summary" is intended to signify certain characteristics of the decision-making process: for example, that "instinct," rather than legal principle, is to be applied; or that decisions are to issue orally, immediately upon completion of the hearing rather than in written form after more thorough deliberation. *Criminal Code* paragraph 488.1(4)(*d*) requires a judge, in deciding whether a solicitor-client privilege attaches to documents, to "determine the question summarily." In short, the "summary" proceeding is nowhere defined and its intended nature can only be the subject of speculation. Yet, it is the most commonly used term to describe pre-trial applications in the *Criminal Code*. It is therefore obvious to us that the present vagueness of the legislation is unsatisfactory.

It is our view that all applications for orders in criminal proceedings should have a uniform structure that is fully and clearly defined. Applicants, counsel and those presiding should all have the same understanding of: (1) the conditions to be satisfied before the application may be heard; (2) the disclosures to be made and notice given to other parties and the court before the proceedings may begin; and (3) the nature and characteristics of the hearing itself, including the evidence that may be received. Imposing a uniform structure on these applications need not make them more cumbersome or time-consuming. Rather, as is the case in civil motions practice, setting these matters out clearly in legislation should result in more concise proceedings concentrating directly on the important and relevant issues. Further, mechanisms are available to expedite applications in appropriate circumstances; for example, normal time periods for the giving of notice may be shortened and orders may issue on consent if the justice approves.

In this Division are found the procedures to be followed for contested applications for orders in relation to the custody and disposal of things seized as objects of seizure under Part Two (*Search and Seizure*) or Part Three (*Obtaining Forensic Evidence*) where the object of seizure is removed from inside a person's body. The procedure for other contested orders in relation to other police powers is set out in other Parts. For example, Part Seven (*Privilege in Relation to Seized Things*) sets out the procedure to determine a claim of privilege. The application procedure set out here may not be ultimately located here in the final consolidated version of the Code. Given the existence of other contested applications elsewhere in this volume and given that we anticipate that similar applications will also be provided for in future volumes of this Code, it may prove desirable to consolidate the common provisions within a revised Chapter in Part One (*General*).

Section 214 states the basic features of applications for orders: they must be in writing and be heard by a justice. The place of application is flexible to account for the various locations that may be convenient for the applicant.

The persons to be given notice of an application and the length of notice required are set out in the specific sections describing each application.

Contents of application

215. (1) An application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian;

(*g*) the nature of the order requested;

(*h*) the reasons for requesting the order; and

(*i*) any additional information required by this Part for the application.

Affidavit in support

(2) The application shall be supported by an affidavit.

COMMENT

Paragraphs (*a*) to (*h*) of subsection (1), which are self-explanatory, set out the mandatory basic ingredients common to all applications for orders under this Part. Paragraph (*i*) alludes to the fact that other ingredients, peculiar to particular applications, are required by specific provisions in this Part.

Submission of an affidavit with the application ensures that the basic facts asserted in the application are supportable.

Notice of application

216. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on all parties to whom notice is required to be given.

COMMENT

This section is designed to inform the parties of the fact of the application and provides a suitable period within which to prepare for it.

Transferring file for hearing

217. If an application is brought in a judicial district other than the judicial district in which the post-seizure report is filed, the clerk of the court for the judicial district in which the post-seizure report is filed shall, on the written request of the applicant, have the post-seizure report and all accompanying material transferred to the clerk of the court for the judicial district in which the application is to be heard.

COMMENT

Section 217 authorizes the clerk of the court for the judicial district in which the post-seizure report was filed, on the written request of an applicant, to transfer relevant files and material to the place of application. Under sections. 225 and 229, a justice may, if satisfied that it is in the best interests of justice to do so, order that the application be made in a more convenient judicial district and then have relevant material transferred to the appropriate court clerk.

2. The Hearing

Power of justice

218. A justice to whom an application is made or who is authorized to make an order without an application being made may, in determining whether to make an order,

(*a*) compel the attendance of, and question, the custodian;

(*b*) examine a seized thing or require it to be produced for examination; and

(*c*) receive evidence, including evidence by affidavit.

COMMENT

This provision is designed to provide a broad base of information to a justice who is asked to make an order (or, where permitted by the relevant provision, who contemplates making an order without an application first being made). The justice may receive relevant information in the form ordinarily allowed in court proceedings (*i.e.*, testimony on oath) as well as by affidavit. The presiding justice is thus given the means to "go behind" an application in order to ascertain, in an active and effective manner, whether the requirements for making an order have been met.

Paragraph (*a*) recognizes the potential importance of the custodian in providing information to the justice charged with making a special order affecting the disposition of anything seized.

Although applications for orders will generally be based on evidence or information tendered by the parties or by other interested persons who have been given notice of the application, the justice is here given an unfettered discretion to compel the attendance of and to question the custodian.

Paragraph (*b*) complements the justice's discretionary power under paragraph (*a*). It is in keeping with our view that the justice, before making an order in relation to any thing seized, should have access to all necessary information, including information that may be derived from an examination of anything seized.

Paragaph (*c*) allows a justice to receive both oral testimony and affidavit evidence. Allowing affidavit evidence to be received provides a mechanism for avoiding unnecessary attendances and the inconveniencing of witnesses. This should reduce the cost of litigation and save court time. On balance, these benefits outweigh the delay that may be caused in occasional cases when cross-examination on an affidavit is required on the hearing of an application.[245]

Service of affidavit evidence

219. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on all parties who received notice of the application.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

245. See *Re Senechal and The Queen* (1980), 52 C.C.C. (2d) 313 (Ont. H.C.), *per* Linden J. If affidavit evidence may be received upon the "hearing" of an application, cross-examination by the party adverse in interest must be allowed.

COMMENT

This section addresses the procedure relating to affidavit evidence. The parties who receive notice of the application should also receive any affidavits that are to be tendered as evidence within a reasonable time of the hearing of the application in order to be able to prepare for the hearing and thereby expedite the process. In addition, the deponent of an affidavit may be questioned about it.

Evidence on oath

220. The evidence of any person shall be on oath.

Recording evidence

221. (1) Any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of oral evidence shall be identified as to time, date and contents.

Certification of transcription

(3) Any transcription of the record of oral evidence shall be certified as to time, date and accuracy.

COMMENT

This provision parallels one governing warrant applications (section 11). It is designed to ensure the maintenance of records sufficient to allow for subsequent review[246] and thus serves the general aim of accountability.

3. Issuance of Order

Form of order

222. An order shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of order

223. An order shall disclose

(*a*) the applicant's name if the order is made on application;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the justice and any conditions imposed;

(*g*) the date and place of issuance;

246. See also the comment to section 11.

(*h*) the name and jurisdiction of the justice; and

(*i*) any additional information required by this Part for the order.

COMMENT

Paragraphs (*a*) to (*h*) of this provision enumerate the mandatory elements common to all orders. Paragraph (*i*) refers to the fact that other unique ingredients of particular orders are required by specific provisions in this Part.

4. Filing

Filing application, evidence, order

224. (1) The justice shall, as soon as practicable after the hearing, have the following filed with the clerk of the court for the judicial district in which the post-seizure report was filed:

(*a*) the notice of the application;

(*b*) the application;

(*c*) the record of any oral evidence heard by the justice or its transcription;

(*d*) any other evidence received by the justice; and

(*e*) if an order is issued, the original of the order.

Return of material

(2) If the post-seizure report and any accompanying material were transferred for a hearing from the judicial district in which they were filed, the justice shall have them returned after the hearing.

COMMENT

This provision has the same object as the filing requirements for warrant applications:[247] to ensure the maintenance and availability of the material upon which an application is based, so that those affected can later ascertain whether the order was properly issued.

Although under section 214 an applicant is given a number of alternative places in which to bring an application, subsection (1) of this section requires the justice to ensure that, after the hearing, all application material is filed in the judicial district in which the post-seizure report was filed.[248] Ordinarily this location is likely to be the most convenient and accessible to those directly affected by the seizure. Further, under subsection 224(2), any post-seizure report and accompanying material transferred to the court where the application was heard pursuant to section 217 must be returned to the

247. See s. 13.

248. The place for filing the post-seizure report (the judicial district where the seizure has been made) is specified in s. 213. See also the comment to s. 213.

judicial district in which they were filed in the first place. Thus, all documentation may ultimately be found in one location.

5. Changing Place of Application

Order changing place of application

225. (1) Where an application is filed and notice given, the justice before whom the application is to be brought may, on separate application, order that the application be transferred to and heard, or that a new application be made, in another judicial district if the justice is satisfied that it would be in the best interests of justice, having regard to the interest of the witnesses and the parties.

Different judicial districts

(2) The justice may order that the application be transferred to or that a new application be made in the judicial district in which the post-seizure report was filed, the thing is in custody or the charge in relation to which the thing is being held was laid.

COMMENT

This provision gives the justice the power, on application, to ensure that applications for orders are heard and determined in the place that is most convenient to all of the parties. This power is provided because of the flexibility given to the applicant, under section 214, in deciding where to apply initially.

Application for changing place of application

226. An application for change of place may be made by any person who received notice of the application for which a change of place is requested.

Notice

227. The application shall be made on three clear days' notice to

(*a*) the person who made the application for which a change of place is requested; and

(*b*) anyone else who received notice of that application.

Additional contents of application

228. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the reasons for believing that a change of place for the application would be in the best interests of justice, having regard to the interest of the witnesses and the parties.

Transferring file

229. A justice who orders that an application be transferred to or made in another judicial district shall have the file transferred to the clerk of the court for that judicial district.

DIVISION II
PRESERVATION AND SAFEGUARDING

Custodian

230. A peace officer who seizes anything and does not return it shall act as its custodian by taking steps to ensure its preservation and safeguarding.

Report 27, rec. 3(1), (3)
Criminal Code, s. 489.1(1), (6)

COMMENT

We originally recommended[249] that in all cases the seizing authorities should be required to apply for a "custody order," to regulate the storage and supervision of seized articles. This application for an order was to be initiated automatically when an endorsed warrant or post-seizure report was taken before a justice. The procedure would have required the attendance of at least one officer familiar with the seizure.[250]

Upon reflection, we now believe that the goals of the custody order can more efficiently be realized by a simpler procedure not automatically requiring the initiation of a formal hearing and time-consuming attendances at judicial proceedings. Thus, section 230, as drafted, codifies procedures now employed by many police officers and forces as a matter of good practice. The provision requires the peace officer who effects a seizure to act, at least initially, as custodian of the seized thing. This more simply imposes the responsibility and informs persons affected where the responsibility lies.

Under paragraph 490(1)(*a*) of the present *Code*, the burden is initially placed on the "prosecutor" to satisfy the justice "that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding." On being so satisfied, the justice may order the detention and preservation of the seized thing that may initially extend to a maximum of three months from the date of the seizure.[251]

In this scheme, the process is simplified. The early involvement of the prosecutor is not required and the seized thing may automatically be detained and preserved under section 230. Changes to the basic requirements of section 230 must be authorized under powers conferred in this Part. In fact, the remainder of this Part basically outlines the circumstances in which such changes may be made.[252]

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249. Report 27, rec. 3.

250. *Ibid.* at 15-16.

251. *Criminal Code*, s. 490(1)(*b*), (2).

252. Section 270 continues the present *Code*'s basic three-month limitation on the initial detention period. Sections 273 and 274 specify the manner of applying for, and the grounds justifying, an extension.

Entrusting seized thing to another

231. The custodian may entrust a seized thing to any person, including a person from whom it was seized, on such reasonable conditions as are consistent with its preservation and safeguarding.

COMMENT

This section relates to the custodian's ability to take control (rather than physical possession) of something seized. It builds on section 20, which provides that the power to seize means the power to take possession or control of a thing and the power to take control over funds in a financial account. In many cases, "taking control" will necessarily require that the seized thing be left in the physical possession of someone other than the custodian. This section makes it clear that the custodian may entrust anything seized to another person (even the person from whom it is seized), if the thing can be effectively preserved and safeguarded and provided it remains under the overall supervision of the custodian.

Further, this section provides flexibility in the means of preserving and safeguarding unusual items such as perishables or large articles that cannot be stored in locations under the direct physical control of the custodian.

Order on application

232. A justice may, on application, make an order for the preservation and safeguarding of a seized thing, including an order substituting or adding custodians.

COMMENT

Section 232 establishes the power of a justice, on application, to order variations in the basic conditions of detention of seized things mentioned in the post-seizure report.[253] This ensures an overall independent judicial supervision of the process.

Applicant

233. An application may be made by a peace officer, the accused, the prosecutor or any person who claims an ownership or a possessory interest in a seized thing.

COMMENT

Section 233 clearly specifies the persons who may apply for an order to change the conditions of custody of seized things. The list of possible applicants (for this as well as some other orders under this Part)[254] includes persons who claim either "an ownership or a possessory interest" in something that has been seized. This provision therefore recognizes the potentially broad range of persons who can have a valid claim to

253. The peace officer who seizes a thing that is not returned is the initial custodian of it. See s. 230 and the accompanying comment.

254. See ss. 248 and 261.

assert in a seized thing. Persons such as bailees, unpaid sellers, chattel mortgagees, lienholders or pawnbrokers could fall within this category.

Notice by applicant

234. The applicant shall give three clear days' notice to any person who, to the knowledge of the applicant, may have an ownership or a possessory interest in the seized thing and to any other person named by the justice hearing the application.

COMMENT

Section 234 is designed to ensure that persons other than the applicant who may have an ownership or possessory interest in the seized thing are notified and given adequate time to prepare to make representations to better protect the thing or their interests, if they so desire.

Additional contents of application

235. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the applicant is a peace officer, the accused, the prosecutor or a person who claims an ownership or a possessory interest in the seized thing; and

(*b*) if the applicant is a person who claims an ownership or a possessory interest in the seized thing, the nature of that interest.

Report 27, rec. 3(2)
Criminal Code, s. 490(1)(*b*), (15), (16)

COMMENT

As noted, subsection 215(1) sets out the required contents of all applications for orders made under this Part and, in paragraph (*i*), provides for the inclusion of "any additional information required by this Part for the application." Section 235 states the additional matters that must be specified in an application for an order under sections 232 to 235.

Order without application

236. (1) A justice who receives a post-seizure report may, without an application being made, make an order for the preservation and safeguarding of a seized thing that is the subject of the report, including an order substituting or adding custodians.

Notice by justice

(2) A justice who is considering making the order without an application being made shall give three clear days' notice of a hearing to determine the issue to the prosecutor and to any person

who, to the justice's knowledge, may have an ownership or a possessory interest in the seized thing.

Report 27, rec. 3

COMMENT

Once a post-seizure report is filed, a justice who reads the report may question whether the steps taken by the police to safeguard and preserve a seized thing are adequate. This section creates a justice's power to commence a hearing, on his or her own initiative, to determine whether or not to make an order to preserve and safeguard a seized thing (for example, by substituting a different custodian) should be made. As a result, there is no application procedure. However, the justice must notify the interested parties of the hearing.

Additional contents of order

237. In addition to disclosing the information required by paragraphs 223(*a*) to (*h*), the order shall disclose the name of any added or substituted custodian.

DIVISION III
TESTING OR EXAMINATION

Release for analysis

238. A peace officer may have a seized thing examined, tested or analyzed, and the custodian shall release it for that purpose.

COMMENT

This provision, included here for clarity, recognizes an accepted practice that is often necessary in order for the evidentiary value of the seized thing to be assessed.

Order for release

239. A justice who, on application, is satisfied that it is necessary to do so to enable the accused to make full answer and defence may order that a seized thing be released for examination, testing or analysis, subject to any conditions that the justice considers necessary to preserve and safeguard it.

Criminal Code, s. 605

COMMENT

Investigators and prosecutors have an unrestricted right to have any seized thing scientifically examined, tested or analyzed from the moment of seizure. However, the right of the accused to have seized things released for the purpose of examination or analysis is limited to that provided by subsection 605(1) of the *Criminal Code*. Under subsection 605(1), either the prosecutor or the accused may apply for the release of

"exhibits" for scientific testing or examination. We believe that the authority given by this section is too narrow and requires simplification.

The *Code*'s restriction on testing to "exhibits,"[255] and its requirement that release applications be made to the higher courts,[256] may result in unnecessary delay and thereby prejudice an accused person's defence. Moreover, in our view, there is no need to burden higher courts with these release applications. Accordingly, section 239 allows an accused person to apply to any justice for an order, and the application may be made any time after a seizure, whether or not the seized thing has been formally entered as an exhibit in proceedings.

Combining the power to release with the power to impose conditions, as this section does, helps ensure the continuity of possession and the integrity of the thing, thereby preserving its evidentiary value.

Notwithstanding this section, there remains a need to allow both the prosecution and the defence to apply for the release of trial exhibits for examination or testing. Additional provisions of this kind will be included in a forthcoming Part of this Code regulating the conduct of the trial.

Application for release

240. The application may be made by an accused on three clear days' notice to the prosecutor.

Criminal Code, s. 605

DIVISION IV
ACCESS TO SEIZED THINGS

Asking for access

241. (1) A person who has an interest in a seized thing may ask the custodian for permission to examine it at the place of custody.

Power of custodian

(2) A custodian who believes

(*a*) that the person has an interest in the seized thing, and

(*b*) that giving permission would not frustrate an ongoing police investigation, pose a risk to anyone's safety, interfere with an ownership or a possessory interest in the seized thing or jeopardize its preservation and safeguarding

may give permission, subject to any conditions that the custodian considers necessary to preserve and safeguard the seized thing.

255. However, see *R.* v. *Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.).

256. See *R.* v. *Walsh* (1981), 59 C.C.C. (2d) 554 (Ont. Prov. Ct.), holding that a justice presiding at a preliminary inquiry may not order the release of exhibits under this section.

COMMENT

A number of provisions in the *Criminal Code* now regulate various aspects of the question of access to seized things. Subsection 490(15) of the *Code* allows a person with "an interest in what is detained [under subsection 490(1), (2) or (3)]" to apply, on three clear days' notice to the Attorney General, to "a judge of a superior court of criminal jurisdiction or a judge as defined in section 552"[257] for an order permitting its examination. In making such an order, the judge, under subsection 490(16), may set terms to safeguard and preserve the thing.

In this Part, sections 241 to 246 regulate general issues involving access.

As noted, under subsection 605(1) of the *Criminal Code*, an application may also be made for the release of an "exhibit" for the purpose of a scientific test or other examination. Applications for the release of seized things for examination, testing or analysis (as opposed to access to them) are regulated by sections 239 and 240 of this Part.

Further, a person claiming a solicitor-client privilege in respect of detained documents may, under subsection 488.1(9) of the current *Code*, be allowed to examine them or make copies. Access in such cases is regulated by sections 301 to 310 of our proposed Code.

We have concluded that access to seized things should be restricted to persons with an interest in the things.[258] (Normally the public has no discernible interest in such things.) We also believe that the present process for obtaining access is overly cumbersome and formal.[259]

Subsection 241(1) replaces the current *Code*'s subsection 490(15) requirement that a summary application be brought to a judge "[w]here anything is detained pursuant to subsections (1) to (3) [of section 490] . . ." with the requirement that a simple request for access be made to the custodian. Sections 243 to 246 provide for an application to a justice in cases where the custodian denies access.[260]

Subsection (2) specifies the criteria to be applied by the custodian in deciding whether to allow access. There have been both narrow and broad interpretations by the courts of the present *Code*'s requirement that the applicant have "an interest in what is detained."[261] The courts have extended the meaning of "interest" beyond strict property confines to include a legal concern in the matters referred to in seized documents.[262] Too narrow an interpretation works so as to frustrate the purpose of this scheme. Paragraph (*a*) of subsection (2) is premised on the assumption that custodians and, if

257. "[S]uperior court of criminal jurisdiction" is defined in section 2 of the *Criminal Code*.

258. Report 27 at 19.

259. *Ibid.* at 20.

260. *Ibid.*, rec. 4, and at 20.

261. See Working Paper 39 at 35-36.

262. Report 27 at 19.

necessary, the justices, will ensure that persons who have a real need for access will be given it.

Paragraph (*b*) of subsection (2) alludes to factors that may justify a refusal of access. A refusal for any of these reasons should be rare once a charge has been laid in relation to anything seized.

Asking for copies

242. (1) A person who has an interest in information contained in a seized thing that is capable of being reproduced may ask the custodian to provide copies of the information.

Power of custodian

(2) A custodian who

(*a*) believes that the person has an interest in the information,

(*b*) believes that providing copies would not frustrate an ongoing police investigation, pose a risk to anyone's safety, interfere with an ownership or a possessory interest in the seized thing or jeopardize its preservation and safeguarding, and

(*c*) is able to provide copies of the information

may provide the copies on payment of a prescribed fee.

COMMENT

This provision establishes a procedure and criteria, similar to those applicable when general access is sought, for obtaining copies of information contained in a seized thing, such as information in a written document or information stored on a computer disk. In the case of a computer disk, access to the thing itself — the disk — may be of little value. Meaningful access may require permitting the information stored on the disk to be printed out and copied.

Subsection (2) also addresses the question of the cost of reproduction. A fixed fee for reproduction is to be established by regulation. However, under subsection 243(2) a justice may, on application, order that the fee be dispensed with if the justice is satisfied that financial hardship or other inequity would result. The goal of these provisions is to ensure that necessary access is available and is not frustrated by administrative, financial or bureaucratic barriers.

Order dealing with access

243. (1) A justice who, on application, is satisfied that a person should be given permission to examine a seized thing, or that a person should be provided with copies, may make an order requiring the custodian to permit the applicant to examine the seized thing or to provide copies of the information, subject to any conditions that the justice considers necessary to preserve and safeguard the seized thing.

Dispensing with fee

(2) A justice who, on application, is satisfied that the fee fixed for copies would result in financial hardship to the applicant or would be inequitable in the circumstances may make an order dispensing with the fee.

Report 27, rec. 4(1)
Criminal Code, s. 490(15), (16)

COMMENT

Section 243 enables anyone who has been refused access or copies, or who is unable or unwilling to pay the fee fixed for such copies, to pursue the matter further by means of a fresh application to a justice.[263]

Application for access, copies, or dispensing with fee

244. An application may be made by any person who has been refused permission to examine a seized thing, who has been denied copies of information contained in a seized thing or who has been allowed copies but for whom payment of the fee would result in financial hardship or would be inequitable.

Report 27, rec. 4(1)
Criminal Code, s. 490(15)

Notice

245. An application shall be made on three clear days' notice to the prosecutor.

Report 27, rec. 4(1)
Criminal Code, s. 490(15)

Additional contents of application

246. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the nature of the applicant's interest in the seized thing.

DIVISION V
RELEASE OR SALE OF PERISHABLE THINGS

Order on application

247. A justice who is satisfied that a seized thing is perishable or likely to depreciate rapidly in value may, on application, order that it be

(*a*) released, with or without conditions, to its lawful possessor if there is no dispute as to the right to possession; or

263. Our original recommendation was that an application following a denial of access should be made to the "court of appeal." However, such a review of an essentially administrative decision would impose an unnecessary burden on the court of appeal at a preliminary stage of the proceedings. The approach adopted here is more in keeping with our stated desire to make these proceedings less cumbersome and formal. See Report 27, rec. 4(2).

(*b*) sold on such conditions as the justice directs if there is a dispute as to the right to possession.

COMMENT

The *Criminal Code* does not now clearly specify procedures to govern the handling and disposition (including the sale) of seized perishable things. Instead, an application for the return of anything seized may be made before the expiry of a period of detention if a judge or justice is satisfied that its continued detention would result in "hardship."[264]

Sections 247 to 250 specifically permit a justice, on application, to make an order for the release or sale of perishable things or things likely to depreciate rapidly in value. They are designed to minimize the hardship, particularly to crime victims, caused by unnecessary detention of such things. These sections and sections 266 to 269 (which allow photographs or other representations of seized things to be admitted in evidence) protect the interests of persons entitled to possession while causing little, if any, interference with the state interest in having access to evidence in criminal proceedings.

Applicant

248. An application may be made by a peace officer, the accused, the prosecutor or any person who claims an ownership or a possessory interest in anything seized.

COMMENT

Section 248 says who may apply for an order for the release or sale of things that are "perishable or likely to depreciate rapidly in value." Since an application will ordinarily be made in urgent circumstances, the section is drafted broadly to enable it to be made by a wide range of interested persons having knowledge that deterioration or devaluation may be imminent.

Notice by applicant

249. An applicant shall give one clear day's notice to any person who, to the knowledge of the applicant, may have an ownership or a possessory interest in the seized thing and to any other person named by the justice hearing the application.

COMMENT

Section 249 states who must receive notice of the application. Persons known to have an ownership or a possessory interest in any seized perishable or rapidly depreciating thing are entitled to receive notice of any application for its return. Because of the urgent circumstances, minimal notice is required.

264. *Criminal Code*, s. 490(7), (8).

Additional contents of application

250. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the applicant is a peace officer, the accused, the prosecutor or a person who claims an ownership or a possessory interest in the seized thing; and

(*b*) if the applicant is a person who claims an ownership or a possessory interest in the seized thing, the nature of that interest.

Report 27, rec. 3(3), (4)
Criminal Code, s. 490(1)(*b*), (7), (8), (9), (10), (11)

Order without application

251. (1) A justice who receives a post-seizure report and who is satisfied that a seized thing is perishable or likely to depreciate rapidly in value may, without an application being made, order that it be

(*a*) released, with or without conditions, to its lawful possessor if there is no dispute as to the right to possession; or

(*b*) sold on such conditions as the justice directs if there is a dispute as to the right to possession.

Notice by justice

(2) A justice who is considering making the order without an application being made shall give one clear day's notice of a hearing to determine the issue to the prosecutor and to any person who, to the justice's knowledge, may have an ownership or a possessory interest in the seized thing.

Report 27, rec. 3(3), (4)
Criminal Code, s. 490(1)(*b*), (8), (9), (11)

COMMENT

This section gives a justice who receives a post-seizure report the power, exercisable on his or her own initiative, to commence a hearing to determine whether or not a seized thing that appears to be perishable or rapidly depreciating in value should be returned or otherwise sold. Thus, there is no application procedure. However, appropriate notice should be given to interested parties so that they may attend the hearing.

Proceeds of sale

252. Where a seized thing has been sold, the custodian shall deposit the proceeds of the sale in an interest-bearing account on such conditions as the justice directs.

COMMENT

Section 252 specifies how the custodian is to deal with the proceeds of a sale ordered under paragraphs 247(*b*) or 251(1)(*b*). It protects the interests of the person eventually found to be entitled to possession of a perishable thing or a thing "likely to depreciate rapidly in value." The assumption here is that the justice, by means of the

order made, will cautiously endeavour to maximize the revenue generated from the proceeds of the sale.

DIVISION VI
REMOVING DANGEROUS THINGS

Duty of peace officer

253. A peace officer who believes that a seized thing poses a serious danger to public health or safety shall, as soon as practicable, remove it or have it removed to a place of safety.

Report 27, rec. 3(6)
Criminal Code, s. 492

COMMENT

Divisions VI and VII of this Chapter establish special powers concerning the handling of "dangerous" seized things, such as weapons or explosives.

If a seized thing is believed by a peace officer to pose a serious danger to public health or safety, section 253 requires it to be removed to a place of safety.[265] The belief may prove wrong or even be unreasonable, but out of caution and in the interest of public health and safety the section imposes a duty to act to eliminate the apprehended danger.

The mere movement of a seized thing to a place of safety without prior judicial screening need not irreparably interfere with the interests of anyone lawfully entitled to possession. Judicial screening will occur under section 254 if an application is made to have the thing destroyed or disposed of and wrongful or negligent action can be identified at that point. With these safeguards, there is no need for a requirement of prior screening.

Order dealing with dangerous things

254. A justice who, on application, is satisfied that a seized thing poses a serious danger to public health or safety, may order that it be destroyed or otherwise disposed of, subject to any conditions that the justice considers necessary to eliminate or alleviate the danger.

Report 27, rec. 3(6)
Criminal Code, ss. 491, 492

Applicant and notice

255. An application may be made by a peace officer on reasonable notice to any person who the peace officer believes

265. The grounds for acting under this section should be contrasted with the more onerous conditions for the exercise of the exceptional power to destroy or otherwise dispose of anything believed on reasonable grounds to pose an imminent and serious danger to pubic health or safety. See s. 257.

may have an interest in the seized thing and to any person named by the justice hearing the application.

COMMENT

This section is designed to ensure that affected persons have the opportunity to make representations before drastic steps are taken under section 254.

Preparing report

256. (1) A report confirming that the order was carried out and explaining how the seized thing was destroyed or otherwise disposed of shall be prepared and given as soon as practicable to a justice in the judicial district in which the order was issued.

Filing report

(2) The justice shall have the report filed with the clerk of the court for the judicial district in which the post-seizure report was filed.

DIVISION VII
DESTROYING THINGS POSING IMMINENT AND SERIOUS DANGER

Power of peace officer

257. A peace officer who believes on reasonable grounds that a seized thing poses an imminent and serious danger to public health or safety may destroy or otherwise dispose of it.

Report 27, rec. 3(6)

COMMENT

Section 257 gives a peace officer an exceptional power to destroy seized things in certain circumstances. Sections 258 and 259 couple this power with stringent after-the-fact reporting requirements.

When questions of "imminent and serious danger . . ." are involved, we believe that the safety of the public should outweigh property interests. The need to protect the public obviously demands that an officer take immediate action. The delay otherwise necessary to obtain prior judicial approval or review is an unwarranted luxury in these circumstances.

Destruction of a seized thing under section 257 necessarily affects those with a legal interest in it. Where the officer acts wrongfully or negligently, he or she may be exposed to civil liability. The threshold requirement — the officer "believes on reasonable grounds that a seized thing poses an imminent and serious danger to public health or safety . . ." — is therefore justified, not only to prevent unnecessary destruction of property, but to protect the officer.

Notice and report

258. After the thing is destroyed or otherwise disposed of, the peace officer shall

(*a*) notify the person from whom the thing was seized and any other person who the peace officer believes has an ownership or a possessory interest in it; and

(*b*) prepare a report describing the seized thing and explaining why and how it was disposed of.

Return of report

259. (1) The report shall be given, as soon as practicable, to a justice in the judicial district in which the post-seizure report was filed.

Filing

(2) The report shall be filed with the post-seizure report.

DIVISION VIII
RESTORATION ORDERS

Restoration

260. A justice shall, on application, order that a seized thing or the proceeds of its sale be restored to the applicant if the justice is satisfied that

(*a*) there is no dispute as to the right to possession of the thing or the proceeds;

(*b*) possession by the applicant would be lawful;

(*c*) the thing or the proceeds are not subject by statute to forfeiture; and

(*d*) it is not necessary for the thing or the proceeds to be kept in custody for investigation or use in any proceeding.

Report 27, recs. 9, 12
Criminal Code, ss. 490(5), (9), (11); 491(2), (3)

COMMENT

This scheme for the restoration of seized things or of the proceeds of sale of seized things is designed to accommodate sometimes conflicting interests in one simplified proceeding that may be easily invoked at any time after a seizure. In this one proceeding, all claims of entitlement to anything seized or the proceeds of sale will be considered, restoration will be expeditiously ordered where warranted and the public interest and individual interests will be accommodated wherever possible.

In restoration proceedings three basic interests must be balanced. First, the public interest in the effective administration of justice requires that the authorities have adequate powers to detain and preserve seized things as long as reasonably necessary for the purpose of criminal investigation, for use as evidence, or for possible forfeiture where the power to order forfeiture of the seized things is provided by statute. (The

latter applies as well to proceeds of sale.) This interest must initially take precedence over the interest of individuals in having their property restored.[266]

Second, individuals who have had their property seized from them have an obvious interest in not being deprived of the use and enjoyment of their property. This interest often conflicts with the first.

Third, victims of crime (whose property may have been seized from an alleged offender) have an interest in securing the earliest possible return of their property. This interest must also be juxtaposed against the need to ensure that the offender is effectively prosecuted.

Subsection 490(9) of the *Criminal Code* now provides that an order of restoration to the person from whom property has been seized may be made if the judge or justice is satisfied of two things: first, "that the periods of detention provided for or ordered under subsections (1) to (3) . . . have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4) . . ."; and secondly, that "possession of it by the person from whom it was seized is lawful . . . ." Subsection 490(9) also provides that "if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known," the judge or justice may "order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession . . . ." Moreover, "if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known . . .," the judge or justice may "order it to be forfeited to Her Majesty . . . ."

If the applicant is someone other than the person from whom the property has been seized and essentially the same conditions are met, an order for restoration to this applicant may be made under subsection 490(11). If the seized thing, by virtue of subsection 490(9), has already been "forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant . . .," an order may be made under paragraph 490(11)(*d*) that "the applicant be paid the proceeds of sale or the value of the thing seized." Other statutes have similar procedures, with some differences in detail.[267]

Section 260 consolidates and simplifies the basic law.

Even if detention is required initially, restoration may subsequently be ordered if the procedures set out in Division IX of this Chapter are followed. That Division allows photographs or other representations of a seized thing to be admitted in evidence,

266. Where contraband is involved, even if the thing is no longer needed for investigation or evidence, a public interest in forfeiture of the thing to the state may take precedence over a claim for restoration.

267. Under the *Narcotic Control Act*, s. 15(2), and the *Food and Drugs Act*, ss. 43(2), 51(1), for example, restoration of certain things "forthwith . . ." may be ordered if the court "is satisfied that the applicant is entitled to possession . . . and that the thing seized is not or will not be required as evidence . . . ." See *Fleming* v. *The Queen*, [1986] 1 S.C.R. 415. The *Narcotic Control Act*, s. 16(2), also uniquely provides for the punitive forfeiture of "any conveyance seized under section 11 that has been proved to have been used in any manner in connection with [certain offences under the Act]."

instead of the thing itself, for the purpose of identifying the thing. This alternative approach has only very recently been fully recognized in the *Criminal Code*.[268]

The present law allows applications for restoration under the *Criminal Code* to be made to various judicial officers depending on the circumstances. In some cases, the application may be considered by a judicial officer having no necessary connection with the seized thing or its location at the time of the application. The *Narcotic Control Act*, subsection 15(1), and the *Food and Drugs Act*, subsection 43(1), provide that applications must be made "to a [provincial court judge] within whose territorial jurisdiction the seizure was made . . . ." This requirement applies even if the seized things have long been within the jurisdiction of another court, for example, as a result of an accused's election.

Section 260 clearly and simply provides that all restoration applications may be made to a justice. In section 2, "justice" is defined to mean a justice of the peace or a judge. Under our proposed Unified Criminal Court structure, things seized in criminal investigations will remain within the jurisdiction of one court throughout and thus the administrative difficulties that may now be caused by allowing courts having no real connection with the seized things to order restoration is avoided. Flexibility in choosing the place of application is provided by section 214.[269] The provisions of Division I of Chapter III ensure that all applications under this Part will proceed in the location most convenient for the parties involved.

Applicant

261. An application may be made by any person claiming an ownership or a possessory interest in the seized thing or in the proceeds of its sale.

Report 27, rec. 7
Criminal Code, s. 490(7), (10)

COMMENT

The *Criminal Code*, in subsections 490(7) and (10), now cumbersomely provides for separate applications by persons from whom anything is seized and by others who claim to be lawfully entitled to possession. Yet, in each application, the factors and interests to be considered are basically the same. The *Narcotic Control Act* and the *Food and Drugs Act* establish different, even more complex, procedures for restoration, although here again the basic purpose of the proceedings and interests to be considered are similar.

Section 261 is designed to simplify the law.

268. *An Act to amend the Criminal Code (victims of crime)*, S.C. 1988, c. 30, s. 2; now *Criminal Code* s. 491.2.

269. The application may be brought in the judicial district in which the post-seizure report was filed, the thing is in custody or the charge in relation to which the thing is being held was laid.

Notice

262. The applicant shall give eight clear days' notice to the prosecutor, the accused, any person who, to the applicant's knowledge, may have an ownership or a possessory interest in the seized thing and any other person named by the justice.

Report 27, rec. 8
Criminal Code, s. 490(7), (10)

COMMENT

The present requirements as to the timing and notice of restoration applications under section 490 of the *Criminal Code* are unnecessarily complex and confusing. "Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) . . . the prosecutor determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4) . . .," he or she must bring an application under subsection 490(5). "Where the periods of detention provided for or ordered under subsections (1) to (3) . . . have expired and proceedings have not been instituted in which the thing detained may be required . . .," an application must be made by the prosecutor under subsection 490(6). Neither of these provisions stipulates a period for giving notice to interested parties. A person from whom anything is seized may bring an application "on three clear days notice to the Attorney General . . ." *after* the expiration of the detention period (s. 490(7)) but may apply earlier in circumstances where prolonged detention will result in hardship (s. 490(8)). An application by a person other than one from whom the thing has been seized may be brought "summarily" pursuant to subsection 490(10) "at any time, on three clear days notice to the Attorney General and the person from whom the thing was seized . . . ." Other statutes contain different requirements.[270]

The scheme proposed here is simpler. Under section 262 of our proposed Code, all restoration applications may be brought at any time on eight clear days' notice to the parties specified. Section 5 in Part One (*General*) allows the notice period to be shortened on consent of the person to be notified or by order of a justice. An eight-day notice period is provided for here because the scheme contemplates notification of all known persons with the type of interest specified; the presence of such persons may lead in turn to a fuller and more complicated hearing than is ordinarily the case.

Additional contents of application

263. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the nature of the applicant's interest in the seized thing.

Condition

264. A justice may, as a condition to making a restoration order, require the applicant to return the seized thing when required by the court, and may impose any other conditions that

270. Under s. 15(1) of the *Narcotic Control Act* and s. 43(1) of the *Food and Drugs Act*, application may be made by "any person . . . within two months after the date of seizure, on prior notification being given to the Crown in the manner prescribed by the regulations . . . ."

the justice considers necessary to preserve and safeguard it for investigation or use in any proceeding.

Report 27, rec. 10(3)

COMMENT

Subsection 490(16) of the *Criminal Code* now allows a judge to impose conditions to safeguard and preserve a seized thing in an order allowing access to it. However, no authority is given to impose conditions in a restoration order. Section 264 rectifies this situation by creating a new power to order restoration, subject to conditions imposed to preserve or safeguard the seized thing. Its purpose is to strike a better balance between the prosecutorial interests of the state and the individual's interest in using and enjoying his or her property.

Effect of restoration order

265. A restoration order does not affect an ownership or a possessory interest in a seized thing or in the proceeds of its sale.

Report 27, rec. 13

COMMENT

Section 265 is new. It makes clear that the purpose of the restoration order is merely to return the seized thing (or the proceeds from its sale) to the custody of someone with an uncontested right to possession. It does not purport to decide authoritatively ownership or possessory rights. If there is a dispute as to the right to possession at the hearing to determine restoration, the custodian retains possession until proper disposition of the thing or the proceeds from its sale can be determined under sections 278 to 282. The scheme reflects our belief that disputes as to lawful possession are more appropriately resolved in civil rather than criminal proceedings.

DIVISION IX
REPRODUCTION OF SEIZED THINGS

Photograph of seized thing

266. (1) A peace officer may have a photograph taken of a seized thing.

Admissibility of photograph

(2) The photograph, when accompanied by a certificate described in subsection 268(1), is admissible in evidence for the purpose of identifying the seized thing and has, in the absence of evidence to the contrary, the same probative force for the purpose of identification as the seized thing.

Report 27, rec. 11
Criminal Code, s. 491.2(1), (2)

COMMENT

This Division has three basic purposes: (1) to facilitate the prompt return of anything seized if the prosecution can preserve its evidentiary value by means other than detention; (2) to reduce the administrative and supervisory obligations of police and courts to store large quantities of seized items; and (3) to encourage the use and acceptance of alternative forms of evidence in the criminal justice system.

The current *Criminal Code*, in subsections 490(13) and (14), allows for the making, retention and admissibility of copies of documents "returned or ordered to be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11) . . . ." A recent amendment, section 491.2,[271] has now adopted an approach recommended by this Commission and has extended the previous law to allow for the taking, retention and admissibility of photographs of "any property . . . that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceeding in respect of [certain offences] . . ." and that "is returned or ordered to be returned, forfeited or otherwise dealt with under section 489.1 or 490 . . . ." Our formulation retains the basic purpose of the recent amendment, with important refinements.

As drafted, subsection 491.2(2) directs that the photograph is, for all purposes, to be accorded "the same probative force as the property would have had if it had been proved in the ordinary way." This broad provision is capable of meaningful application in the case of photographs of information contained in documents, where the photograph of the document clearly reproduces the information, or in cases where, for identification purposes, a photograph captures the visual characteristics of a thing in sufficient detail to enable it to be properly identified from the photograph. However, the provision defies meaningful application in cases where the probative value of a thing can only derive from physically examining or handling the thing itself. For example, the weight of an alleged burglar tool may have significant probative value if the accused denies having had the strength to carry or wield it. A photograph would have no probative value on the issue of whether the tool was too heavy for the accused to carry.

We have stated the admissibility and probative effect of a certified photograph more narrowly and precisely than the present law. Under our rule, it may only be admitted in evidence for the purpose of identifying the seized thing, and may only have probative value for this purpose. The actual probative force that is to be given to the photograph may be undermined under this rule where other evidence is adduced to the contrary.

Copying information

267. (1) A peace officer may have a copy made of any information that is contained in a seized thing.

Admissibility of copy

(2) The copy of the information, when accompanied by a certificate described in subsection 268(1), is admissible in

271. Previously noted in the comment to s. 260.

evidence and has, in the absence of evidence to the contrary, the same probative force as the information.

Report 27, rec. 11
Criminal Code, ss. 490(13), 14; 491.2(1), (2)

COMMENT

This section complements section 266. While section 266 allows a peace officer to have a photograph made of a seized thing (for example, of a stolen television set), this section allows a peace officer to have a copy made of information contained in a seized thing (for example, by copying information contained in a computer onto a diskette).

Certificate

268. (1) A certificate of a person stating that

(*a*) the person made a copy or took a photograph under the authority of this Division,

(*b*) the person is a peace officer or made the copy or took the photograph under the direction of a peace officer, and

(*c*) the copy or photograph is a true copy or photograph

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature of the person appearing to have signed the certificate.

Affidavit of peace officer

(2) An affidavit of a peace officer stating that

(*a*) the peace officer has seized a thing and has had custody of it from the time of seizure until a copy was made of the information contained in it or a photograph was taken of it, and

(*b*) the thing or the information was not altered in any way before the copy was made or the photograph was taken

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the affidavit without proof of the signature or official character of the person appearing to have signed it.

Power to require person to appear

(3) The court may require the person appearing to have signed a certificate or an affidavit to attend before it for examination or cross-examination about the statements contained in the certificate or the affidavit.

Report 27, rec. 11
Criminal Code, s. 491.2(3), (4), (6)

COMMENT

This provision, with minor wording and structural changes, retains the basic features of present *Code* subsections 491.2(3) to (6).

Notice of intention to produce photograph or copy

269. Unless the court orders otherwise, no copy, photograph, certificate or affidavit shall be received in evidence unless the prosecutor has, before the proceeding, given a copy of it, and reasonable notice of intention to produce it, to the accused.

Criminal Code, s. 491.2(5)

DIVISION X
TERMINATION OF CUSTODY AND DISPOSITION

1. Period of Authorized Custody

Period of custody

270. A seized thing or the proceeds of its sale may be held in custody for ninety days after seizure.

COMMENT

Subsection 490(2) of the *Criminal Code*, dealing with things detained under paragraph 490(1)(*b*), now provides for a maximum initial detention period of three months from the date of the seizure. A justice may order a further period of detention if proceedings in which the thing is needed are instituted before the initial period ends, or if the justice, on application made before the period expires, is satisfied that a further period of detention is justified, "having regard to the nature of the investigation . . . ."

Subsection 490(3) of the *Code* provides that there may be successive extension orders under paragraph 490(2)(*a*). However, the cumulative detention period of such orders may not exceed one year from the date of seizure unless, within that year, "a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 . . ." orders additional detention, having, on application, been "satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period" (s. 490(3)(*a*)); or "proceedings are instituted in which the thing detained may be required" (s. 490(3)(*b*)).

If, before a detention period expires, the prosecutor decides that further detention is not necessary, subsection 490(5) now requires the initiation of restoration proceedings.

Sections 270 and 271 do not change the basic grounds justifying detention or extension orders but state the law more simply. In our view, after a seizure has been made, three months (with the possibility of extension in appropriate circumstances) is, in most cases, an adequate and reasonable period within which a decision to initiate criminal proceedings can be made. Three months (specified more precisely here as

ninety days) is not an unreasonable burden for a citizen to bear in order to assist in the administration of justice.

Extension of period of custody

271. The seized thing or the proceeds may be held for a longer period if

(*a*) within ninety days after seizure

(i) proceedings have begun in which the seized thing may be required as evidence or in which the thing or the proceeds are subject by statute to forfeiture, or

(ii) an application for extension of the period of custody has been made; or

(*b*) before an extended period of custody ends, proceedings have begun or another application for extension has been made.

COMMENT

Accountability and control are enhanced when the authorities are regularly required to justify extensions. If an extension is truly necessary, it should be granted. However, the *Code*'s provision for a present one-year maximum cumulative period of detention which may nevertheless be extended (see subsection 490(3)) is a curious formulation and has been deleted. Paragraph 271(*b*) otherwise continues the present law, stating explicitly that any extension must be granted *before* the authorized detention period expires.

Custody after end of proceedings

272. The seized thing or the proceeds may be held in custody for a period no longer than thirty days after the end of all proceedings in respect of which the thing or the proceeds were detained.

Report 27, rec. 5(1), (2), (3)
Criminal Code, s. 490(2), (3), (12)

COMMENT

To allow for meaningful appeals, section 272 states that the seized thing or the proceeds of its sale may be detained for a period of thirty days after the end of all criminal proceedings in which it is needed for evidence or investigation.

2. Application for Extension of Custody

Application by prosecutor

273. (1) A justice who, on application by the prosecutor, is satisfied that a seized thing or the proceeds of its sale are required to be kept in custody because of the complex nature of the investigation may order that the period of custody be extended for further periods not exceeding ninety days each.

Application by other person

(2) A justice who, on application by a person with an interest in a seized thing, is satisfied that the seized thing is required to be kept in custody to preserve it as evidence may order that the period of custody be extended for further periods not exceeding ninety days each.

Report 27, rec. 5(2)
Criminal Code, s. 490 (2)(*a*), (3)(*a*)

COMMENT

This section specifies who may apply to extend a custody period and sets out the grounds for an extension. (These grounds vary, depending on who the applicant is.) While the applicant will ordinarily be a prosecutor seeking an extension because the investigation is complex and thus time-consuming (see subsection 273(1)), subsection 273(2) contemplates the possibility of an application by other persons interested in the evidentiary value of the thing seized. An applicant under subsection 273(2) could, for example, include an accused or co-accused who seeks an extension to ensure that evidence is retained for use in the same or separate proceedings.

Notice

274. The applicant shall give three clear days' notice to any person who, to the applicant's knowledge, may have an ownership or a possessory interest in the seized thing or the proceeds of its sale, to the prosecutor and to any other person named by the justice.

Report 27, rec. 5(2)
Criminal Code, s. 490(2), (3)

COMMENT

This section continues the present general requirement that extension applications be brought on notice to affected parties. Paragraphs 490(2)(*a*) and (3)(*a*) of the present *Code* require notice only to "the person from whom the thing detained was seized . . . ," who may have no real or continuing interest in the thing after its seizure. The persons specified in section 274 as requiring notice have been selected in an endeavour to restrain unnecessary extensions. These are the persons most likely to have an interest in the speedy disposition of the seized thing and it is assumed that they will vigorously defend their position in applications seeking to prolong the period during which the seized thing may be detained.

3. Return of Seized Things

Power of prosecutor to return seized things

275. The prosecutor may have a seized thing or the proceeds of its sale returned to the person who is believed to be lawfully entitled to possession if

(*a*) the period of authorized custody has expired or the seized thing or the proceeds are no longer needed;

(*b*) to the knowledge of the prosecutor, there is no dispute as to the right to possession; and

(*c*) the seized thing or the proceeds are not subject by statute to forfeiture.

COMMENT

If a detention period expires, or if the prosecutor determines before the period expires that the continued detention of something seized is no longer required, the present law requires the prosecutor to initiate what is, in effect, a restoration application.[272] Sections 275 to 277 establish a simple and efficient procedure, allowing the prosecutor, without the need for a hearing, to have the thing or its proceeds returned to the person believed to be lawfully entitled to possession, provided there is no dispute as to the right to possession known to the prosecutor and the seized thing or the proceeds of its sale are not by statute subject to forfeiture.

Notice

276. A prosecutor who intends to have a seized thing or the proceeds of its sale returned shall notify the custodian in writing and shall file a copy of the notice with the clerk of the court for the judicial district in which the post-seizure report is filed.

Returning seized thing

277. The custodian shall return the seized thing or the proceeds of its sale as soon as practicable after receiving the notice.

Report 27, recs. 5(1), (3); 6(2)
Criminal Code, s. 490(5), (6)

4. Disposition Order

Duty of prosecutor

278. If the prosecutor does not have a seized thing or the proceeds of its sale returned when the period of authorized custody has expired or the seized thing or the proceeds are no longer needed, the prosecutor shall apply as soon as practicable for an order to dispose of the seized thing or the proceeds.

COMMENT

Sections 278 to 282 set out the procedure to be followed when the prosecutor does not act under section 275. In this case, the prosecutor must initiate an application to a justice for an order to dispose of the seized thing or the proceeds of its sale, on notice to all interested parties as specified in section 279.

272. See *Criminal Code*, s. 490(5), (6).

Notice

279. The prosecutor shall give eight clear days' notice to the custodian, the accused, any person who, to the prosecutor's knowledge, may have an ownership or a possessory interest in the seized thing or the proceeds and to any other person named by the justice.

Additional contents of application

280. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the period of authorized custody has expired or the seized thing or the proceeds are no longer needed;

(*b*) if the period of authorized custody has expired, the date on which it expired; and

(*c*) whether the thing or the proceeds are subject by statute to forfeiture.

Power of justice

281. The justice shall order that the thing or the proceeds be

(*a*) returned to the lawful possessor if there is no dispute as to the right to possession;

(*b*) returned to the person from whom it was seized if possession by that person is lawful and if there is a dispute as to the right to possession but no civil proceedings in respect of any possessory interest in the thing or the proceeds have been commenced;

(*c*) transferred to the custody of any court in which there are pending civil proceedings in respect of any possessory interest in the thing or the proceeds; or

(*d*) forfeited to Her Majesty, to be disposed of as the Attorney General directs, if

(i) there is no person known or claiming to be the lawful owner or possessor,

(ii) possession by the person from whom it was seized is unlawful and if there is a dispute as to the right to possession but no civil proceedings in respect of any possessory interest in the thing or the proceeds have been commenced,

(iii) the thing or the proceeds are subject by statute to forfeiture, or

(iv) the lawful owner or possessor cannot be found.

Report 27, recs. 5(1), (3); 6(2)
Criminal Code, ss. 490(5), (6), (9); 491.1

COMMENT

Section 281 sets out the various disposition options available to the justice. Paragraph (*a*) provides the option of restoring the state of affairs existing before the seizure. It allows the return of the thing to the lawful possessor if there is no dispute as to the right to possession. For example, a television set marked with the owner's name may be expeditiously returned to the owner under this provision.

The Criminal Court is not an appropriate forum for the adjudication of property disputes. Paragraphs (*b*) and (*c*) and subparagraph (*d*)(ii) establish the procedure governing the disposition of disputed goods.

If there is a dispute, but no civil proceeding is pending to resolve the dispute, paragraph (*b*) requires that the *status quo ante* be restored and that the justice order the items returned to the person from whom they have been seized provided that possession by that person appears to be lawful. (Goods seized from a person charged with possession of stolen goods could not be returned to that person.) If there is a civil proceeding pending to resolve disputed ownership or possession, paragraph (*c*) requires the justice to order that the thing be transferred to the custody of the appropriate civil court that will be called upon to determine the issue. Finally, under subparagraph (*d*)(ii) a justice may order forfeiture of the seized thing if the person from whom seizure was made has no lawful claim to it, if the right to possession is in dispute as between other parties, and if no civil proceedings have been commenced in order to resolve the dispute. This provision is designed to serve as an incentive to affected parties to assert their rights in relation to seized goods or their proceeds of sale. Naturally, it is expected that the prosecutor would move with caution and restraint when seeking to exercise the power given under this provision.

Other aspects of forfeiture are also addressed in paragraph (*d*). If no one is known to be the lawful owner or possessor, if the lawful owner or possessor cannot be found or if a statute provides for forfeiture, subparagraphs (*d*)(i), (iii) and (iv) authorize the justice to order forfeiture of the thing or its proceeds to the state.

Things of negligible value

282. If the seized thing is of negligible value, the justice may order that it be destroyed or otherwise disposed of.

COMMENT

Section 282 is a new provision designed to simplify administration. It gives a justice the discretionary power to order the destruction or other disposal of seized things of negligible value. This paragraph could apply, for example, to a broken beer bottle which may have been an important piece of evidence, but has no value for its "owner." Since restoration of such things will normally not be sought and forfeiture will technically not be available under paragraph 281(*d*), a special provision for disposal of such things has been provided.

CHAPTER IV
APPEALS

Right to appeal

283. Any person aggrieved by a decision under section 232 (preservation and safeguarding), subsection 236(1) (preservation and safeguarding), 243(1) (access, copies) or (2) (dispensing with fee), section 254 (dangerous things) or 260 (restoration) or paragraph 281(*d*) (forfeiture) respecting anything seized or the proceeds of its sale may appeal the decision to an appeal court within thirty days after the date of the decision.

Report 27, rec. 14(1)
Criminal Code, s. 490(17)

COMMENT

Present *Criminal Code* provisions are unduly restrictive of the right to appeal decisions made in relation to seized things.[273] Section 283 recognizes that many people, not just the person searched, are affected by dispossession resulting from a seizure. Accordingly, any person "aggrieved" is permitted to appeal decisions made under this Part that could defeat the ends of justice (such as a restoration order that may result in a loss of evidence) or that could irremediably compromise one's rights in the seized thing (such as an order of forfeiture that denies a right of ownership or possession.)

Custody after order or pending appeal

284. A seized thing or the proceeds of its sale shall not be disposed of until thirty days after an order is made pursuant to a provision referred to in section 283 or pending an appeal of any such order unless all aggrieved persons waive their right of appeal in writing or unless the thing seized poses an imminent and serious danger to public health or safety.

Report 27, rec. 14(2)
Criminal Code, s. 490(12)

COMMENT

Section 284 has as its goal the effective preservation of appeal rights. It is designed to ensure that seized things or the proceeds of their sale are not disposed of before decisions may be reviewed. Unlike subsection 490(12) of the present *Code*, however, this provision clearly allows for earlier disposal in the circumstances stated.

273. For example, while s. 490(15) allows for an application to be made for access to detained things for the purpose of examination, there is no provision for appeal from a denial of access. See *R.* v. *Stewart*, [1970] 3 C.C.C. 428 (Sask. C.A.).

PART SEVEN

PRIVILEGE IN RELATION TO SEIZED THINGS

DERIVATION OF PART SEVEN

LRC PUBLICATIONS

Search and Seizure, Report 24 (1984)

Disposition of Seized Property, Report 27 (1986)

Toward a Unified Criminal Court, Working Paper 59 (1989)

LEGISLATION

Criminal Code, s. 488.1

INTRODUCTORY COMMENTS

Provisions governing the handling of allegedly privileged things or information that officers are about to examine, photograph, copy or, in the case of things, seize, are to be found in Part Two (*Search and Seizure*), section 53. This Part regulates the manner of dealing with allegedly privileged things or information contained in them after the seized things are sealed or taken control of and placed in custody in accordance with the requirements of section 53.

The provisions of this Part are understandable if considered in the context of the evolution of the present law and our recommended reforms. Related provisions in other Parts of this Code should also be taken into account.

The *Criminal Code* contains special rules for handling seized things in relation to which a privilege is claimed. Former section 444.1 (now section 488.1),[274] enacted in 1985, incorporated into the *Code* procedures (previously confined to the *Income Tax Act*)[275] for dealing with a claim of solicitor-client privilege. The purpose of this reform was to ensure that documents subject to a claim of solicitor-client privilege were not examined or otherwise disclosed in the course of a search. The *Code* provisions provide for their examination only after a judge has decided that the claimed privilege does not apply to the documents.

The *Code*'s special sealing and application procedures permit a lawyer at the time of seizure to assert the privilege on behalf of a named client. If the lawyer asserts the claim at the point of seizure, the peace officer involved must seal the documents in a package without examining them and turn them over to a specified custodian. Affected parties (the Attorney General, the client or the lawyer on behalf of the client) then have fourteen days to apply to a judge for an order setting a date for a hearing before a superior court judge. The hearing, to determine whether the documents are to be treated as privileged, must begin not later than twenty-one days after the date of the order. If it is decided that the documents are privileged, they must be returned, unexamined. If no privilege is found, the documents are turned over to the officer who seized them, subject to such restrictions as the judge may impose.

We took note of the 1985 reform in Reports 24 and 27 and recommended two additional improvements,[276] which are now incorporated in this Part.

First, the present *Code* provisions are silent as to whether a client who is in possession of privileged documents can assert a claim of privilege during a search so as to bring the sealing provisions into play. We believe, consistent with the broad scope of the privilege described by the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski*,[277] that the special sealing procedure should also apply in these cases. The

274. *Criminal Law Amendment Act, 1985*, *supra*, note 227, s. 72.

275. R.S.C. 1952, c. 148; S.C. 1970-71-72, c. 63.

276. Report 24, Part 2, rec. 7 and the comment thereto at 58-61; Report 27, rec. 3(5).

277. *Supra*, note 54.

protection of privileged communications from disclosure should not depend on the location of the search.

Second, we believe that paragraph 488.1(4)(*b*) of the present *Criminal Code*, which permits the Crown to inspect the seized material at the hearing to determine the privilege, should be changed so as to prohibit such inspection. As we stated in Report 24 (at 60):

> Granting counsel for the Crown access to confidential documents for the purpose of the application procedure breaches what has now been explicitly recognized by the Supreme Court of Canada as a person's substantive right to communicate in confidence with his legal adviser.

Our provisions also now regulate more than the area of solicitor-client privilege and encompass all categories of privilege claims.[278] This change is incorporated in the provisions of Part Two (*Search and Seizure*).

While the provisions of this Part continue some aspects of the 1985 reform, other aspects have been simplified or altered. Some notice and other time periods have been changed. The *Code*'s complicated two-stage procedure (in which application must be made for an order setting a date for the hearing and then for another order actually deciding the privilege issue) is replaced by a single, simpler procedure that aligns better with the general procedures applicable with respect to other applications for orders under Part Six (*Disposition of Seized Things*). This Part, in section 293, continues the general approach of the present law by giving a judge the power, on application, to determine questions of privilege in respect of anything seized. However, consistent with the recognition of a distinction (discussed previously) between something seized and information contained in something seized, section 293 also provides that the judge's power includes the power to determine whether privilege exists in respect of information contained in a seized thing.

CHAPTER I
INTERPRETATION

Application of Part

285. This Part applies to anything seized under Part Two (*Search and Seizure*) as an object of seizure where a claim of privilege is made in respect of the seized thing or information contained in it.

278. This follows upon the decision of the Supreme Court of Canada in *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254, which, in turn, accepted Wigmore's test for determining whether a privilege exists. (Wigmore, *Evidence*, Vol. 8 (McNaughton rev., 1961) at 527, para. 2285.) The Supreme Court decision makes possible the emergence of additional kinds of privilege in Canada. See the analysis of priest-penitent privilege in relation to these authorities in *Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at 529-543.

COMMENT

This section sets out the scope of this Part. It applies only to a claim of privilege made in relation to an object of seizure, or information that is contained in it, that is seized pursuant to Part Two (*Search and Seizure*). Other issues of privilege — for example, whether a blood sample taken at the request of an accused to test for drunk driving is privilege — are left to be determined either by other Parts of this Code or by developing case law.

CHAPTER II
DUTIES OF PEACE OFFICER ON SEIZURE

Inventory and post-seizure report

286. Sections 210 (inventory of seized things), 212 (preparation of post-seizure report) and 213 (return of post-seizure report) apply to the seizure of a thing that is the subject of a claim of privilege.

COMMENT

This section sets out that, with one exception, the duties of a peace officer that arise on seizing things as outlined in Chapter II of Part Six (*Disposition of Seized Things*) apply to things seized in respect of which a claim of privilege is made. (The one exception is section 211, which allows a peace officer to return something seized to the person from whom it was seized.) Once a claim of privilege is made in respect of a thing or information contained in it, the thing must be kept in the custody of the police pending determination of the claim (see section 53). This is logical since, once a claim of privilege is made, the police cannot examine the thing to determine if the thing should be returned to the person asserting the claim (again, see section 53).

CHAPTER III
APPLICATION TO DETERMINE ISSUE OF PRIVILEGE

DIVISION I
MAKING AN APPLICATION

Applicant

287. A prosecutor or a person who claims to have a privilege in respect of a seized thing or information contained in it may apply to have the issue of whether a privilege exists determined.

Report 27, rec. 3(5)
Criminal Code, s. 488.1(3)

COMMENT

The provisions of this Chapter establish a simpler one-stage procedure designed to enable the issue of privilege to be determined expeditiously. This section specifies clearly who may apply to have the issue of privilege determined.

Manner of making application

288. The application shall be made in writing within fourteen days after the date of seizure to a judge in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

Criminal Code, s. 488.1(3)

COMMENT

This section sets out where an application to determine the issue of privilege may be brought. It is consistent with our policy as to where contested applications involving custody or disposition of seized things may generally be brought as set out in section 214. It also imposes a time-limit for bringing the application of fourteen days from the date of seizure.

Contents of application

289. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian; and

(*g*) the grounds in support of the application.

Affidavit in support

(2) The application shall be supported by an affidavit.

Notice by applicant

290. (1) Five clear days' notice of the application shall be given to the custodian and

(*a*) to the prosecutor, if the applicant is the person who claims to have a privilege; or

(*b*) to the person who claims to have a privilege, if the applicant is the prosecutor.

Contents and service of notice

(2) The notice shall set out the time, date and place the application is to be heard and shall be served together with the application and the supporting affidavit.

Criminal Code, s. 488.1(3)

COMMENT

This section states how many days' notice must be given, to whom notice must be given and the contents of the notice.

Production of package or information

291. (1) The custodian, on receiving notice of an application, shall produce the sealed package referred to in paragraph 53(2)(*b*) (claim of privilege during search) or the information contained in the seized thing on the date and at the time specified in the notice.

Request for directions

(2) Where it is impracticable to produce the sealed package or the information contained in the seized thing, the custodian shall request a judge in the judicial district in which the seizure was made to give directions as to the steps that should be taken to enable the thing or the information to be examined.

Criminal Code, s. 488.1(3)

COMMENT

This provision is generally designed to enable the judge to examine the material in respect of which privilege is claimed.[279] Subsection (1) deals with the ordinary situation where the allegedly privileged material has been put in a sealed package. Subsection (2) recognizes that the nature of the material may make its production impracticable or inadvisable. (For example, privilege may be claimed in relation to hundreds of documents, which could not possibly be stored in one sealed package.)

Application of certain provisions

292. Sections 217 (transferring file for hearing) and 225 to 229 (changing place of application) apply to an application made under this Division.

279. See s. 294(*c*) of this Part.

COMMENT

This section incorporates the same provisions dealing with changing the place of application as are provided for contested applications in respect of orders in Part Six (*Disposition of Seized Things*).

DIVISION II
HEARING THE APPLICATION

Authority and duty of judge

293. A judge shall, on application, determine whether privilege exists in respect of a seized thing or information contained in it and shall hold a hearing in private for that purpose and determine the issue within thirty days after the date of seizure.

Criminal Code, s. 488.1(3)(*c*), (10)

COMMENT

This section gives a judge of the Criminal Court authority to determine a claim of privilege in relation to a seized thing or information contained in it. It also describes how the application is to be heard. The application, although designed to be contested, must be heard in private. Allowing the public to be present at the hearing to determine privilege could defeat the purpose of the sealing and application procedures. This "in private" provision continues the restriction now found in subsection 488.1(10) of the *Criminal Code*.

Powers at hearing

294. At the hearing the judge may

(*a*) compel the attendance of, and question, the custodian;

(*b*) receive evidence, including evidence by affidavit; and

(*c*) if the judge considers it necessary to do so to determine whether privilege exists, examine the thing or the information or require it to be produced for examination.

Report 27, rec. 3(5)
Criminal Code, s. 488.1(4)(*a*) to (*d*)

COMMENT

This section sets out the judge's power to obtain relevant information at the hearing to determine the issue of privilege. Paragraphs (*a*) and (*b*) reflect the same policy as is provided for in Part Six (*Disposition of Seized Things*) in relation to a justice's power to determine the various applications for orders. However, two major differences exist at this hearing. First, paragraph 294(*c*) restricts a judge's power to examine the allegedly privileged material. This reflects the present law set out in *Code* paragraph

488.1(4)(*a*). Second, as noted, the present *Code*[280] gives the judge power to allow the prosecutor to inspect allegedly privileged documents if the judge is of the opinion that such inspection could assist in deciding whether or not a document is privileged. No such power is included here.[281] Under Chapter IV of this Part, only a person claiming to have a privilege may, on application, have access to allegedly privileged material before the claim is determined.

Application of certain provisions

295. Sections 219 to 221 (evidence at hearing) and 224 (filing) apply to a hearing held under this Division.

COMMENT

This section incorporates various sections (governing the introduction, production and recording of evidence at a hearing, and the filing of documents) that are found in Part Six (*Disposition of Seized Things*).

Decision and reasons

296. The judge shall give reasons for the decision that contain sufficient information to indicate the basis of the decision without disclosing details of the thing or information in respect of which the privilege is claimed.

Criminal Code, s. 488.1(4)(*d*)

Order if privilege found to exist

297. (1) A judge who determines that a privilege exists shall order that

(*a*) the thing be resealed and delivered by the custodian to the person from whom it was seized; or

(*b*) control of the thing be delivered by the custodian to the person from whom it was seized, and until delivery, such steps as the judge directs be taken to ensure that the thing or the information contained in it is not examined or interfered with.

Order if privilege not found

(2) A judge who determines that no privilege exists shall order the custodian to deliver the thing or control of the thing to the peace officer who seized it or to some other person named by the prosecutor, subject to any conditions that the judge considers necessary, and the thing shall be dealt with in accordance with Chapters III and IV of Part Six (*Disposition of Seized Things*).

Report 27, rec. 3(5)
Criminal Code, s. 488.1(4)(*d*).

280. *Criminal Code*, s. 488.1(4)(*b*).

281. See Introductory Comments to this Part.

COMMENT

This provision continues generally the procedure found in the present *Code* (paragraph 488.1(4)(*d*)), but is drafted to allow for the fact that things may be seized under our Code by taking control rather than possession (see section 20). It also clarifies that, if it is determined that no privilege exists in respect of the thing or information contained in it, the thing is to be treated as any other object of seizure.

Form of order

298. (1) The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

(2) The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the judge and any conditions imposed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the judge.

Effect of determination of privilege

299. Where a seized thing or information contained in it is determined to be privileged, it remains privileged and inadmissible in evidence unless the person who has the privilege consents to its admission in evidence or the privilege is otherwise lost.

Criminal Code, s. 488.1(5)

COMMENT

This provision continues the present law[282] but incorporates some minor changes in wording to align with the expansion of the privileges that may be considered and the consideration of privilege claims in relation to items other than documents.

282. *Criminal Code*, s. 488.1(5).

DIVISION III
DISPOSITION IF NO APPLICATION MADE

Delivery to peace officer

300. (1) If the custodian of a seized thing that is the subject of a claim of privilege has not received notice of an application to determine whether a privilege exists within fourteen days after the date of seizure, the custodian shall deliver the thing or control of the thing to the peace officer who seized it.

Disposition of seized thing

(2) The seized thing shall be dealt with in accordance with Chapters III and IV of Part Six (*Disposition of Seized Things*).

Criminal Code, s. 488.1(6)

COMMENT

This section, modelled generally on present *Code* subsection 488.1(6), sets out in a clear manner what happens to the seized thing when no application to determine the issue of privilege has been made within the time-limit imposed by section 288.

CHAPTER IV
EXAMINING INFORMATION CLAIMED TO BE PRIVILEGED

Applicant

301. A person who claims to have a privilege in respect of a seized thing or information contained in it may apply for an order permitting the applicant to examine the thing or the information and to make a copy of it.

Criminal Code, s. 488.1(9)

COMMENT

This section is designed to enable a person who claims to have a privilege to prepare for the hearing to determine the privilege claim, and to minimize the disruption caused by the seizure. The prosecutor cannot apply for access. Thus, the section restricts access to potentially privileged material, so that the purpose of the privilege claim is not defeated.

Manner of making application

302. The application shall be made in writing, unilaterally and in private to a judge in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

Criminal Code, s. 488.1(9)

COMMENT

This section states where the application is to be brought and describes how the application is to be brought. Unlike all other applications dealing with the custody and disposition of seized things, this application must be brought unilaterally and in private in order to preserve the confidentiality of the allegedly privileged information.

Contents of application

303. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian;

(*g*) the nature of the order requested; and

(*h*) the reasons for requesting the order.

Affidavit in support

(2) The application shall be supported by an affidavit.

Transferring file

304. Section 217 (transferring file for hearing) applies to an application made under this Chapter.

Powers of judge

305. (1) In determining the issue, the judge may

(*a*) compel the attendance of, and question, the custodian;

(*b*) question the applicant;

(*c*) receive evidence, including evidence by affidavit; and

(*d*) if the judge considers it necessary, examine the thing or the information or require it to be produced for examination.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Application of certain sections

306. Sections 220 (evidence on oath), 221 (record of oral evidence) and 224 (filing) apply to a hearing held under this Chapter.

Authority of judge

307. A judge may, on application, make an order permitting the applicant, in the presence of the custodian or the

judge, to examine the thing or the information and to make a copy of it, subject to such conditions as the judge considers necessary to preserve and safeguard it, if the judge is satisfied as to the sufficiency of the applicant's reasons for seeking the order.

Criminal Code, s. 488.1(9)

Imposing requirements

308. If the seized thing was in a sealed package, the judge shall, in the order, require that it be resealed without alteration or damage.

Criminal Code, s. 488.1(9)

COMMENT

This section is based on present *Code* subsection 488.1(9). It ensures that allowing the applicant to examine the allegedly privileged material will not affect the integrity of the material.

Form of order

309. The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

310. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the judge and any conditions imposed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the judge.

CHAPTER V
APPEALS

Right to appeal

311. Any person aggrieved by a decision under section 293 (issue of privilege) may appeal the decision to an appeal court within thirty days after the date of the decision.

Report 27, rec. 14(1)

COMMENT

This section creates a right of appeal from a hearing to determine the issue of privilege. It is modelled on section 283. It should be noted that there is no appeal provided from a judge's decision denying the applicant an opportunity to examine the allegedly privileged material, since it would be inconsistent to allow an appeal of this decision within a thirty-day period when, by operation of section 293, the hearing and determination of the issue of privilege must be made within thirty days after the date of seizure.

Custody after decision or pending appeal

312. The seized thing shall remain with the custodian, without being interfered with or examined, for thirty days after a decision on the issue of privilege is made or pending an appeal of that decision, unless all aggrieved persons waive their right to appeal in writing.

Report 27, rec. 14(2)

COMMENT

This section is modelled, with appropriate changes, on section 284 (disposition of seized things).

CODE OF CRIMINAL PROCEDURE

VOLUME ONE

Police Powers

TITLE I

Search and Related Matters

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PRIVILEGE IN RELATION TO SEIZED THINGS

An Act to revise and codify the law of criminal procedure

PART ONE

GENERAL

CHAPTER I
SHORT TITLE

Short title

1. This Act may be cited as the *Code of Criminal Procedure*.

CHAPTER II
INTERPRETATION

Definitions

2. In this Act,

"clerk of the court" (*greffier*)

"clerk of the court" includes a person, by whatever name or title the person may be designated, who from time to time performs the duties of a clerk of the court;

"court of appeal" (*cour d'appel*)

"court of appeal" means

(*a*) in the Provinces of Nova Scotia and Prince Edward Island, the Appeal Division of the Supreme Court, and

(*b*) in any other province, the Court of Appeal;

"crime" (*crime*)

"crime" means an offence that is defined by the proposed Criminal Code (LRC) or any other Act of Parliament and that is punishable by imprisonment otherwise than on default of payment of a fine;

"in private" (*huis clos*)

"in private" means

(*a*) in relation to an application made unilaterally, without any member of the public or any party other than the applicant being present, and

(*b*) in relation to a hearing with respect to which notice must be given, without any member of the public being present;

"judge" (*juge*)

"judge" means a judge of the Criminal Court;

"judicial district" (*district judiciaire*)

"judicial district" means one of the territorial divisions into which a province is divided for the purposes of the Criminal Court or, if there are no such divisions, the province;

"justice" (*juge de paix*)

"justice" means a justice of the peace or a judge;

"medical practitioner" (*médecin*)

"medical practitioner" means a person qualified under provincial law to practise medicine;

"objects of seizure" (*choses saisissables*)

"objects of seizure" means things, including funds in a financial account, that constitute or provide evidence with respect to the commission of a crime, but does not include

(*a*) residues adhering to the surface of a person's body, or

(*b*) a person's tissues, bodily fluids or other bodily substances such as breath, hair or nails, unless they have been removed or have become dissociated from the person's body;

"peace officer" (*agent de la paix*)

"peace officer" includes

(*a*) a sheriff, deputy sheriff and sheriff's officer,

(*b*) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison,

(*c*) a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

(*d*) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or *Excise Act*,

(*e*) a person appointed or designated as a fishery officer under the *Fisheries Act* when performing any duties or functions pursuant to that Act,

(*f*) the pilot in command of an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as the owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(*g*) officers and non-commissioned members of the Canadian Forces who are

(i) appointed for the purposes of section 156 of the *National Defence Act*, or

(ii) employed on duties that the Governor in Council, by regulations made under the *National Defence Act*, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;

"photograph" (*photographie*)

"photograph" means a picture, whether still or moving, that represents the appearance of a thing and that is produced with the aid of a camera;

"prescribed" (*prescrit*)

"prescribed" means prescribed by regulation;

"prosecutor" (*poursuivant*)

"prosecutor" means the Attorney General or, where the Attorney General does not intervene, the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them;

"unilaterally" (*unilatéralement* et *unilatérale*)

"unilaterally", in relation to the making of an application by a party, means without notice to any other party being required.

CHAPTER III
GENERAL PROVISIONS

Common law powers replaced

3. The provisions of Parts Two to Seven replace any common law powers of a peace officer, in relation to the investigation of a crime, to

(*a*) search a person, place or vehicle, seize a thing or retrieve a confined person, and maintain custody of and dispose of seized things;

(*b*) carry out or have carried out an investigative procedure to which Part Three (*Obtaining Forensic Evidence*) applies;

(*c*) take or have taken samples of a person's breath or blood for the purpose of determining the presence or concentration of alcohol in the person's blood; and

(*d*) intercept or have intercepted, by means of a surveillance device, a private communication.

Warning or informing person

4. A peace officer who is under a duty to warn a person or to tell a person anything shall do so in a language and in a manner understood by the person.

Shortening notice period for application

5. (1) The period of notice required for any application may be shortened if the persons to whom the notice must be given consent, or if a justice so orders.

Order shortening notice period

(2) A justice may, on an application made unilaterally, make an order shortening a period of notice if satisfied that doing so would be reasonable in the circumstances and would not prejudice any person to whom the notice must be given.

Expediting hearing

6. A justice may give any directions considered necessary for expediting a hearing.

Execution in province

7. A warrant or order issued by a justice may be executed or carried out anywhere in the province in which it is issued, unless a particular location is specified in the warrant or order.

Presumption of authenticity of warrant or order

8. An original warrant or order purporting to be signed by a justice is, in the absence of evidence to the contrary, proof of the authenticity of the warrant or order, without proof of the signature of the justice appearing to have signed it.

CHAPTER IV
GENERAL APPLICATION PROCEDURES FOR WARRANTS

DIVISION I
INTERPRETATION

Application of Chapter

9. This Chapter applies to applications for warrants under Part Two (*Search and Seizure*), Part Three (*Obtaining Forensic Evidence*) and Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).

DIVISION II
PROCEDURE ON HEARING APPLICATION

Hearing evidence

10. (1) A justice to whom an application for a warrant is made may question the applicant and hear or receive other evidence, including evidence by affidavit based on information and belief.

Questioning deponent

(2) Where affidavit evidence is received, the justice may question the deponent on the affidavit.

Evidence on oath

(3) The evidence of any person shall be on oath.

Recording oral application, evidence

11. (1) An application made orally and any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of an oral application or of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of an oral application or of oral evidence shall be certified as to time, date and accuracy.

Procedure for issuing warrant on application by telephone

12. Where a warrant is issued on application made by telephone or other means of telecommunication, the justice shall

(*a*) complete the warrant; and

(*b*) transmit two copies of the warrant to the applicant, or direct the applicant to complete two copies of it.

DIVISION III
FILING

Filing application, evidence, warrant

13. A justice to whom an application for a warrant is made shall, as soon as practicable, have the following filed with the clerk of the court for the judicial district in which the application was received:

(*a*) the application received by the justice, or the record of the application or its transcription;

(*b*) the record of any oral evidence heard by the justice or its transcription;

(*c*) any other evidence received by the justice; and

(*d*) if a warrant is issued, the original warrant.

Notice of out-of-district execution

14. (1) A peace officer who executes a warrant in a judicial district other than the one in which it was issued shall, as soon as practicable, advise the clerk of the court for the judicial district in which the warrant was issued of the place of execution.

Filing material in district where warrant executed

(2) After being so advised, the clerk of the court for the judicial district in which the warrant was issued shall have the material or a copy of the material listed in section 13 filed, as soon as practicable, with the clerk of the court for the judicial district in which the warrant was executed.

PART TWO

SEARCH AND SEIZURE

CHAPTER I
INTERPRETATION

Definitions

15. In this Part,

"confined" (*séquestrée*)

"confined" means confined or taken into custody unlawfully as defined in section 49 (confinement), 50 (kidnapping) or 51 (child abduction) of the proposed Criminal Code (LRC);

"night" (*nuit*)

"night" means the period between 2100 hours and 0600 hours on the following day;

"vehicle" (*véhicule*)

"vehicle" means a thing used or designed to be used as a means of transportation.

Meaning of power to search person

16. The power to search a person, otherwise than with consent, for an object of seizure or a confined person means the power to

(*a*) stop and detain the person;

(*b*) carry out a protective search of the person;

(*c*) search anything carried by the person in which it is reasonable to believe that the object of seizure or confined person might be found;

(*d*) search those areas of the surface of the person's body where it is reasonable to believe that the object of seizure might be found;

(*e*) search those areas of the person's clothing where it is reasonable to believe that the object of seizure or confined person might be found; and

(*f*) remove any article of the person's clothing that it is reasonable and necessary to remove to see whether the person is carrying or concealing the object of seizure or confined person, or to effect seizure or retrieve the confined person.

Meaning of protective search

17. The power to carry out a protective search of a person means the power to

(*a*) frisk the person and search the person's clothing and anything carried by the person or within the person's reach for weapons and instruments of escape;

(*b*) if the frisk or search discloses that anything believed on reasonable grounds to be a weapon or instrument of escape is located under or in the person's clothing, remove any article of the person's clothing that it is reasonable and necessary to remove to effect a seizure; and

(*c*) seize anything believed on reasonable grounds to be a weapon or instrument of escape.

Meaning of power to search vehicle

18. The power to search a vehicle, otherwise than with consent, for an object of seizure or a confined person means the power to stop and detain the vehicle, enter the vehicle and search those areas of the vehicle, or of anything within the vehicle, where it is reasonable to believe that the object of seizure or the confined person might be found.

Meaning of power to search place

19. The power to search a place, otherwise than with consent, for an object of seizure or a confined person means the power to enter the place and search those areas of the place, or of anything within the place, where it is reasonable to believe that the object of seizure or the confined person might be found.

Meaning of power to seize

20. The power to seize means

(*a*) in the case of a thing, the power to take possession or control of the thing; and

(*b*) in the case of funds in a financial account, the power to take control over the funds.

CHAPTER II
SEARCH AND SEIZURE WITH A WARRANT

DIVISION I
APPLICATION FOR SEARCH WARRANT

Applicant

21. Any person may apply for a search warrant.

Application in person or by telephone

22. (1) An application for a search warrant shall be made in person or, if the applicant is a peace officer and it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally, in private and on oath, orally or in writing.

Form of written application

(3) An application in writing shall be in the prescribed form.

Justice on application in person

23. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on application by telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

Contents of application

24. An application for a search warrant shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the person, place or vehicle to be searched;

(*e*) if the application is for a warrant to search for and seize objects of seizure,

(i) the objects of seizure sought,

(ii) the applicant's grounds for believing that the objects of seizure will be found on the person or in the place or vehicle, and

(iii) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person, place, vehicle or objects of seizure and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;

(*f*) if the application is for a warrant to search for and retrieve a confined person,

(i) the person sought,

(ii) the applicant's grounds for believing that the person will be found in the place or vehicle or concealed on the person to be searched, and

(iii) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person, place, vehicle or confined person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application

and whether each application was withdrawn, refused or granted;

(*g*) if the applicant requests authority for the warrant to be executed during the night, the applicant's grounds for believing that it is necessary for the warrant to be executed during the night;

(*h*) if the applicant, on application made in person, requests authority for the warrant to be executed more than ten days after it is issued, the applicant's grounds for believing that the longer period is necessary; and

(*i*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

DIVISION II
ISSUANCE OF SEARCH WARRANT

Grounds for issuing warrant for object of seizure

25. (1) A justice who, on application, is satisfied there are reasonable grounds to believe that an object of seizure will be found on a person or in a place or vehicle may issue a warrant authorizing a peace officer to search the person, place or vehicle for the object of seizure and to seize the object of seizure.

Grounds for issuing warrant for confined person

(2) A justice who, on application, is satisfied there are reasonable grounds to believe that a confined person will be found in a place or vehicle or concealed on the person to be searched may issue a warrant authorizing a peace officer to search the person, place or vehicle for the confined person and to retrieve the confined person.

Additional ground if application by telephone

26. If the application is made by telephone or other means of telecommunication, a warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

Conditions relating to execution

27. A justice who issues a search warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

Authorizing execution by night

28. If the applicant has specified grounds for believing that it is necessary for the search warrant to be executed during the night and the justice is satisfied there are reasonable grounds for that belief, the justice may, by the warrant, authorize its execution during the night.

Form of warrant

29. A search warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of warrant

30. A search warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the objects of seizure or confined person sought;

(*d*) the person, place or vehicle to be searched;

(*e*) any conditions imposed relating to its execution;

(*f*) the date it expires if not executed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

DIVISION III
EXPIRATION OF SEARCH WARRANT

Warrant issued on application in person

31. (1) A search warrant issued on application made in person expires ten days after it is issued.

Shortening expiration period

(2) A justice who is satisfied that a shorter expiration period is sufficient may issue a warrant with an expiry date that is less than ten days after the date of issue.

Extending expiration period

(3) A justice who is satisfied there are reasonable grounds to believe that a longer expiration period is required may issue a warrant with an expiry date that is more than ten days but not more than twenty days after the date of issue.

Warrant issued on application by telephone

32. A search warrant issued on application made by telephone or other means of telecommunication expires three days after it is issued.

Expiry on execution

33. A search warrant that is executed before the expiry date disclosed in it expires on execution.

Return of expired warrant

34. If a search warrant expires without having been executed, a copy of the warrant shall have noted on it the reasons why the warrant was not executed, and shall be filed as soon as practicable with the clerk of the court for the judicial district in which it was issued.

DIVISION IV
EXECUTION OF SEARCH WARRANT

Who may execute warrant

35. A search warrant may be executed in the province in which it is issued by a peace officer of the province.

Execution in different province

36. (1) A search warrant may be executed in another province if it is endorsed by a justice of that province.

Endorsement by justice

(2) The justice may endorse the warrant if it was issued on application made in person and the justice is satisfied that the person, place or vehicle to be searched is in the province.

Form of endorsement

(3) The endorsement shall be in the prescribed form.

Effect of endorsement

(4) The endorsement authorizes peace officers of the province in which the warrant was issued or endorsed to execute the warrant in the province in which it was endorsed.

Power under warrant

37. A peace officer may, under the authority of a search warrant,

(*a*) search a person, place or vehicle specified in the warrant;

(*b*) search a person who is found in a place or vehicle specified in the warrant if the officer believes on reasonable grounds that the person is carrying or concealing the object of seizure or the confined person identified in the warrant;

(*c*) seize anything believed on reasonable grounds to be the object of seizure identified in the warrant; and

(*d*) retrieve any person believed on reasonable grounds to be the person identified in the warrant as a confined person.

Execution by day

38. A peace officer shall execute a search warrant during the period beginning at 0600 hours and ending at 2100 hours, unless the issuing justice has, by the warrant, authorized its execution during the night.

Execution in presence of occupier

39. A peace officer shall execute a search warrant in the presence of a person who occupies or is in apparent control of the place or vehicle being searched, unless it is impracticable to do so.

Providing copy of warrant

40. (1) A peace officer shall, before starting a search or as soon as practicable, give a copy of the warrant

(*a*) in the case of a warrant to search a person, to the person; or

(*b*) in the case of a warrant to search a place or vehicle, to a person present and in apparent control of the place or vehicle.

Copy in unoccupied place or vehicle

(2) A peace officer who executes a warrant to search a place or vehicle where there is no person present and in apparent control shall, when the search is done, indicate on a copy of the warrant the date and time of the search and whether anything was seized, and shall affix the copy of the warrant in a prominent location in the place or vehicle.

DIVISION V
EVIDENTIARY RULE WHERE ORIGINAL OF WARRANT ABSENT

Absence of original warrant

41. In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant.

CHAPTER III
SEARCH AND SEIZURE WITHOUT A WARRANT

DIVISION I
SEARCH AND SEIZURE IN EXIGENT CIRCUMSTANCES

Power to search

42. (1) A peace officer may, without a search warrant, search a person, place or vehicle for an object of seizure or a confined person if the officer believes on reasonable grounds that

(*a*) the object of seizure or confined person will be found on the person or in the place or vehicle; and

(*b*) the delay involved in obtaining a warrant would endanger anyone's life or safety.

Power to seize

(2) The peace officer may seize anything believed on reasonable grounds to be the object of seizure, or retrieve any person believed on reasonable grounds to be the confined person, found in the course of the search.

DIVISION II
SEARCH AND SEIZURE INCIDENT TO ARREST

Protective search

43. Anyone who has arrested another person may, incident to the arrest and without a search warrant, carry out a protective search of the person.

Additional power of peace officer

44. A peace officer who has arrested a person may, incident to the arrest and without a search warrant,

(*a*) if the officer believes on reasonable grounds that an object of seizure will be found on the person and that the delay involved in obtaining a warrant would result in the loss or destruction of the object of seizure, search the person for the object of seizure and seize anything believed on reasonable grounds to be the object of seizure; or

(*b*) if the person is in present control of, or is an occupant of, a vehicle, and the officer believes on reasonable grounds that an object of seizure will be found in the vehicle and that the delay involved in obtaining a warrant would result in the loss or destruction of the object of seizure, search the vehicle for the object of seizure and seize anything believed on reasonable grounds to be the object of seizure.

DIVISION III
SEARCH WITH CONSENT AND SEIZURE

Power to search

45. (1) A peace officer may search without a warrant

(*a*) a person or anything carried by the person if the person consents to the search; and

(*b*) a place or vehicle with the consent of a person who is present and in apparent control and who is apparently competent to consent to the search.

Restriction on consent under this Part

(2) A person may not consent, under this Part, to a search for an object of seizure inside the person's body.

Information required to be disclosed

46. (1) When asking a person for consent, a peace officer shall tell the person

(*a*) what crime is being investigated;

(*b*) what the officer is looking for;

(*c*) what the proposed search will involve; and

(*d*) that consent may be refused or, if given, may be withdrawn at any time.

Form of consent

(2) Consent may be given orally or in writing.

Power to seize

47. The peace officer may seize anything believed on reasonable grounds to be an object of seizure, or retrieve any person believed on reasonable grounds to be a confined person, found in the course of the search.

CHAPTER IV
SEIZURE OF OBJECTS IN PLAIN VIEW

Power to seize

48. (1) Where a peace officer engaged in the lawful execution of duty discovers in plain view anything believed on reasonable grounds to be an object of seizure, the officer may seize it.

Private premises

(2) Subsection (1) does not confer authority to enter private premises.

Object of seizure not in plain view

49. An object of seizure is not in plain view if movement or manipulation of it is required in order for the peace officer to acquire reasonable grounds for believing it to be an object of seizure.

CHAPTER V
EXERCISING SEARCH AND SEIZURE POWERS

Manner of carrying out search

50. (1) A search of the person shall be carried out in a manner that respects the dignity of the person and that, having regard to the nature of the search and the circumstances,

(*a*) involves as little intrusion as is reasonably practicable; and

(*b*) provides as much privacy as is reasonably practicable.

Waiver of requirements

(2) A person who is to be searched may waive the requirement set out in paragraph (1)(*a*) or (*b*), orally or in writing.

Obtaining assistance to search

51. A peace officer who carries out a search may obtain the assistance of any person whose assistance the officer reasonably believes is necessary to carry out the search effectively.

Demand to enter private premises

52. A peace officer who is authorized to enter private premises to carry out a search shall, before entering the premises, identify himself or herself as a peace officer, make a demand to enter, state the purpose of the entry and allow the occupant a reasonable time to let the officer in, unless the officer believes on reasonable grounds that doing so would result in the loss or destruction of an object of seizure in relation to which the search is authorized, or would endanger anyone's life or safety.

Opportunity to make claim of privilege

53. (1) No peace officer, or person assisting a peace officer, who knows of the possible existence of a privilege in respect of a thing or in respect of information contained in a thing shall examine or seize the thing or examine the information without affording a reasonable opportunity for a claim of privilege to be made.

Procedure if claim made

(2) If a privilege is claimed, the officer shall, without examining the thing or the information or having it photographed or copied,

(*a*) seize the thing by taking control of it, and take steps to ensure that the thing or the information contained in it is not examined or interfered with; or

(*b*) seize the thing by taking possession of it, place it in a package, suitably seal and identify the package and place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is an agreement in writing between the officer and the person claiming the privilege that a specified person will act as custodian, in the custody of that person.

Custodian of seized thing

(3) The peace officer who seizes the thing by taking control of it, or the sheriff or person in whose custody the sealed package is placed, is the custodian of the seized thing for the purposes of Part Seven (*Privilege in Relation to Seized Things*).

Return of seized weapons

54. (1) A peace officer who, during a protective search, seizes anything believed to be a weapon or instrument of escape shall have the thing returned to the person from whom it was seized as soon after the seizure as it is safe and practicable to do so, unless seizure or retention of the thing is otherwise authorized.

Delivery of seized weapons to peace officer

(2) If a person other than a peace officer seizes, during a protective search, anything believed to be a weapon or instrument of escape, the seized thing shall be delivered, as soon as practicable, to a peace officer to be dealt with in accordance with subsection (1).

PART THREE

OBTAINING FORENSIC EVIDENCE

CHAPTER I
INTERPRETATION

Application of Part

55. (1) This Part applies to any investigative procedure that is carried out by or at the request of a peace officer for the purpose of obtaining evidence or information relating to a person's responsibility for the commission of a crime, in a manner that requires physical contact with the person or the person's participation in the procedure and awareness of that participation.

Exception

(2) This Part does not apply to an investigative procedure that merely involves questioning the person, searching the person pursuant to Part Two (*Search and Seizure*) or taking samples of the person's breath or blood pursuant to Part Four (*Testing Persons for Impairment in the Operation of Vehicles*).

CHAPTER II
INVESTIGATIVE PROCEDURES WITH A WARRANT

DIVISION I
APPLICATION FOR WARRANT

Applicant and nature of warrant

56. A peace officer may apply for a warrant authorizing the carrying out of one or more of the following investigative procedures:

(*a*) the visual inspection of the surface of a person's body;

(*b*) the visual inspection of a person's body cavities and the probing for, removal of and seizure of any object of seizure concealed in a body cavity;

(*c*) the taking of prints or impressions from any exterior part of a person's body;

(*d*) the taking of dental or bite impressions from a person;

(*e*) the taking of hair samples from a person;

(*f*) the taking of scrapings or clippings from a person's fingernails or toe-nails;

(*g*) the removal of residues or substances from the surface of a person's body by means of washings, swabs or adhesive materials;

(*h*) the taking of saliva samples or swabs from a person's mouth for purposes other than the detection of intoxicating substances;

(*i*) the physical examination of a person by a medical practitioner; or

(*j*) the examination of a person by means of X-rays or ultrasound.

Application in person or by telephone

57. (1) An application for a warrant shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally, in private and on oath, orally or in writing.

Form of written application

(3) An application in writing shall be in the prescribed form.

Justice on application in person

58. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on application by telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

Contents of application

59. An application for a warrant shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the person who is to be subjected to the investigative procedure;

(*e*) whether the person has been arrested for, charged with or issued an appearance notice in relation to the crime under investigation;

(*f*) the procedure to be carried out;

(*g*) the applicant's grounds for believing that carrying out the procedure will provide probative evidence of the person's involvement in the crime and that there is no practicable and less intrusive means for obtaining the evidence;

(*h*) if the application is for a warrant for an examination of the person by means of X-rays or ultrasound, the applicant's grounds for believing that carrying out the examination would not endanger life or health;

(*i*) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted;

(*j*) the name of a person or a class of persons believed by the applicant to be competent, by virtue of training or experience, to carry out the procedure;

(*k*) if the applicant, on application made in person, requests authority for the warrant to be executed more than ten days after it is issued, the applicant's grounds for believing that the longer period is necessary; and

(*l*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

DIVISION II
ISSUANCE OF WARRANT

Grounds for issuing warrant

60. (1) A justice may, on application, issue a warrant authorizing the carrying out of an investigative procedure listed in section 56 if

(*a*) the person who is to be subjected to the procedure has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment; and

(*b*) the justice is satisfied there are reasonable grounds to believe that

(i) carrying out the procedure will provide probative evidence of the person's involvement in the crime,

(ii) there is no practicable and less intrusive means for obtaining the evidence, and

(iii) if the application is for a warrant for an examination of the person by means of X-rays or ultrasound, the carrying out of the examination would not endanger life or health.

Additional ground if application by telephone

(2) If the application is made by telephone or other means of telecommunication, the warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

Conditions relating to execution

61. A justice who issues a warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

Form of warrant

62. A warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of warrant

63. A warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the person who is to be subjected to the investigative procedure;

(*d*) the procedure to be carried out;

(*e*) any conditions imposed relating to its execution;

(*f*) the date it expires if not executed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

DIVISION III
EXPIRATION OF WARRANT

Warrant issued on application in person

64. (1) A warrant issued on application made in person expires ten days after it is issued.

Shortening expiration period

(2) A justice who is satisfied that a shorter expiration period is sufficient may issue a warrant with an expiry date that is less than ten days after the date of issue.

Extending expiration period

(3) A justice who is satisfied there are reasonable grounds to believe that a longer expiration period is required may issue a

warrant with an expiry date that is more than ten days but not more than twenty days after the date of issue.

Warrant issued on application by telephone

65. A warrant issued on application made by telephone or other means of telecommunication expires three days after it is issued.

Expiry on execution

66. If all of the procedures authorized by a warrant are carried out before the expiry date set out in the warrant, the warrant expires on the date that the last procedure is carried out.

Expiration of unexecuted warrant

67. (1) If none of the procedures authorized by a warrant is carried out before the warrant expires, a copy of the warrant shall have noted on it the reasons why no procedure was carried out.

Filing copy of warrant

(2) The copy shall be filed as soon as practicable with the clerk of the court for the judicial district in which the warrant was issued.

DIVISION IV
EXECUTION OF WARRANT

Who may execute warrant

68. A warrant may be executed by a peace officer of the province in which it is issued.

Providing copy of warrant

69. A peace officer shall, before executing a warrant or as soon as practicable, give a copy of the warrant to the person who is subjected to the procedure.

DIVISION V
EVIDENTIARY RULE WHERE ORIGINAL OF WARRANT ABSENT

Absence of original warrant

70. In any proceeding in which it is material for a court to be satisfied that the carrying out of an investigative procedure was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the carrying out of the procedure was not authorized by a warrant.

CHAPTER III
INVESTIGATIVE PROCEDURES WITHOUT A WARRANT

DIVISION I
INVESTIGATIVE PROCEDURES IN EXIGENT CIRCUMSTANCES

Grounds for carrying out procedure

71. Where a person has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment, a peace officer may, without a warrant, carry out or have carried out with respect to that person any investigative procedure listed in paragraphs 56(*a*) to (*i*) if the officer believes on reasonable grounds that

(*a*) doing so will provide probative evidence of the person's involvement in the crime;

(*b*) the delay involved in obtaining a warrant would result in the loss or destruction of the evidence; and

(*c*) there is no practicable and less intrusive means for obtaining the evidence.

DIVISION II
INVESTIGATIVE PROCEDURES INCIDENT TO ARREST

Visual inspection

*__72.__ A peace officer who has arrested a person for a crime punishable by more than two years' imprisonment may, incident to the arrest and without a warrant, carry out or have carried out the visual inspection of the surface of the person's body, excluding the person's genitals, buttocks and, where the person is female, breasts, if the officer believes on reasonable grounds that

(*a*) doing so will provide probative evidence of the person's involvement in the crime; and

(*b*) there is no practicable and less intrusive means for obtaining the evidence.

* A minority of the Commission dissents with respect to the inclusion of this section in the Code.

DIVISION III
INVESTIGATIVE PROCEDURES WITH CONSENT

Procedures that may be conducted with consent

73. (1) A peace officer may, without a warrant, carry out or have carried out any investigative procedure, other than an investigative procedure that involves the administration of a drug known or designed to affect mood, inhibitions, judgment or thinking, if the person who is to be subjected to the procedure consents.

Information required to be disclosed

(2) Where a person's consent is sought,

(*a*) the person shall be given a description of the investigative procedure, an explanation of its nature and the reasons for its being carried out;

(*b*) the individual who is to carry out the procedure shall tell the person whether there are any significant risks to health or safety associated with the procedure and, if so, what those risks are; and

(*c*) a peace officer shall tell the person that the person has the right to consult with counsel before deciding whether to consent to the procedure, and that consent may be refused or, if given, may be withdrawn at any time.

Form of consent

(3) Consent may be given orally or in writing.

CHAPTER IV
EXERCISING POWER TO CARRY OUT INVESTIGATIVE PROCEDURES

DIVISION I
REQUIREMENTS FOR CARRYING OUT PROCEDURES

Competence of person carrying out procedure

74. (1) An investigative procedure shall be carried out by a person who, by virtue of training or experience, is competent to carry it out.

Dental impressions

(2) Dental or bite impressions shall be taken by a person who is qualified under provincial law to take dental or bite impressions.

Medical procedures

(3) An investigative procedure that involves probing for or removing an object of seizure that is inside a person's body shall be carried out by a medical practitioner.

Exception

(4) A peace officer may probe for or remove an object of seizure concealed in a person's mouth if the officer is carrying out the procedure pursuant to section 71 (exigent circumstances).

Information required to be disclosed

75. (1) A person who is to be subjected to an investigative procedure carried out without the person's consent shall be

(*a*) given a description of the procedure, an explanation of its nature and the reasons for its being carried out; and

(*b*) told that the person is required by law to submit to the procedure and that such force as is necessary and reasonable in the circumstances may be used to carry it out.

Time of disclosure

(2) The information shall be provided to the person before the procedure is carried out or, if that is impracticable, at the first reasonable opportunity.

Waiver of requirement

(3) The person may waive the requirement set out in paragraph (1)(*a*), orally or in writing.

Manner of carrying out procedure

76. (1) An investigative procedure shall be carried out in a manner that respects the dignity of the person and that, having regard to the nature of the procedure and the circumstances,

(*a*) involves as little discomfort as is reasonably practicable; and

(*b*) provides as much privacy as is reasonably practicable.

Waiver of requirements

(2) A person who is to be subjected to an investigative procedure may waive the requirement set out in paragraph (1)(*a*) or (*b*), orally or in writing.

Exemption from criminal liability

77. No person is guilty of a crime by reason of a failure or refusal to carry out an investigative procedure with respect to another person.

DIVISION II
SCOPE OF POWER

Visual inspection and power to photograph

78. The authority to inspect visually a person's body cavities or the surface of a person's body without the person's consent includes the authority to take a photograph of any probative evidence revealed by the inspection.

Power to examine, test or analyze

79. (1) A peace officer may have anything taken or obtained in the course of carrying out an investigative procedure examined, tested or analyzed.

Safeguarding of evidence

(2) If probative evidence is revealed, the thing, or that portion of it remaining after the examination, test or analysis, shall be safeguarded so as to preserve it for use in subsequent proceedings.

Application of section

(3) This section does not apply to anything seized under this Part as an object of seizure.

DIVISION III
REPORT OF PROCEDURES CARRIED OUT

Requirement for and contents of report

80. (1) Where an investigative procedure has been carried out pursuant to a warrant, section 71 (exigent circumstances) or 72 (incident to arrest), or where anything has been taken or obtained in the course of carrying out an investigative procedure with a person's consent, a peace officer shall, as soon as practicable, complete and sign a report that discloses

(*a*) the crime under investigation;

(*b*) the person who was subjected to the procedure;

(*c*) the procedure that was carried out and a description of anything that was taken or obtained;

(*d*) the time, date and place that the procedure was carried out;

(*e*) the name of the person who carried out the procedure; and

(*f*) the name of the peace officer.

Additional contents where procedure carried out in exigent circumstances

(2) Where the procedure was carried out pursuant to section 71 (exigent circumstances), the report shall disclose, in addition, the grounds for the peace officer's belief that carrying out the procedure would provide probative evidence of the person's involvement in the crime, that the delay involved in obtaining a warrant would result in the loss or destruction of the evidence and that there was no practicable and less intrusive means for obtaining the evidence.

Additional contents where procedure carried out incident to arrest

(3) Where the procedure was carried out pursuant to section 72 (incident to arrest), the report shall disclose, in addition, the grounds for the peace officer's belief that carrying out the procedure would provide probative evidence of the person's involvement in the crime and that there was no practicable and less intrusive means for obtaining the evidence.

Additional contents where all authorized procedures not carried out

(4) Where the procedure was carried out pursuant to a warrant issued for more than one investigative procedure and not all of the authorized procedures were carried out, the report shall disclose, in addition, the reasons why each of the authorized procedures was not carried out.

Providing copy of report and filing

81. The peace officer shall, as soon as practicable,

(*a*) give a copy of the report to the person who was subjected to the procedure; and

(*b*) have the report filed with the clerk of the court for the judicial district in which the procedure was carried out.

PART FOUR

TESTING PERSONS FOR IMPAIRMENT IN THE OPERATION OF VEHICLES

CHAPTER I
INTERPRETATION

Definitions

82. In this Part,

"analyst" (*analyste*)

"analyst" means a person designated by the Attorney General as an analyst for the purposes of this Part;

"breath analysis instrument" (*analyseur d'haleine*)

"breath analysis instrument" means an instrument designed to receive and analyze a sample of a person's breath in order to measure the concentration of alcohol in the person's blood, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"container" (*contenant*)

"container" means

(*a*) in respect of breath samples, a container designed to receive a sample of a person's breath for analysis, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada, and

(*b*) in respect of blood samples, a container designed to receive a sample of a person's blood for analysis, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"operate" (*conduire*)

"operate" includes, in respect of a vessel or an aircraft, navigate;

"preliminary breath testing device" (*alcootest*)

"preliminary breath testing device" means a device designed to ascertain the presence of alcohol in a person's blood, and of a kind approved as suitable for the purposes of this Part by order of the Attorney General of Canada;

"technician" (*technicien*)

"technician" means

(*a*) in respect of breath samples, a person designated by the Attorney General as being qualified to operate a breath analysis instrument, and

(*b*) in respect of blood samples, a person or member of a class of persons designated by the Attorney General as being qualified to take a sample of a person's blood for the purposes of this Part;

"vehicle" (*véhicule*)

"vehicle" means a motor vehicle, train, vessel or aircraft, but does not include anything driven by, propelled by or drawn by means of muscular power.

CHAPTER II
PRELIMINARY BREATH TESTS

Request for preliminary breath sample

83. (1) Where a peace officer reasonably suspects that there is alcohol in the body of a person who is operating or has the care or control of a vehicle, the peace officer may request that the person

(*a*) provide, as soon as practicable, such a breath sample as the peace officer considers necessary to enable a proper analysis to be made with a preliminary breath testing device; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the breath sample to be taken.

Warning

(2) When making the request, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where a breath analysis instrument is available.

CHAPTER III
REQUEST FOR SAMPLES FOR BLOOD-ALCOHOL ANALYSIS

DIVISION I
REFUSAL TO PROVIDE PRELIMINARY BREATH SAMPLE

Request for breath samples

84. Where a person has been arrested for failure or refusal to provide a breath sample for a preliminary breath testing device or to accompany a peace officer for the purpose of enabling the breath sample to be taken, a peace officer may request that the person provide, as soon as practicable, such breath samples as a technician considers necessary to enable a proper analysis to be made with a breath analysis instrument.

DIVISION II
COMMISSION OF ALCOHOL-RELATED CRIME

Request for breath samples

85. (1) Where a peace officer believes on reasonable grounds that a person, at any time within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), the peace officer may, as soon as practicable, request that the person

(*a*) provide, as soon as practicable, such breath samples as a technician considers necessary to enable a proper analysis to be made with a breath analysis instrument; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the breath samples to be taken.

Warning

(2) When making a request that the person accompany the peace officer, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where a breath analysis instrument is available.

Request for blood samples

86. (1) If the peace officer believes on reasonable grounds that, because of any physical condition of the person, it would be impracticable to obtain breath samples from the person or the person would be incapable of providing breath samples, the peace officer may, as soon as practicable, request that the person

(*a*) submit, as soon as practicable, to having blood samples taken for the purpose of determining the concentration of alcohol in the person's blood; and

(*b*) if necessary, accompany the peace officer for the purpose of enabling the blood samples to be taken.

Warning

(2) When making a request that the person accompany the peace officer, the peace officer shall warn the person that, in case of failure or refusal to comply, the officer may arrest the person and convey the person to a site where blood samples can be taken.

DIVISION III
WARNING REGARDING REFUSAL

Warning

87. When making a request for breath samples or blood samples, the peace officer shall warn the person that it is a crime under section 59 (failure or refusal to provide breath sample) of the

proposed Criminal Code (LRC) to fail or refuse, without a reasonable excuse, to comply with the request.

DIVISION IV
RESTRICTION ON REQUEST FOR SAMPLES

Request not prejudicial to medical treatment

88. A peace officer may not request that a person who has been admitted to hospital or is undergoing emergency medical treatment provide breath samples or submit to having blood samples taken unless the attending medical practitioner is of the opinion that making the request and taking the samples would not be prejudicial to the person's proper care or treatment.

DIVISION V
REQUEST FOR BLOOD SAMPLES AFTER DISCLOSURE OF BREATH ANALYSES RESULTS

Disclosure of results

89. (1) As soon as practicable after the results of breath analyses are known, a peace officer shall tell the person who provided the breath samples the results.

Request for blood samples

(2) A person who is detained in custody may, after being told the results of the breath analyses, request that blood samples be taken and, if a request is made, a peace officer shall arrange for the samples to be taken.

CHAPTER IV
WARRANT TO TAKE BLOOD SAMPLES

DIVISION I
APPLICATION FOR WARRANT

Applicant

90. A peace officer may apply for a warrant authorizing the taking of samples of a person's blood.

Application in person or by telephone

91. (1) An application for a warrant shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made unilaterally and on oath, orally or in writing.

Form of written application

(3) An application in writing shall be in the prescribed form.

Justice on application in person

92. (1) An application in person shall be made to a justice in the judicial district in which the crime under investigation is alleged to have been committed or in which the warrant is intended for execution.

Justice on application by telephone

(2) An application by telephone or other means of telecommunication shall be made to a justice designated for that purpose by the Chief Justice of the Criminal Court.

Contents of application

93. An application for a warrant shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the person from whom the blood samples are to be taken;

(*e*) the applicant's grounds for believing that the person, within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC) and was involved in an accident resulting in the death of, or bodily harm to, someone;

(*f*) the applicant's grounds for believing that a medical practitioner is of the opinion that

(i) the person is unable to consent to the taking of the blood samples because of a physical or mental condition resulting from the consumption of alcohol, the accident or an occurrence related to or resulting from the accident, and

(ii) taking the blood samples would not endanger the person's life or health;

(*g*) a list of any previous applications, of which the applicant is aware, for a warrant in respect of the same person and the same or a related investigation, indicating the date each application was made, the name of the justice who heard each application and whether each application was withdrawn, refused or granted; and

(*h*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person before a justice.

DIVISION II
ISSUANCE OF WARRANT

Grounds for issuing warrant

94. (1) A justice may, on application, issue a warrant authorizing the taking of samples of a person's blood if the justice is satisfied there are reasonable grounds to believe that

(*a*) the person, within the preceding two hours, has committed an alcohol-related crime under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC) and was involved in an accident resulting in the death of, or bodily harm to, someone; and

(*b*) a medical practitioner is of the opinion that

(i) the person is unable to consent to the taking of blood samples because of a physical or mental condition resulting from the consumption of alcohol, the accident or an occurrence related to or resulting from the accident, and

(ii) taking the blood samples would not endanger the person's life or health.

Additional ground if application by telephone

(2) If the application is made by telephone or other means of telecommunication, the warrant shall not be issued unless the justice is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person before a justice.

Conditions relating to execution

95. A justice who issues a warrant may, by the warrant, impose any conditions relating to its execution that the justice considers appropriate.

Form of warrant

96. A warrant shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of warrant

97. The warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the person from whom the blood samples are to be taken;

(*d*) the time and date the application was made;

(*e*) any conditions imposed relating to its execution;

(*f*) the time and date it expires if not executed;

(*g*) the time, date and place of issuance; and

(*h*) the name and jurisdiction of the justice.

DIVISION III
EXPIRATION OF WARRANT

Six-hour expiration period

98. A warrant authorizing the taking of blood samples expires six hours after it is issued or, if it is executed less than six hours after it is issued, on execution.

Return of expired warrant

99. If a warrant expires without having been executed, a copy of the warrant shall have noted on it the reasons why the warrant was not executed, and shall be filed as soon as practicable with the clerk of the court for the judicial district in which it was issued.

DIVISION IV
PROVISION OF COPY OF WARRANT

Person to whom copy given

100. A peace officer shall, as soon as practicable after executing a warrant, give a copy of the warrant to the person from whom the blood samples were taken, unless the justice who issued the warrant imposed a condition requiring that the copy be given to another designated person.

CHAPTER V
TAKING, TESTING AND RELEASING BLOOD SAMPLES

DIVISION I
INTERPRETATION

Application of Chapter

101. This Chapter applies to blood samples taken pursuant to a warrant, a request made under paragraph 86(1)(*a*) (request by peace officer) or a request made in the circumstances described in subsection 89(2) (request by person detained in custody).

DIVISION II
TAKING AND TESTING BLOOD SAMPLES

Conditions for taking samples

102. (1) Blood samples shall be taken from a person

(*a*) as soon as practicable after the request for the samples has been made or the warrant has been issued;

(*b*) by a medical practitioner or a technician acting under the direction of a medical practitioner; and

(*c*) in a manner that ensures the least discomfort to the person.

Opinion of medical practitioner

(2) Blood samples shall not be taken unless the medical practitioner is of the opinion, before each sample is taken,

(*a*) that taking the sample would not endanger the person's life or health; and

(*b*) in the case of a blood sample taken pursuant to a warrant, that the person is unable to consent to the taking of the sample because of a physical or mental condition resulting from the consumption of alcohol, the accident with respect to which the warrant was issued or an occurrence related to or resulting from the accident.

Number of samples

103. (1) No more than two separate blood samples may be taken from a person.

Size of sample

(2) Each blood sample shall be taken in such an amount as a medical practitioner considers necessary to enable the sample to be divided into two parts suitable for separate analysis for the purpose of determining the concentration of alcohol in the person's blood.

Dividing and sealing samples

104. (1) Each blood sample shall be divided into two parts and each part shall be placed in a separate sealed container.

Custody and safeguarding of samples

(2) The peace officer investigating the crime in relation to which the blood samples were taken shall have custody of the samples, and shall take steps to ensure their preservation and safeguarding.

Analysis on behalf of peace officer

105. (1) The peace officer may have one part of each blood sample analyzed by an analyst for the purpose of determining the concentration of alcohol in the blood.

Retaining sample for separate analysis

(2) The peace officer shall retain the other part of each sample so as to permit an analysis to be made on behalf of the person from whom the samples were taken.

Testing blood sample for drugs

106. A blood sample may be tested for the presence of drugs.

DIVISION III
APPLICATION TO RELEASE BLOOD SAMPLES

Applicant and notice

107. A person from whom blood samples are taken may, on reasonable notice to the prosecutor, apply for an order to release one part of each sample for the purpose of analysis or testing.

Time and manner of making application

108. The application shall be made in writing to a justice within three months after the day on which the blood samples were taken.

Contents of application

109. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) the date the blood samples were taken; and

(*e*) the nature of the order requested.

Affidavit in support

(2) The application shall be supported by an affidavit.

Service of notice

110. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on the prosecutor.

Hearing evidence

111. A justice to whom an application is made may receive evidence, including evidence by affidavit.

Service of affidavit

112. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on the prosecutor.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

113. The evidence of any person shall be on oath.

Recording evidence

114. (1) Any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of oral evidence shall be certified as to time, date and accuracy.

Order to release samples

115. The justice shall, on application, order the release of one part of each sample, subject to any conditions that the justice considers necessary to ensure its preservation for use in any proceeding.

Form of order

116. The order shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of order

117. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) the date the blood samples were taken;

(*d*) any conditions imposed by the justice;

(*e*) the date and place of issuance; and

(*f*) the name and jurisdiction of the justice.

Filing application, evidence, order

118. The justice shall, as soon as practicable after the hearing, have the following filed with the clerk of the court for the judicial district in which the application was made:

(*a*) the notice of the application;

(*b*) the application;

(*c*) the record of any oral evidence heard by the justice or its transcription;

(*d*) any other evidence received by the justice; and

(*e*) the original of the order.

DIVISION IV
EXEMPTION FROM CRIMINAL LIABILITY

Refusal to take blood sample

119. No medical practitioner or technician is guilty of a crime because of a failure or refusal to take a blood sample from a

person and no medical practitioner is guilty of a crime because of the practitioner's failure or refusal to have a blood sample taken from a person by a technician acting under the practitioner's direction.

[Alternative — A minority of the Commission would propose an alternative draft of Chapter V.

As in the majority draft, subsections 102(1) to 104(1) would apply to blood samples taken pursuant to a warrant or pursuant to a request made by a peace officer under paragraph 86(1)(a) or a request made by a detained person in the circumstances described in subsection 89(2). Section 119 would also be of general application.

Subsection 104(2) to section 118 would be made applicable only to blood samples taken pursuant to a warrant or pursuant to a request made by a peace officer.

The following provisions would be added and made applicable to blood samples taken pursuant to a request made by a detained person in the circumstances described in subsection 89(2):

Providing sample to person

119.1 (1) One part of each blood sample shall be given to the person from whom the samples were taken.

Results confidential and privileged

(2) The results of any analysis or test carried out with respect to that part of a blood sample are confidential and privileged with respect to the person from whom the samples were taken.

Notice of intention to tender results

(3) If the person intends to tender the results in evidence in any proceeding, reasonable notice shall be given to the prosecutor of that intention.

Custody and safeguarding of samples

119.2 (1) The peace officer investigating the crime in relation to which the blood samples were taken shall have custody of the other part of each blood sample, and shall take steps to ensure its preservation and safeguarding.

Analysis and testing on behalf of peace officer

(2) The peace officer may have that part of each blood sample analyzed by an analyst for the purpose of determining the concentration of alcohol in the blood and tested for the presence of drugs.

Disclosure of results

(3) The results of the analysis or test shall not be disclosed by the analyst or individual who carried out the test unless the person from whom the samples were taken has given notice under subsection 119.1(3).

Inadmissibility of evidence

119.3 If a person from whom blood samples were taken has not given notice under subsection 119.1(3), the fact that blood samples were taken and the results of any analysis or test carried

out with respect to them are not admissible in evidence in any proceeding, and the fact that blood samples were taken shall not be the subject of comment by anyone in the proceeding.]

CHAPTER VI
EVIDENTIARY RULES

DIVISION I
ABSENCE OF ORIGINAL OF WARRANT

Original warrant absent

120. In any proceeding in which it is material for a court to be satisfied that the taking of a blood sample was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the taking of the blood sample was not authorized by a warrant.

DIVISION II
RESULTS OF ANALYSES

Presumption relating to breath sample results

121. (1) In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), where samples of a person's breath have been taken and analyzed in accordance with the conditions set out in subsection (2),

(*a*) if the results of the analyses are the same, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the concentration determined by the analyses; and

(*b*) if the results of the analyses are different, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the lowest of the concentrations determined by the analyses.

Conditions for presumption to apply

(2) The conditions for the purposes of subsection (1) are as follows:

(*a*) at least two samples of the person's breath were taken;

(*b*) the samples were taken pursuant to a request made by a peace officer under section 84 or paragraph 85(1)(*a*);

(*c*) the samples were taken as soon as practicable after the crime was alleged to have been committed;

(*d*) the first sample was taken not more than two hours after the crime was alleged to have been committed;

(*e*) an interval of at least fifteen minutes passed between the taking of the samples;

(*f*) each sample was received from the person directly into a container or into a breath analysis instrument operated by a technician; and

(*g*) an analysis of each sample was made with a breath analysis instrument operated by a technician.

Presumption inoperative

(3) Subsection (1) does not apply if a peace officer failed to tell the person who provided the breath samples the results of the breath analyses in accordance with subsection 89(1) or failed to arrange for the taking of samples of the person's blood in accordance with subsection 89(2).

Presumption relating to blood sample results

122. (1) In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), where samples of a person's blood have been taken and analyzed in accordance with the conditions set out in subsection (2),

(*a*) if the results of the analyses are the same, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the concentration determined by the analyses; and

(*b*) if the results of the analyses are different, the concentration of alcohol in the person's blood at the time the crime was alleged to have been committed shall be presumed, in the absence of evidence to the contrary, to be the lower of the concentrations determined by the analyses.

Conditions for presumption to apply

(2) The conditions for the purposes of subsection (1) are as follows:

(*a*) the blood samples were taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*);

(*b*) two samples of the person's blood were taken;

(*c*) the samples were taken as soon as practicable after the crime was alleged to have been committed;

(*d*) the first sample was taken not more than two hours after the crime was alleged to have been committed;

(*e*) an interval of at least fifteen minutes passed between the taking of the samples;

(*f*) each sample was taken by a medical practitioner or a technician acting under the direction of a medical practitioner;

(*g*) at the time each sample was taken, the individual taking the sample divided it into two parts;

(*h*) both parts of each sample were received from the person directly into, or placed directly into, containers that were subsequently sealed;

(*i*) one part of each sample was retained to permit an analysis to be made by or on behalf of the person;

(*j*) an analyst made an analysis of one part of each sample that was contained in a sealed container; and

(*k*) if an order to release one part of each sample has been made pursuant to section 115, that order has been complied with.

DIVISION III
CERTIFICATE EVIDENCE

Proof of facts alleged in certificate

123. In any proceeding in respect of a crime committed under section 58 (operation of vehicle while impaired) of the proposed Criminal Code (LRC), each of the following certificates is evidence of the facts alleged in the certificate without proof of the signature or the official character of the individual appearing to have signed the certificate:

(*a*) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with a breath analysis instrument and that the sample of the standard so analyzed is suitable for use with a breath analysis instrument;

(*b*) where samples of a person's breath have been taken pursuant to a request made by a peace officer under section 84 or paragraph 85(1)(*a*), a certificate of a technician stating

(i) that the analysis of each of the samples has been made with a breath analysis instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with a breath analysis instrument,

(ii) the results of the analyses so made, and

(iii) if the technician took the samples,

(A) the time and place each sample was taken, and

(B) that each sample was received from the person directly into a container or into a breath analysis instrument operated by the technician;

(*c*) a certificate of an analyst stating that the analyst has made an analysis of one part of each sample of a person's blood that was contained in a sealed container identified in the certificate, the date and place it was analyzed and the result of the analysis;

(*d*) where samples of a person's blood have been taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner or a technician, stating

(i) that the medical practitioner or technician took the samples,

(ii) the time and place each sample was taken,

(iii) that, at the time the samples were taken, the medical practitioner or technician divided each sample into two parts, and

(iv) that both parts of each sample were received from the person directly into, or placed directly into, containers that were subsequently sealed and that are identified in the certificate;

(*e*) where samples of a person's blood have been taken by a technician pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner stating that the technician was acting under the practitioner's direction;

(*f*) where samples of a person's blood have been taken pursuant to a warrant or a request made by a peace officer under paragraph 86(1)(*a*) or a request made by the person under subsection 89(2), a certificate of a medical practitioner stating that before each sample was taken the practitioner was of the opinion that taking the blood sample would not endanger the person's life or health; and

(*g*) where samples of a person's blood have been taken pursuant to a warrant, a certificate of a medical practitioner stating that before each sample was taken the practitioner was of the opinion that the person was unable to consent to the taking of the blood sample because of a physical or mental condition resulting from the consumption of alcohol, the accident with respect to which the warrant was issued or an occurrence related to or resulting from the accident.

Notice of intention to tender certificate

124. (1) No certificate is admissible in evidence in a proceeding unless the party intending to tender it has, before the proceeding, given to the other party reasonable notice of that intention and a copy of the certificate.

Leave to cross-examine on certificate

(2) A party against whom a certificate is tendered may, with leave of the court, require the attendance of the medical practitioner, analyst or technician for the purpose of cross-examination.

PART FIVE

ELECTRONIC SURVEILLANCE

CHAPTER I
INTERPRETATION

Definitions

125. In this Part,

"federally designated" (*désigné par les autorités fédérales*)

"federally designated" means designated by the Solicitor General of Canada for the purpose of applying for warrants under this Part or intercepting private communications under a warrant;

"general interception clause" (*clause d'interception d'application générale*)

"general interception clause" means a clause in a warrant authorizing the interception of private communications of persons who are not individually identified or authorizing the interception of private communications at unknown places;

"intercept" (*intercepter et interception*)

"intercept", in relation to a private communication, means listen to, record or acquire the contents, substance or meaning of the communication;

"private communication" (*communication privée*)

"private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for a party to it to expect that it will not be intercepted by a person other than a party to the communication, even if any party to it suspects that it is being intercepted by such a person;

"provincial minister" (*ministre provincial*)

"provincial minister" means, in the Province of Quebec, the Minister of Public Security and, in any other province, the Solicitor General of the province or, if there is no Solicitor General, the Attorney General of the province;

"provincially designated" (*désigné par les autorités provinciales*)

"provincially designated" means designated by a provincial minister for the purpose of applying for warrants under this Part or intercepting private communications under a warrant;

"solicitor" (*avocat*)

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

"surveillance device" (*dispositif de surveillance*)

"surveillance device" means any device capable of being used to intercept a private communication.

CHAPTER II
INTERCEPTING PRIVATE COMMUNICATIONS WITHOUT A WARRANT

Interception with consent

126. A peace officer or agent of a peace officer may, by means of a surveillance device, intercept a private communication without a warrant if all the parties to the communication consent to the interception.

Interception to protect life or safety

127. A peace officer may, without a warrant, use a surveillance device to listen to but not record a private communication to which a peace officer or agent of a peace officer is a party if it is reasonable to believe that the life or safety of the officer or agent may be in danger.

CHAPTER III
WARRANT TO INTERCEPT PRIVATE COMMUNICATIONS

DIVISION I
GENERAL RULE FOR WARRANTS

1. Application for Warrant

Federal applicant

128. (1) A federally designated agent designated in writing personally may apply for a warrant to intercept, by means of a surveillance device, a private communication if the crime under investigation is one in respect of which proceedings may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada.

Provincial applicant

(2) A provincially designated agent designated in writing personally may apply in the province of designation for a warrant to intercept, by means of a surveillance device, a private communication if the private communication is to be intercepted in that province and the crime under investigation is one in respect of which proceedings may be instituted at the instance of the government of a province and conducted by or on behalf of the Attorney General of a province.

Manner of making application

129. (1) An application for a warrant shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

(2) An application in writing shall be in the prescribed form.

Place of application

130. An application for a warrant shall be made to a judge of the province in which the private communication is to be intercepted.

Presentation of application

131. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation, and the facts and circumstances of that crime and their seriousness;

(*d*) the type of private communication to be intercepted;

(*e*) a general description of the means of interception to be used;

(*f*) the names of all persons whose private communications are to be intercepted or, if the names cannot be ascertained, a description or other means of identifying those persons individually or, if that is not possible, the class of those unidentified persons;

(*g*) the places, if known, at which the interception would occur;

(*h*) whether any privileged communications are likely to be intercepted;

(*i*) the grounds for believing that the interception may assist in the investigation of the crime;

(*j*) the period for which the warrant is requested;

(*k*) any other investigative method that has been tried without success or, if no other method has been tried, the reasons why no other method is likely to succeed or why the urgency is such that no other method is practicable;

(*l*) a list of any previous applications for a warrant in respect of the same crime and the same persons or class of persons indicating the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted;

(*m*) if the applicant requests authority to make a surreptitious entry to install, service or remove a surveillance device,

(i) why the entry is required and why other less intrusive means of installation, service or removal are unlikely to be effective, and

(ii) the place where the entry would be made; and

(*n*) if the applicant requests an assistance order referred to in section 139, the nature of the assistance required.

Procedure on hearing application

132. Sections 10 and 11 apply to an application for a warrant under this Division.

2. Issuance of Warrant

Grounds for issuing warrant

133. (1) A judge may, on application, issue a warrant authorizing the interception of a private communication by means of a surveillance device if the judge is satisfied that

(*a*) there are reasonable grounds to believe that

(i) a crime punishable by more than two years' imprisonment, or a conspiracy to commit, an attempt to commit, a furthering of or an attempted furthering of such a crime, has been or is being committed, and

(ii) the interception of the private communication will assist in the investigation of the crime;

(*b*) other investigative methods have been tried without success, no other method is likely to succeed or the urgency is such that no other method is practicable; and

(*c*) it would be in the best interests of the administration of justice, having regard to the seriousness of the facts and circumstances of the crime under investigation.

Undercover investigation

(2) The judge shall not refuse to issue a warrant on the basis that a peace officer or an agent of a peace officer will be a party to the communication.

Office of solicitor

134. A judge shall not issue a warrant to intercept a private communication at the office of a solicitor or any place ordinarily used by a solicitor for the purpose of consulting with clients, unless the judge is satisfied, in addition, that there are reasonable grounds to believe that the solicitor or any of the solicitor's partners, associates or employees

(*a*) is or is about to become a participant in the crime under investigation; or

(*b*) is the victim of the crime under investigation and has requested that the interception be made.

Home of solicitor

135. A judge shall not issue a warrant to intercept a private communication at the home of a solicitor, unless the judge is satisfied, in addition, that there are reasonable grounds to believe that the solicitor or any member of the solicitor's household

(*a*) is or is about to become a participant in the crime under investigation; or

(*b*) is the victim of the crime under investigation and has requested that the interception be made.

Unknown places

136. A judge shall not issue a warrant to intercept private communications at unknown places, unless the person whose private communications are to be intercepted is individually identified in the warrant.

Unidentified persons

137. A judge shall not issue a warrant to intercept private communications of persons who are not individually identified, unless the places at which the interception is to occur are identified in the warrant.

Authority to make surreptitious entry

138. At the request of the applicant, the judge may, by the warrant, grant authority to enter any place surreptitiously to install, service or remove a surveillance device, if the judge is satisfied there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective.

Assistance order

139. (1) When issuing a warrant, the judge may, at the request of the applicant, make an order directing any person engaged in providing a communication or telecommunication service, or the owner of or any person engaged in managing or taking care of the place in which a surveillance device is to be installed, to give such assistance as the judge may specify in the order.

Compensation

(2) The order may provide that reasonable compensation be paid for the assistance.

Form of order

(3) The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

(4) The order shall be directed to a named person or organization and shall disclose

(*a*) the applicant's name;

(*b*) the nature of the assistance to be given;

(*c*) the date and place of issuance; and

(*d*) the name and jurisdiction of the judge.

Warning in order

(5) The order shall contain a warning that failure to obey the order is a crime under paragraph 121(*b*) of the proposed Criminal Code (LRC) (disobeying a court order).

Imposition of conditions to minimize intrusion

140. A judge who issues a warrant may include in it any of the following conditions:

(*a*) that the interception be monitored by a person at all times;

(*b*) that, so far as is reasonably practicable, only the communications of persons individually identified or encompassed by a general interception clause in the warrant be intercepted;

(*c*) where private communications at a telephone available to the public will be intercepted, that the interception be monitored by a person at all times and that, where practicable, the telephone be observed at all times;

(*d*) that reasonable steps be taken not to intercept communications between persons in such privileged or confidential relationships as may be specified by the judge;

(*e*) that the interception stop when the objective of the investigation, as disclosed in the application for the warrant, is attained;

(*f*) where private communications on a party line will be intercepted, that the interception be monitored by a person at all times;

(*g*) where authority is given to enter a place surreptitiously, that the entry be made or not be made by certain means;

(*h*) that periodic reports be made to the judge identifying any person who is not individually identified in the warrant but whose private communications are being intercepted;

(*i*) that periodic reports be made to the judge identifying any place that is not identified in the warrant but where interceptions are occurring;

(*j*) that any application for a renewal of the warrant, for an amendment to the warrant or for a separate warrant in respect of the same investigation be made to the same judge who issued the original warrant; and

(*k*) any other conditions that the judge considers advisable to minimize interceptions that would not assist in the investigation of the crime.

Form of warrant

141. A warrant shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of warrant

142. The warrant shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation;

(*c*) the type of private communication that may be intercepted;

(*d*) a general description of the means of interception that may be used;

(*e*) as precisely as possible, the persons or class of persons whose private communications may be intercepted;

(*f*) the places, if known, at which the interception may occur;

(*g*) if authority to make a surreptitious entry is being granted, the place that may be entered;

(*h*) any conditions imposed by the judge;

(*i*) the date the warrant expires;

(*j*) the date and place of issuance; and

(*k*) the name and jurisdiction of the judge.

Expiration period

143. The judge shall set out in the warrant an expiry date not more than sixty days after the date of issue.

3. Renewal of Warrant

Applicant

144. An application to renew a warrant may be made by the designated agent who applied for the warrant or any other agent of the same designation.

Manner of making application

145. (1) The application shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

(2) An application in writing shall be in the prescribed form.

Time and place of application

146. An application to renew a warrant shall be made before the warrant expires, and shall be made to a judge of the province in which the warrant was issued.

Presentation of application

147. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the reasons for requesting a renewal of the warrant;

(*e*) full particulars, including dates and times, of any interception made or attempted under the warrant;

(*f*) any information that was obtained by interception under the warrant;

(*g*) a list of any previous applications to renew the warrant, including the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted;

(*h*) whether the warrant being renewed contains a general interception clause;

(*i*) whether an application to amend the warrant is being brought, together with the application for a renewal, to add new persons whose private communications may be intercepted or new places at which interceptions may occur;

(*j*) the period for which the renewal is requested; and

(*k*) if the applicant requests that the warrant be renewed for a period exceeding thirty days, the grounds for believing that the longer period is necessary.

Procedure on hearing application

148. Sections 10 and 11 apply to an application to renew a warrant.

Grounds for renewal

149. A judge who, on application, is satisfied that the grounds on which a warrant was issued still exist may renew the warrant by endorsing it, signing the endorsement and indicating the date and place of renewal.

Restriction on renewal of warrant containing general interception clause

150. A warrant that contains a general interception clause may not be renewed unless the warrant is amended, in accordance with the amendment procedure, to specify the identities of persons or locations of places previously encompassed by the clause but since ascertained.

Expiration period

151. (1) A warrant expires thirty days after the date of renewal.

Extending expiration period

(2) A judge who is satisfied that the investigation will probably take more than thirty days to complete and that it would be impracticable for the applicant to apply for a further renewal may renew the warrant for a period of more than thirty days but not more than sixty days after the date of renewal.

4. Amendment of Warrant

Applicant

152. An application to amend a warrant may be made by the designated agent who applied for the warrant or any other agent of the same designation.

Manner of making application

153. (1) The application shall be made unilaterally, in person and in private, orally or in writing.

Form of written application

(2) An application in writing shall be in the prescribed form.

Time and place of application

154. An application to amend a warrant shall be made before the warrant expires, and shall be made to a judge of the province in which the warrant was issued.

Presentation of application

155. (1) The application shall be presented by the applicant, and its contents shall be sworn by a peace officer.

Contents of application

(2) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation;

(*d*) the amendment being requested;

(*e*) the reasons for requesting the amendment;

(*f*) full particulars, including dates and times, of any interception made or attempted under the warrant;

(*g*) any information that was obtained by interception under the warrant; and

(*h*) a list of any previous applications to amend the warrant, including the date each application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted.

Procedure on hearing application

156. Sections 10 and 11 apply to an application to amend a warrant.

Grounds for and nature of amendment

157. A judge may, on application, amend a warrant to provide for any of the following if the judge is satisfied that the amendment relates to the investigation of the same crime disclosed in the warrant:

(*a*) a more accurate description of individually identified persons whose private communications may be intercepted under the warrant;

(*b*) the identity of persons, previously encompassed by a general interception clause but since ascertained, whose private communications may be intercepted under the warrant;

(*c*) the places, previously encompassed by a general interception clause but since ascertained, at which the interception may occur under the warrant;

(*d*) the addition of new persons whose private communications may be intercepted or new places at which interceptions may occur, if the judge is satisfied, in addition, that the grounds for issuing a warrant to intercept private communications of such persons or at such places exist;

(*e*) the deletion of persons whose private communications may be intercepted or places at which the interception may occur;

(*f*) authority to enter a place surreptitiously to install, service or remove a surveillance device, if the judge is satisfied, in addition, that there are reasonable grounds to believe that less intrusive means of installation, service or removal are unlikely to be effective;

(*g*) a change in the means of interception that may be used;

(*h*) changes in the conditions of the warrant; and

(*i*) any condition that a judge may include when issuing a warrant.

Making the amendment

158. A judge may amend a warrant by endorsing an amendment on it and signing the endorsement, or by signing an amendment and appending it to the warrant, and indicating the date and place of the amendment.

Assistance order

159. On an application to amend a warrant, a judge may, at the request of the applicant, make an assistance order pursuant to section 139.

DIVISION II
WARRANT UNDER URGENT CIRCUMSTANCES

Grounds for urgent warrant

160. (1) A judge of the province in which a private communication is to be intercepted who is designated by the Chief Justice of the Criminal Court to hear applications for warrants in urgent circumstances may, on application, issue a warrant authorizing the interception, by means of a surveillance device, of the private communication if the judge is satisfied that the grounds for issuing a warrant exist and that there are reasonable grounds to believe that the warrant is urgently required and cannot with reasonable diligence be obtained under Division I.

Additional ground if application by telephone

(2) The judge may issue the warrant on an application made by telephone or other means of telecommunication if the judge is satisfied, in addition, that there are reasonable grounds to believe that it is impracticable for the applicant to appear in person.

Federal applicant

161. (1) A federally designated peace officer designated in writing may make the application if the crime under investigation is one in respect of which proceedings may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada.

Provincial applicant

(2) A provincially designated peace officer designated in writing may make the application in the province of designation if the private communication is to be intercepted in that province and the crime under investigation is one in respect of which proceedings may be instituted at the instance of the government of a province and conducted by or on behalf of the Attorney General of a province.

Application in person or by telephone

162. (1) The application shall be made in person or, if it is impracticable for the applicant to appear in person, by telephone or other means of telecommunication.

Manner of making application

(2) The application shall be made orally, unilaterally, in private and on oath.

Additional contents of application

163. In addition to disclosing the information required to be disclosed in an application for a warrant under subsection 131(2), the application shall disclose

(*a*) the time the application is made;

(*b*) the grounds for believing that the warrant is urgently required and cannot with reasonable diligence be obtained under Division I; and

(*c*) in the case of an application made by telephone or other means of telecommunication, the circumstances that make it impracticable for the applicant to appear in person.

Application of general rules for warrants

164. Sections 10 to 12 apply to an application for a warrant under this Division and sections 134 to 142 apply to the issuance of a warrant.

Expiration period

165. (1) The judge shall set out in the warrant an expiry date and time not more than thirty-six hours after the time of issue.

Renewal or amendment of warrant

(2) The warrant may not be renewed or amended.

CHAPTER IV
CONFIDENTIALITY OF MATERIALS AND OBSCURING INFORMATION

Confidential documents

166. The following material is confidential:

(*a*) a warrant;

(*b*) an order extending the time for giving notice of an interception or a surreptitious entry;

(*c*) an application to issue, renew or amend the warrant or to make the order extending time, or the record of the application and its transcription;

(*d*) any evidence received by a judge when hearing the application, and the record of any oral evidence received and its transcription;

(*e*) an assistance order made pursuant to section 13?, and

(*f*) an order to obscure information.

Order to obscure information

167. (1) A judge may, on the request of an applicant at the time an application to issue, renew or amend a warrant or to make an order extending the time for giving notice of an interception or a surreptitious entry is made, obscure or order obscured any information contained in confidential material.

Grounds for obscuring information

(2) The judge may obscure the information or order it obscured if the judge is satisfied that the information, if revealed, would

(*a*) pose a risk to anyone's safety;

(*b*) frustrate an ongoing police investigation;

(*c*) reveal particular intelligence gathering techniques that ought to remain secret; or

(*d*) cause substantial prejudice to the interests of innocent persons.

Form and contents of order

168. An order to obscure information shall be in writing, in the prescribed form and signed by the judge who issues it, and shall disclose

(*a*) the applicant's name;

(*b*) the information to be obscured;

(*c*) the date and place of issuance; and

(*d*) the name and jurisdiction of the judge.

Copy of material

169. (1) Where information is to be obscured, a copy shall be made of the material that contains the information.

Obscuring information on copy

(2) The information shall be obscured on the copy, leaving the information on the original material unobscured.

Sealed packet

170. (1) Immediately after determining an application to issue, renew or amend a warrant or to make an order extending the time for giving notice of an interception or surreptitious entry, the judge shall seal in a packet

(*a*) the original of all the confidential material; and

(*b*) the copy of any material on which information has been obscured.

Custody of packet

(2) The sealed packet shall be kept in the custody of the court in a place, specified by the judge, to which the public has no access.

Copy of packet

171. The applicant may keep a copy of all the materials contained in the sealed packet.

Prohibition

172. No one shall open or remove the contents of a sealed packet except as directed by a judge.

Examining contents on hearing other applications

173. A judge may have the sealed packet opened and may examine the contents in dealing with any application if the judge considers it necessary to do so in order to determine the application.

Opening packet to prepare transcript

174. A judge may direct that the sealed packet be opened and the contents removed to have a transcript prepared of any oral record contained in the packet.

CHAPTER V
INTERCEPTING AND ENTERING

Person who may intercept

175. Where the interception of a private communication is authorized under a warrant, the communication may be intercepted by

(*a*) a federally designated person, if the application for the warrant was made by a federally designated applicant;

(*b*) a provincially designated person, if the application for the warrant was made by a provincially designated applicant; or

(*c*) a person who is a party to the communication.

Repair and compensation for entry

176. Where, as a result of an entry to install, service or remove a surveillance device, property is damaged, the government or agency whose servant or agent caused the damage shall take prompt and reasonable steps to repair it and, after notice of the entry is given, compensate the owner of the property for any unrepaired damage.

CHAPTER VI
NOTIFICATION OF INTERCEPTION AND SURREPTITIOUS ENTRY

DIVISION I
GIVING NOTICE

Written notice

177. The Solicitor General of Canada or the provincial minister on whose behalf an application for a warrant was made shall notify in writing

(*a*) any person who was the object of an interception made pursuant to the warrant unless the person has already been given notice of an intention to tender evidence of the interception; and

(*b*) any person whose place was entered surreptitiously pursuant to the warrant.

Time of notice

178. The notice shall be given within ninety days after the warrant expires.

Contents of notice of interception

179. (1) A notice of an interception shall disclose the date of the interception, and shall be accompanied by a copy of the warrant.

Contents of notice of entry

(2) A notice of a surreptitious entry shall disclose the place that was entered and the date of the entry, and shall be accompanied by a copy of the warrant.

Service of notice

180. (1) Service of the notice shall be made and proof of its service shall be given in accordance with such regulations as the Governor in Council may make for the purpose.

Inability to serve notice

(2) Where the notice cannot be served, a peace officer with knowledge of the facts shall provide the court with an affidavit setting out the reason why the notice was not served and the efforts that were made to locate the person.

DIVISION II
APPLICATION TO EXTEND TIME FOR NOTICE

Power to extend time of notice

181. (1) A judge who, on application, is satisfied that

(*a*) the investigation of the crime to which a warrant relates, or a subsequent investigation of another crime referred to in subparagraph 133(1)(*a*)(i) commenced as a result of the earlier investigation, is continuing, and

(*b*) it would be in the best interests of the administration of justice

may order that the time for giving notice of an interception or surreptitious entry be extended.

Successive extensions

(2) A judge may grant more than one extension of time as long as the total extra time granted does not exceed three years.

Applicant

182. An application for extension may be made by the Solicitor General of Canada or the provincial minister who is required to give notice of the interception or surreptitious entry.

Manner of making application

183. (1) The application shall be made to a judge unilaterally, in person and in private, orally or in writing, before the ninety-day period or an extension of that period ends and shall be supported by an affidavit of a peace officer.

Contents of affidavit

(2) The affidavit shall disclose

(*a*) the facts relied on to justify the granting of an extension; and

(*b*) a list of any previous applications for extensions in respect of the same warrant indicating the date each previous application was made, the name of the judge who heard each application and whether each application was withdrawn, refused or granted.

CHAPTER VII
APPLICATION FOR DETAILS OF INTERCEPTION

Applicant and notice

184. An accused who discovers that a private communication to which the accused was a party has been intercepted by means of a surveillance device may apply in writing to a judge on two clear

days' notice to the prosecutor for an order requiring the prosecutor to disclose details of the intercepted private communication.

Contents of application

185. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime with which the applicant is charged;

(*d*) the nature of the order requested; and

(*e*) the reasons for requesting the order.

Affidavit in support

(2) The application shall be supported by an affidavit.

Service of notice

186. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on the prosecutor.

Hearing evidence

187. A judge to whom an application is made may receive evidence, including evidence by affidavit.

Service of affidavit

188. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on the prosecutor.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

189. The evidence of any person shall be on oath.

Recording evidence

190. (1) Any oral evidence heard by the judge shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of oral evidence shall be identified as to time, date and contents.

Certification of transcript

(3) Any transcription of the record of oral evidence shall be certified as to time, date and accuracy.

Disclosure of further details

191. A judge who, on application, is satisfied that details of an intercepted private communication are relevant to the crime with which the applicant is charged and are necessary for the

applicant to make full answer and defence may order the prosecutor to disclose such details as can be ascertained by due diligence.

Form of order

192. The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

193. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime with which the applicant is charged;

(*c*) the decision of the judge;

(*d*) the date and place of issuance; and

(*e*) the name and jurisdiction of the judge.

CHAPTER VIII
PROCEDURE FOR TENDERING EVIDENCE AND OBTAINING ADDITIONAL INFORMATION

DIVISION I
NOTICE OF INTENT TO TENDER EVIDENCE

Notice

194. (1) A prosecutor who intends to tender evidence of a private communication that was intercepted by means of a surveillance device shall give the accused reasonable notice of that intention.

Accompanying documents

(2) The notice shall contain

(*a*) a transcript of any private communication that will be tendered in the form of a recording, or a statement giving full particulars of any private communication that will be tendered by a witness;

(*b*) the time, date and place of the private communication and the names of all parties to it, if known; and

(*c*) if the private communication was intercepted pursuant to a warrant, a copy of the warrant and any material relating to an application to issue, renew or amend the warrant.

DIVISION II
APPLICATION FOR FURTHER PARTICULARS

Applicant and notice

195. An accused who has received notice of the prosecutor's intention to tender evidence of an intercepted private communication may apply in writing to a judge on two clear days' notice to the prosecutor for further particulars of the private communication.

Order for further particulars

196. A judge who, on application, is satisfied that further particulars are necessary for the accused to make full answer and defence may order that further particulars be given.

Additional procedures

197. Sections 185 to 190, 192 and 193 apply to this application.

DIVISION III
APPLICATION TO REVEAL OBSCURED INFORMATION

Applicant

198. An accused who has received notice of the prosecutor's intention to tender evidence of an intercepted private communication may apply in writing for an order to reveal information obscured in the material that accompanied the notice.

Manner of making application

199. The application shall be made in person to a judge on two clear days' notice to the prosecutor.

Hearing the application

200. On hearing the application, the judge shall examine the material contained in the sealed packet in the presence of the accused and the prosecutor without allowing the accused to examine it.

Order to reveal information

201. A judge who, on application, is satisfied that information that has been obscured in any material given to the accused relating to the warrant is necessary for the accused to make full answer and defence may order that the information be revealed to the accused.

Additional procedures

202. Sections 185 to 190, 192 and 193 apply to this application.

Appeal

203. The judge's decision may be appealed to a judge of the court of appeal.

CHAPTER IX
EVIDENTIARY RULES

Affidavit evidence

204. Evidence of the following matters may be tendered by affidavit:

(*a*) the times when and the places at which a private communication was intercepted;

(*b*) the means by which a private communication was intercepted;

(*c*) the history of the custody of any recording of an intercepted private communication; and

(*d*) service of a notice of intention to tender evidence.

Status of applicant

205. The recital in a warrant that a person is a designated agent or a designated peace officer is, in the absence of evidence to the contrary, proof of that fact.

Absence of original warrant

206. In any proceeding in which it is material for a court to be satisfied that an interception of a private communication was authorized by a warrant issued on application made by telephone or other means of telecommunication, the absence of the original warrant is, in the absence of evidence to the contrary, proof that the interception was not authorized by a warrant.

CHAPTER X
ANNUAL REPORT

Preparation of report

207. (1) The Solicitor General of Canada and each provincial minister shall, as soon as possible after the end of each year, prepare a report on the electronic surveillance activity conducted on each of their behalf during the year.

Laying before Parliament

(2) The Solicitor General of Canada shall have the report laid before Parliament without delay.

Publication

(3) Each provincial minister shall publish the report or otherwise make it available to the public without delay.

Contents of annual reports

208. The annual reports shall set out

(*a*) the number of applications for warrants, renewals and amendments, listed separately;

(*b*) the number of warrants, renewals and amendments that were issued, refused or issued with judicially-imposed conditions;

(*c*) the number of persons identified in warrants who were prosecuted by the Attorney General of Canada or of the province, as a result of interceptions made under warrants, for

(i) a crime specified in the warrant,

(ii) a crime referred to in subparagraph 133(1)(*a*)(i) that was not specified in the warrant, and

(iii) a crime other than a crime referred to in subparagraph 133(1)(*a*)(i);

(*d*) the number of persons not identified in warrants who, because of information obtained from intercepted private communications made under warrants, were prosecuted by the Attorney General of Canada or of the province for

(i) a crime specified in a warrant,

(ii) a crime referred to in subparagraph 133(1)(*a*)(i) that was not specified in a warrant, and

(iii) a crime other than a crime referred to in subparagraph 133(1)(*a*)(i);

(*e*) the average period for which warrants and renewals were issued;

(*f*) the number of warrants that, when renewed, were valid for periods of

(i) sixty to one hundred and nineteen days,

(ii) one hundred and twenty to one hundred and seventy-nine days,

(iii) one hundred and eighty to two hundred and thirty-nine days, and

(iv) two hundred and forty days or more;

(*g*) the crimes specified in warrants and the number of warrants, renewals and amendments issued for each crime;

(*h*) a description of all classes of places specified in warrants and the number of warrants issued for each class of place;

(*i*) a general description of the means of interception specified in warrants;

(*j*) the number of persons arrested because of information obtained from a private communication intercepted under a warrant;

(*k*) the number of notices of interception of private communications or of surreptitious entry given;

(*l*) the number of criminal proceedings, commenced by the Attorney General of Canada, or of the province, in which private communications intercepted under a warrant were tendered as evidence and the number of those proceedings where the accused was convicted;

(*m*) the number of investigations in which information obtained from a private communication intercepted under a warrant was used, although the private communication was not adduced in evidence in criminal proceedings;

(*n*) the number of prosecutions commenced against officers or servants of Her Majesty for crimes under section 66 (interception of private communications), 67 (entry to install instrument) or 68 (disclosure of private communications) of the proposed Criminal Code (LRC); and

(*o*) a general assessment of the importance of the interception of private communications for the investigation, prevention and prosecution of crimes in Canada or the province.

PART SIX

DISPOSITION OF SEIZED THINGS

CHAPTER I
INTERPRETATION

Application of Part

209. (1) This Part applies to anything seized under Part Two (*Search and Seizure*) as an object of seizure or seized under Part Three (*Obtaining Forensic Evidence*) as an object of seizure that was removed from inside a person's body.

Exception if privilege claimed

(2) If a claim of privilege is made in respect of the seized thing or information contained in it, the seized thing shall be dealt with in accordance with Part Seven (*Privilege in Relation to Seized Things*).

CHAPTER II
DUTIES OF PEACE OFFICER ON SEIZURE

DIVISION I
INVENTORY OF SEIZED THINGS

Preparation and offer of inventory

210. (1) A peace officer shall, at the time of seizure or as soon as practicable after the seizure,

(*a*) prepare and sign an inventory of any seized things that describes them with reasonable particularity; and

(*b*) offer to provide a copy of the inventory to any person who was in apparent possession of the seized things at the time of the seizure, and shall, at the person's request, provide a copy of the inventory.

Inventory for copied information

(2) If a copy of information contained in a seized thing is taken by a peace officer, the inventory shall indicate that fact.

Posting copy of inventory

(3) If no one was in apparent possession of the seized things, the peace officer may post a copy of the inventory where the seizure was made.

Copy to person with ownership or possessory interest

(4) A peace officer who seizes anything shall, where practicable, offer to provide a copy of the inventory to any other person who the officer believes has an ownership or a possessory interest in the seized thing and shall, at the person's request, provide a copy of the inventory.

DIVISION II
RETURN OF SEIZED THINGS BY PEACE OFFICER

Return to person lawfully entitled to possession

211. (1) A peace officer may, before a post-seizure report is given to a justice, return a seized thing to the person who is believed to be lawfully entitled to possession if, to the knowledge of the peace officer, there is no dispute as to possession and the thing is no longer required for investigation or use in any proceeding.

Receipt

(2) The officer shall get a receipt for anything returned.

DIVISION III
POST-SEIZURE REPORT

Preparation of report

212. (1) A peace officer shall prepare a post-seizure report for anything that was seized and not returned.

Contents of report

(2) The post seizure report shall disclose

(*a*) the time and place of seizure;

(*b*) the name of the officer who made the seizure and the name of the police force or other organization that the officer acted for when making the seizure;

(*c*) the name of any person who was given a copy of the inventory;

(*d*) where anything not referred to in a search warrant was seized in the course of executing the warrant, or where anything was seized without a warrant, the reasons for seizing it;

(*e*) the names of any persons who, to the officer's knowledge, may have an ownership or a possessory interest in anything seized; and

(*f*) where the search was carried out pursuant to a warrant issued for more than one object of seizure, and not all of the objects of seizure were searched for, the reasons why a search was not carried out for each object of seizure.

Inventory and receipt to be attached

(3) The peace officer shall attach to the report the inventory of seized things and the receipt for anything that was returned.

Return of post-seizure report

213. (1) A post-seizure report shall be given, as soon as practicable after the seizure, to a justice in the judicial district in which the seizure was made.

Receipt and filing of post-seizure report

(2) The justice who receives the post-seizure report shall have it filed with the clerk of the court for the judicial district in which the seizure was made.

CHAPTER III
CUSTODY AND DISPOSAL OF SEIZED THINGS

DIVISION I
GENERAL PROVISIONS DEALING WITH ORDERS

1. Making an Application

Manner of making application

214. An application for an order shall be made in writing to a justice in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

Contents of application

215. (1) An application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian;

(*g*) the nature of the order requested;

(*h*) the reasons for requesting the order; and

(*i*) any additional information required by this Part for the application.

Affidavit in support

(2) The application shall be supported by an affidavit.

Notice of application

216. A notice setting out the time, date and place the application is to be heard shall be served, together with the application and the supporting affidavit, on all parties to whom notice is required to be given.

Transferring file for hearing

217. If an application is brought in a judicial district other than the judicial district in which the post-seizure report is filed, the clerk of the court for the judicial district in which the post-seizure report is filed shall, on the written request of the applicant, have the post-seizure report and all accompanying material transferred to the clerk of the court for the judicial district in which the application is to be heard.

2. The Hearing

Power of justice

218. A justice to whom an application is made or who is authorized to make an order without an application being made may, in determining whether to make an order,

(*a*) compel the attendance of, and question, the custodian;

(*b*) examine a seized thing or require it to be produced for examination; and

(*c*) receive evidence, including evidence by affidavit.

Service of affidavit evidence

219. (1) Where an affidavit is to be tendered as evidence, the affidavit shall be served, within a reasonable time before the application is to be heard, on all parties who received notice of the application.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Evidence on oath

220. The evidence of any person shall be on oath.

Recording evidence

221. (1) Any oral evidence heard by the justice shall be recorded verbatim, either in writing or by electronic means.

Identification of record

(2) The record of oral evidence shall be identified as to time, date and contents.

Certification of transcription

(3) Any transcription of the record of oral evidence shall be certified as to time, date and accuracy.

3. Issuance of Order

Form of order

222. An order shall be in writing, in the prescribed form and signed by the justice who issues it.

Contents of order

223. An order shall disclose

(*a*) the applicant's name if the order is made on application;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the justice and any conditions imposed;

(*g*) the date and place of issuance;

(*h*) the name and jurisdiction of the justice; and

(*i*) any additional information required by this Part for the order.

4. Filing

Filing application, evidence, order

224. (1) The justice shall, as soon as practicable after the hearing, have the following filed with the clerk of the court for the judicial district in which the post-seizure report was filed:

(*a*) the notice of the application;

(*b*) the application;

(*c*) the record of any oral evidence heard by the justice or its transcription;

(*d*) any other evidence received by the justice; and

(*e*) if an order is issued, the original of the order.

Return of material

(2) If the post-seizure report and any accompanying material were transferred for a hearing from the judicial district in which they were filed, the justice shall have them returned after the hearing.

5. Changing Place of Application

Order changing place of application

225. (1) Where an application is filed and notice given, the justice before whom the application is to be brought may, on separate application, order that the application be transferred to and heard, or that a new application be made, in another judicial

district if the justice is satisfied that it would be in the best interests of justice, having regard to the interest of the witnesses and the parties.

Different judicial districts

(2) The justice may order that the application be transferred to or that a new application be made in the judicial district in which the post-seizure report was filed, the thing is in custody or the charge in relation to which the thing is being held was laid.

Application for changing place of application

226. An application for change of place may be made by any person who received notice of the application for which a change of place is requested.

Notice

227. The application shall be made on three clear days' notice to

(*a*) the person who made the application for which a change of place is requested; and

(*b*) anyone else who received notice of that application.

Additional contents of application

228. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the reasons for believing that a change of place for the application would be in the best interests of justice, having regard to the interest of the witnesses and the parties.

Transferring file

229. A justice who orders that an application be transferred to or made in another judicial district shall have the file transferred to the clerk of the court for that judicial district.

DIVISION II
PRESERVATION AND SAFEGUARDING

Custodian

230. A peace officer who seizes anything and does not return it shall act as its custodian by taking steps to ensure its preservation and safeguarding.

Entrusting seized thing to another

231. The custodian may entrust a seized thing to any person, including a person from whom it was seized, on such reasonable conditions as are consistent with its preservation and safeguarding.

Order on application

232. A justice may, on application, make an order for the preservation and safeguarding of a seized thing, including an order substituting or adding custodians.

Applicant

233. An application may be made by a peace officer, the accused, the prosecutor or any person who claims an ownership or a possessory interest in a seized thing.

Notice by applicant

234. The applicant shall give three clear days' notice to any person who, to the knowledge of the applicant, may have an ownership or a possessory interest in the seized thing and to any other person named by the justice hearing the application.

Additional contents of application

235. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the applicant is a peace officer, the accused, the prosecutor or a person who claims an ownership or a possessory interest in the seized thing; and

(*b*) if the applicant is a person who claims an ownership or a possessory interest in the seized thing, the nature of that interest.

Order without application

236. (1) A justice who receives a post-seizure report may, without an application being made, make an order for the preservation and safeguarding of a seized thing that is the subject of the report, including an order substituting or adding custodians.

Notice by justice

(2) A justice who is considering making the order without an application being made shall give three clear days' notice of a hearing to determine the issue to the prosecutor and to any person who, to the justice's knowledge, may have an ownership or a possessory interest in the seized thing.

Additional contents of order

237. In addition to disclosing the information required by paragraphs 223(*a*) to (*h*), the order shall disclose the name of any added or substituted custodian.

DIVISION III
TESTING OR EXAMINATION

Release for analysis

238. A peace officer may have a seized thing examined, tested or analyzed, and the custodian shall release it for that purpose.

Order for release

239. A justice who, on application, is satisfied that it is necessary to do so to enable the accused to make full answer and defence may order that a seized thing be released for examination, testing or analysis, subject to any conditions that the justice considers necessary to preserve and safeguard it.

Application for release

240. The application may be made by an accused on three clear days' notice to the prosecutor.

DIVISION IV
ACCESS TO SEIZED THINGS

Asking for access

241. (1) A person who has an interest in a seized thing may ask the custodian for permission to examine it at the place of custody.

Power of custodian

(2) A custodian who believes

(*a*) that the person has an interest in the seized thing, and

(*b*) that giving permission would not frustrate an ongoing police investigation, pose a risk to anyone's safety, interfere with an ownership or a possessory interest in the seized thing or jeopardize its preservation and safeguarding

may give permission, subject to any conditions that the custodian considers necessary to preserve and safeguard the seized thing.

Asking for copies

242. (1) A person who has an interest in information contained in a seized thing that is capable of being reproduced may ask the custodian to provide copies of the information.

Power of custodian

(2) A custodian who

(*a*) believes that the person has an interest in the information,

(*b*) believes that providing copies would not frustrate an ongoing police investigation, pose a risk to anyone's safety, interfere with an ownership or a possessory interest in the

seized thing or jeopardize its preservation and safeguarding, and

(*c*) is able to provide copies of the information

may provide the copies on payment of a prescribed fee.

Order dealing with access

243. (1) A justice who, on application, is satisfied that a person should be given permission to examine a seized thing, or that a person should be provided with copies, may make an order requiring the custodian to permit the applicant to examine the seized thing or to provide copies of the information, subject to any conditions that the justice considers necessary to preserve and safeguard the seized thing.

Dispensing with fee

(2) A justice who, on application, is satisfied that the fee fixed for copies would result in financial hardship to the applicant or would be inequitable in the circumstances may make an order dispensing with the fee.

Application for access, copies, or dispensing with fee

244. An application may be made by any person who has been refused permission to examine a seized thing, who has been denied copies of information contained in a seized thing or who has been allowed copies but for whom payment of the fee would result in financial hardship or would be inequitable.

Notice

245. An application shall be made on three clear days' notice to the prosecutor.

Additional contents of application

246. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the nature of the applicant's interest in the seized thing.

DIVISION V
RELEASE OR SALE OF PERISHABLE THINGS

Order on application

247. A justice who is satisfied that a seized thing is perishable or likely to depreciate rapidly in value may, on application, order that it be

(*a*) released, with or without conditions, to its lawful possessor if there is no dispute as to the right to possession; or

(*b*) sold on such conditions as the justice directs if there is a dispute as to the right to possession.

Applicant

248. An application may be made by a peace officer, the accused, the prosecutor or any person who claims an ownership or a possessory interest in anything seized.

Notice by applicant

249. An applicant shall give one clear day's notice to any person who, to the knowledge of the applicant, may have an ownership or a possessory interest in the seized thing and to any other person named by the justice hearing the application.

Additional contents of application

250. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the applicant is a peace officer, the accused, the prosecutor or a person who claims an ownership or a possessory interest in the seized thing; and

(*b*) if the applicant is a person who claims an ownership or a possessory interest in the seized thing, the nature of that interest.

Order without application

251. (1) A justice who receives a post-seizure report and who is satisfied that a seized thing is perishable or likely to depreciate rapidly in value may, without an application being made, order that it be

(*a*) released, with or without conditions, to its lawful possessor if there is no dispute as to the right to possession; or

(*b*) sold on such conditions as the justice directs if there is a dispute as to the right to possession.

Notice by justice

(2) A justice who is considering making the order without an application being made shall give one clear day's notice of a hearing to determine the issue to the prosecutor and to any person who, to the justice's knowledge, may have an ownership or a possessory interest in the seized thing.

Proceeds of sale

252. Where a seized thing has been sold, the custodian shall deposit the proceeds of the sale in an interest-bearing account on such conditions as the justice directs.

DIVISION VI
REMOVING DANGEROUS THINGS

Duty of peace officer

253. A peace officer who believes that a seized thing poses a serious danger to public health or safety shall, as soon as practicable, remove it or have it removed to a place of safety.

Order dealing with dangerous things

254. A justice who, on application, is satisfied that a seized thing poses a serious danger to public health or safety, may order that it be destroyed or otherwise disposed of, subject to any conditions that the justice considers necessary to eliminate or alleviate the danger.

Applicant and notice

255. An application may be made by a peace officer on reasonable notice to any person who the peace officer believes may have an interest in the seized thing and to any person named by the justice hearing the application.

Preparing report

256. (1) A report confirming that the order was carried out and explaining how the seized thing was destroyed or otherwise disposed of shall be prepared and given as soon as practicable to a justice in the judicial district in which the order was issued.

Filing report

(2) The justice shall have the report filed with the clerk of the court for the judicial district in which the post-seizure report was filed.

DIVISION VII
DESTROYING THINGS POSING IMMINENT AND SERIOUS DANGER

Power of peace officer

257. A peace officer who believes on reasonable grounds that a seized thing poses an imminent and serious danger to public health or safety may destroy or otherwise dispose of it.

Notice and report

258. After the thing is destroyed or otherwise disposed of, the peace officer shall

(*a*) notify the person from whom the thing was seized and any other person who the peace officer believes has an ownership or a possessory interest in it; and

(*b*) prepare a report describing the seized thing and explaining why and how it was disposed of.

Return of report

259. (1) The report shall be given, as soon as practicable, to a justice in the judicial district in which the post-seizure report was filed.

Filing

(2) The report shall be filed with the post-seizure report.

DIVISION VIII
RESTORATION ORDERS

Restoration

260. A justice shall, on application, order that a seized thing or the proceeds of its sale be restored to the applicant if the justice is satisfied that

(*a*) there is no dispute as to the right to possession of the thing or the proceeds;

(*b*) possession by the applicant would be lawful;

(*c*) the thing or the proceeds are not subject by statute to forfeiture; and

(*d*) it is not necessary for the thing or the proceeds to be kept in custody for investigation or use in any proceeding.

Applicant

261. An application may be made by any person claiming an ownership or a possessory interest in the seized thing or in the proceeds of its sale.

Notice

262. The applicant shall give eight clear days' notice to the prosecutor, the accused, any person who, to the applicant's knowledge, may have an ownership or a possessory interest in the seized thing and any other person named by the justice.

Additional contents of application

263. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose the nature of the applicant's interest in the seized thing.

Condition

264. A justice may, as a condition to making a restoration order, require the applicant to return the seized thing when required by the court, and may impose any other conditions that the

justice considers necessary to preserve and safeguard it for investigation or use in any proceeding.

Effect of restoration order

265. A restoration order does not affect an ownership or a possessory interest in a seized thing or in the proceeds of its sale.

DIVISION IX
REPRODUCTION OF SEIZED THINGS

Photograph of seized thing

266. (1) A peace officer may have a photograph taken of a seized thing.

Admissibility of photograph

(2) The photograph, when accompanied by a certificate described in subsection 268(1), is admissible in evidence for the purpose of identifying the seized thing and has, in the absence of evidence to the contrary, the same probative force for the purpose of identification as the seized thing.

Copying information

267. (1) A peace officer may have a copy made of any information that is contained in a seized thing.

Admissibility of copy

(2) The copy of the information, when accompanied by a certificate described in subsection 268(1), is admissible in evidence and has, in the absence of evidence to the contrary, the same probative force as the information.

Certificate

268. (1) A certificate of a person stating that

(*a*) the person made a copy or took a photograph under the authority of this Division,

(*b*) the person is a peace officer or made the copy or took the photograph under the direction of a peace officer, and

(*c*) the copy or photograph is a true copy or photograph

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature of the person appearing to have signed the certificate.

Affidavit of peace officer

(2) An affidavit of a peace officer stating that

(*a*) the peace officer has seized a thing and has had custody of it from the time of seizure until a copy was made of the information contained in it or a photograph was taken of it, and

(*b*) the thing or the information was not altered in any way before the copy was made or the photograph was taken

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the affidavit without proof of the signature or official character of the person appearing to have signed it.

Power to require person to appear

(3) The court may require the person appearing to have signed a certificate or an affidavit to attend before it for examination or cross-examination about the statements contained in the certificate or the affidavit.

Notice of intention to produce photograph or copy

269. Unless the court orders otherwise, no copy, photograph, certificate or affidavit shall be received in evidence unless the prosecutor has, before the proceeding, given a copy of it, and reasonable notice of intention to produce it, to the accused.

DIVISION X
TERMINATION OF CUSTODY AND DISPOSITION

1. Period of Authorized Custody

Period of custody

270. A seized thing or the proceeds of its sale may be held in custody for ninety days after seizure.

Extension of period of custody

271. The seized thing or the proceeds may be held for a longer period if

(*a*) within ninety days after seizure

(i) proceedings have begun in which the seized thing may be required as evidence or in which the thing or the proceeds are subject by statute to forfeiture, or

(ii) an application for extension of the period of custody has been made; or

(*b*) before an extended period of custody ends, proceedings have begun or another application for extension has been made.

Custody after end of proceedings

272. The seized thing or the proceeds may be held in custody for a period no longer than thirty days after the end of all proceedings in respect of which the thing or the proceeds were detained.

2. Application for Extension of Custody

Application by prosecutor

273. (1) A justice who, on application by the prosecutor, is satisfied that a seized thing or the proceeds of its sale are required to be kept in custody because of the complex nature of the investigation may order that the period of custody be extended for further periods not exceeding ninety days each.

Application by other person

(2) A justice who, on application by a person with an interest in a seized thing, is satisfied that the seized thing is required to be kept in custody to preserve it as evidence may order that the period of custody be extended for further periods not exceeding ninety days each.

Notice

274. The applicant shall give three clear days' notice to any person who, to the applicant's knowledge, may have an ownership or a possessory interest in the seized thing or the proceeds of its sale, to the prosecutor and to any other person named by the justice.

3. Return of Seized Things

Power of prosecutor to return seized things

275. The prosecutor may have a seized thing or the proceeds of its sale returned to the person who is believed to be lawfully entitled to possession if

(*a*) the period of authorized custody has expired or the seized thing or the proceeds are no longer needed;

(*b*) to the knowledge of the prosecutor, there is no dispute as to the right to possession; and

(*c*) the seized thing or the proceeds are not subject by statute to forfeiture.

Notice

276. A prosecutor who intends to have a seized thing or the proceeds of its sale returned shall notify the custodian in writing and shall file a copy of the notice with the clerk of the court for the judicial district in which the post-seizure report is filed.

Returning seized thing

277. The custodian shall return the seized thing or the proceeds of its sale as soon as practicable after receiving the notice.

4. Disposition Order

Duty of prosecutor

278. If the prosecutor does not have a seized thing or the proceeds of its sale returned when the period of authorized custody has expired or the seized thing or the proceeds are no longer needed, the prosecutor shall apply as soon as practicable for an order to dispose of the seized thing or the proceeds.

Notice

279. The prosecutor shall give eight clear days' notice to the custodian, the accused, any person who, to the prosecutor's knowledge, may have an ownership or a possessory interest in the seized thing or the proceeds and to any other person named by the justice.

Additional contents of application

280. In addition to disclosing the information required by paragraphs 215(1)(*a*) to (*h*), the application shall disclose

(*a*) whether the period of authorized custody has expired or the seized thing or the proceeds are no longer needed;

(*b*) if the period of authorized custody has expired, the date on which it expired; and

(*c*) whether the thing or the proceeds are subject by statute to forfeiture.

Power of justice

281. The justice shall order that the thing or the proceeds be

(*a*) returned to the lawful possessor if there is no dispute as to the right to possession;

(*b*) returned to the person from whom it was seized if possession by that person is lawful and if there is a dispute as to the right to possession but no civil proceedings in respect of any possessory interest in the thing or the proceeds have been commenced;

(*c*) transferred to the custody of any court in which there are pending civil proceedings in respect of any possessory interest in the thing or the proceeds; or

(*d*) forfeited to Her Majesty, to be disposed of as the Attorney General directs, if

(i) there is no person known or claiming to be the lawful owner or possessor,

(ii) possession by the person from whom it was seized is unlawful and if there is a dispute as to the right to possession but no civil proceedings in respect of any possessory interest in the thing or the proceeds have been commenced,

(iii) the thing or the proceeds are subject by statute to forfeiture, or

(iv) the lawful owner or possessor cannot be found.

Things of negligible value

282. If the seized thing is of negligible value, the justice may order that it be destroyed or otherwise disposed of.

CHAPTER IV
APPEALS

Right to appeal

283. Any person aggrieved by a decision under section 232 (preservation and safeguarding), subsection 236(1) (preservation and safeguarding), 243(1) (access, copies) or (2) (dispensing with fee), section 254 (dangerous things) or 260 (restoration) or paragraph 281(*d*) (forfeiture) respecting anything seized or the proceeds of its sale may appeal the decision to an appeal court within thirty days after the date of the decision.

Custody after order or pending appeal

284. A seized thing or the proceeds of its sale shall not be disposed of until 30 days after an order is made pursuant to a provision referred to in section 283 or pending an appeal of any such order unless all aggrieved persons waive their right of appeal in writing or unless the thing seized poses an imminent and serious danger to public health or safety.

PART SEVEN

PRIVILEGE IN RELATION TO SEIZED THINGS

CHAPTER I
INTERPRETATION

Application of Part

285. This Part applies to anything seized under Part Two (*Search and Seizure*) as an object of seizure where a claim of privilege is made in respect of the seized thing or information contained in it.

CHAPTER II
DUTIES OF PEACE OFFICER ON SEIZURE

Inventory and post-seizure report

286. Sections 210 (inventory of seized things), 212 (preparation of post-seizure report) and 213 (return of post-seizure report) apply to the seizure of a thing that is the subject of a claim of privilege.

CHAPTER III
APPLICATION TO DETERMINE ISSUE OF PRIVILEGE

DIVISION I
MAKING AN APPLICATION

Applicant

287. A prosecutor or a person who claims to have a privilege in respect of a seized thing or information contained in it may apply to have the issue of whether a privilege exists determined.

Manner of making application

288. The application shall be made in writing within fourteen days after the date of seizure to a judge in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

Contents of application

289. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian; and

(*g*) the grounds in support of the application.

Affidavit in support

(2) The application shall be supported by an affidavit.

Notice by applicant

290. (1) Five clear days' notice of the application shall be given to the custodian and

(*a*) to the prosecutor, if the applicant is the person who claims to have a privilege; or

(*b*) to the person who claims to have a privilege, if the applicant is the prosecutor.

Contents and service of notice

(2) The notice shall set out the time, date and place the application is to be heard and shall be served together with the application and the supporting affidavit.

Production of package or information

291. (1) The custodian, on receiving notice of an application, shall produce the sealed package referred to in paragraph 53(2)(*b*) (claim of privilege during search) or the information contained in the seized thing on the date and at the time specified in the notice.

Request for directions

(2) Where it is impracticable to produce the sealed package or the information contained in the seized thing, the custodian shall request a judge in the judicial district in which the seizure was made to give directions as to the steps that should be taken to enable the thing or the information to be examined.

Application of certain provisions

292. Sections 217 (transferring file for hearing) and 225 to 229 (changing place of application) apply to an application made under this Division.

DIVISION II
HEARING THE APPLICATION

Authority and duty of judge

293. A judge shall, on application, determine whether privilege exists in respect of a seized thing or information contained in it and shall hold a hearing in private for that purpose and determine the issue within thirty days after the date of seizure.

Powers at hearing

294. At the hearing the judge may

(*a*) compel the attendance of, and question, the custodian;

(*b*) receive evidence, including evidence by affidavit; and

(*c*) if the judge considers it necessary to do so to determine whether privilege exists, examine the thing or the information or require it to be produced for examination.

Application of certain provisions

295. Sections 219 to 221 (evidence at hearing) and 224 (filing) apply to a hearing held under this Division.

Decision and reasons

296. The judge shall give reasons for the decision that contain sufficient information to indicate the basis of the decision without disclosing details of the thing or information in respect of which the privilege is claimed.

Order if privilege found to exist

297. (1) A judge who determines that a privilege exists shall order that

(*a*) the thing be resealed and delivered by the custodian to the person from whom it was seized; or

(*b*) control of the thing be delivered by the custodian to the person from whom it was seized, and, until delivery, such steps as the judge directs be taken to ensure that the thing or the information contained in it is not examined or interfered with.

Order if privilege not found

(2) A judge who determines that no privilege exists shall order the custodian to deliver the thing or control of the thing to the peace officer who seized it or to some other person named by the prosecutor, subject to any conditions that the judge considers necessary, and the thing shall be dealt with in accordance with Chapters III and IV of Part Six (*Disposition of Seized Things*).

Form of order

298. (1) The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

(2) The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the judge and any conditions imposed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the judge.

Effect of determination of privilege

299. Where a seized thing or information contained in it is determined to be privileged, it remains privileged and inadmissible in evidence unless the person who has the privilege consents to its admission in evidence or the privilege is otherwise lost.

DIVISION III
DISPOSITION IF NO APPLICATION MADE

Delivery to peace office

300. (1) If the custodian of a seized thing that is the subject of a claim of privilege has not received notice of an application to determine whether a privilege exists within fourteen days after the date of seizure, the custodian shall deliver the thing or control of the thing to the peace officer who seized it.

Disposition of seized thing

(2) The seized thing shall be dealt with in accordance with Chapters III and IV of Part Six (*Disposition of Seized Things*).

CHAPTER IV
EXAMINING INFORMATION CLAIMED TO BE PRIVILEGED

Applicant

301. A person who claims to have a privilege in respect of a seized thing or information contained in it may apply for an order permitting the applicant to examine the thing or the information and to make a copy of it.

Manner of making application

302. The application shall be made in writing, unilaterally and in private to a judge in the judicial district in which the post-seizure report was filed, the thing is in custody or a charge in relation to which the thing is being held was laid.

Contents of application

303. (1) The application shall disclose

(*a*) the applicant's name;

(*b*) the date and place the application is made;

(*c*) the crime under investigation or charged;

(*d*) a description of the seized thing that is the subject of the application;

(*e*) the date the seizure was made;

(*f*) the name of the custodian;

(*g*) the nature of the order requested; and

(*h*) the reasons for requesting the order.

Affidavit in support

(2) The application shall be supported by an affidavit.

Transferring file

304. Section 217 (transferring file for hearing) applies to an application made under this Chapter.

Powers of judge

305. (1) In determining the issue, the judge may

(*a*) compel the attendance of, and question, the custodian;

(*b*) question the applicant;

(*c*) receive evidence, including evidence by affidavit; and

(*d*) if the judge considers it necessary, examine the thing or the information or require it to be produced for examination.

Questioning deponent

(2) Where affidavit evidence is received, the deponent may be questioned on the affidavit.

Application of certain sections

306. Sections 220 (evidence on oath), 221 (record of oral evidence) and 224 (filing) apply to a hearing held under this Chapter.

Authority of judge

307. A judge may, on application, make an order permitting the applicant, in the presence of the custodian or the judge, to examine the thing or the information and to make a copy of it, subject to such conditions as the judge considers necessary to

preserve and safeguard it, if the judge is satisfied as to the sufficiency of the applicant's reasons for seeking the order.

Imposing requirements

308. If the seized thing was in a sealed package, the judge shall, in the order, require that it be resealed without alteration or damage.

Form of order

309. The order shall be in writing, in the prescribed form and signed by the judge who issues it.

Contents of order

310. The order shall disclose

(*a*) the applicant's name;

(*b*) the crime under investigation or charged;

(*c*) a description of the seized thing that is the subject of the order;

(*d*) the date the seizure was made;

(*e*) the name of the custodian;

(*f*) the decision of the judge and any conditions imposed;

(*g*) the date and place of issuance; and

(*h*) the name and jurisdiction of the judge.

CHAPTER V
APPEALS

Right to appeal

311. Any person aggrieved by a decision under section 293 (issue of privilege) may appeal the decision to an appeal court within thirty days after the date of the decision.

Custody after decision or pending appeal

312. The seized thing shall remain with the custodian, without being interfered with or examined, for thirty days after a decision on the issue of privilege is made or pending an appeal of that decision, unless all aggrieved persons waive their right to appeal in writing.

APPENDIX

Special Contributors

Advisory Panel of Judges

The Hon. Madame Justice Claire Barrette-Joncas,
Superior Court of Quebec

His Honour Judge Stephen Borins,*
District Court of Ontario

The Hon. Mr. Justice James C. Cavanagh,
Court of Queen's Bench of Alberta

The Hon. Mr. Justice William A. Craig,
Court of Appeal of British Columbia

The Hon. Mr. Justice Charles L. Dubin,
Court of Appeal of Ontario

The Hon. Judge Jean B. Falardeau,
Cour des sessions de la paix

The Hon. Judge Bernard Grenier,
Cour des sessions de la paix

The Hon. Mr. Justice Doane Hallett,
Supreme Court of Nova Scotia, Trial Division

The Hon. Mr. Justice Malachi C. Jones,
Supreme Court of Nova Scotia, Appeal Division

The Hon. Mr. Justice Fred Kaufman,
Court of Appeal of Quebec

The Hon. Mr. Justice Louis-Philippe Landry,
Superior Court of Quebec

His Honour Judge Patrick J. LeSage,*
District Court of Ontario

The Hon. Mr. Justice Angus L. Macdonald,
Supreme Court of Nova Scotia, Appeal Division

His Honour Judge Jean-Pierre Plouffe,*
Provincial Court of Quebec

The Hon. Mr. Justice Melvin L. Rothman,
Court of Appeal of Quebec

His Honour Judge André Saint-Cyr,
Tribunal de la jeunesse, Montreal

His Honour Judge Roger E. Salhany,*
District Court of Ontario

The Hon. Mr. Justice William A. Stevenson,*
Court of Appeal of Alberta

* Indicates titles at the time. They have since changed.

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The Hon. Mr. Justice André Trotier,
Superior Court of Quebec

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Madame Justice Claire Barrette-Joncas,
Superior Court of Quebec

The Hon. Mr. Justice Jean-Louis Baudouin,
Court of Appeal of Quebec

The Hon. Mr. Justice John C. Bouck,
Supreme Court of British Columbia

The Hon. Mr. Justice Jacques Ducros,
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(retired)

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* Ces documents sont épuisés mais ils peuvent être consultés dans de nombreuses bibliothèques.

RAPPORT 33

POUR UNE NOUVELLE CODIFICATION DE LA PROCÉDURE PÉNALE

VOLUME PREMIER

TITRE PREMIER

RAPPORT

POUR UNE NOUVELLE CODIFICATION DE LA PROCÉDURE PÉNALE

VOLUME PREMIER

Les pouvoirs de la police

TITRE PREMIER

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Février 1991

L'Honorable A. Kim Campbell, c.p., députée
Ministre de la Justice et
Procureure générale du Canada
Ottawa, Canada

Madame la Ministre,

Conformément aux dispositions de l'article 16 de la *Loi sur la Commission de réforme du droit*, nous avons l'honneur de vous présenter le rapport résultant des recherches effectuées par la Commission sur la procédure pénale.

Veuillez agréer, Madame la Ministre, l'assurance de notre très haute considération.

Gilles Létourneau
président

John Frecker
commissaire

La Commission

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M^e Gilles Létourneau, vice-président*
M^e Joseph Maingot, c.r., commissaire*
M^e John Frecker, commissaire
M^me la juge Michèle Rivet, commissaire*

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* Lorsque ce rapport a été approuvé, M. le juge Linden était président, M^e Létourneau était vice-président et M^me la juge Rivet était commissaire. M^e Maingot n'était plus commissaire, mais a pris part à toutes les étapes de l'élaboration du rapport. M^e Létourneau a été nommé président de la Commission le 6 juillet 1990.

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Remerciements

Au cours des travaux qui ont mené à l'élaboration du présent rapport, nous avons consulté un grand nombre de personnes provenant de toutes les régions du pays, qui ont accepté de nous faire bénéficier de leur vaste expérience dans leurs sphères d'activité respectives — police et application de la loi, enseignement du droit, exercice du droit (poursuite et défense) et magistrature. Nous tenons à remercier chacune d'entre elles pour les conseils qu'elles nous ont prodigués et nous nous devons de mentionner l'influence marquée qu'elles ont eue sur nos travaux. Il serait impossible de nommer ici tous et chacun des experts qui ont prêté leur concours à ce projet de codification; nous aimerions toutefois adresser des remerciements particuliers aux personnes dont le nom figure en annexe du présent rapport.

Nous tenons également à témoigner notre gratitude aux ministres de la Justice, aux solliciteurs généraux, ainsi qu'à leurs sous-ministres respectifs, aux députés actuels et à leurs prédécesseurs qui ont participé à nos travaux au fil des ans, pour leur encouragement et leur appui. Leur aide précieuse a permis d'atténuer certaines des faiblesses du présent rapport. Il va sans dire que les opinions formulées dans ce document ne reflètent pas nécessairement la position du Parlement ou du ministère de la Justice, ni l'opinion individuelle des personnes consultées.

Enfin, nous remercions également tous les coordonnateurs, chargés de recherche et membres du personnel qui ont contribué à ce projet.

INTRODUCTION

> Nous pourrions résumer notre conception de la procédure pénale dans les termes suivants :
>
> Il s'agit d'une procédure pénale déterminée par des règles exprimées de façon simple et claire, qui est fondée sur la recherche de l'équité comme de l'efficacité; qui, tout en favorisant la modération et la responsabilité, vise à protéger la société; et enfin, qui encourage la participation concrète des citoyens. Ces caractéristiques fondamentales forment l'essence même de nos principes.
>
> *Notre procédure pénale*[1]

On trouvera dans le présent rapport le premier titre du premier volume du code de procédure pénale proposé par la Commission de réforme du droit du Canada. Caractérisé par sa simplicité et sa cohérence, ce code se veut aussi fidèle aux sept principes directeurs qui ont orienté nos travaux de réforme depuis la création de la Commission. Ces principes, qui ont été expliqués et illustrés dans un récent rapport au Parlement intitulé *Notre procédure pénale*, sont les suivants :

1. *Le principe de l'équité : les règles de procédure devraient être équitables;*
2. *Le principe de l'efficacité : les règles de procédure devraient être efficaces;*
3. *Le principe de la clarté : les règles de procédure devraient être claires et compréhensibles;*
4. *Le principe de la modération : les règles de procédure susceptibles de porter atteinte à la liberté individuelle devraient être utilisées avec modération;*
5. *Le principe de la responsabilité : les personnes exerçant des pouvoirs en matière de procédure pénale devraient être tenues de rendre compte de la façon dont elles les exercent;*
6. *Le principe de la participation : la procédure pénale devrait permettre la participation véritable des citoyens;*
7. *Le principe de la protection : la procédure pénale devrait favoriser la protection de la société.*[2]

Il y a déjà longtemps que le Canada s'est doté d'un *Code criminel*[3]. Mais avec les années qui ont passé, les innombrables modifications effectuées à la pièce, l'utilité de ce texte est devenue problématique : les avantages de la codification ont dans une large mesure été perdus en cours de route.

Ces avantages, la Commission les a évoqués à maintes reprises[4]. Essentiellement, ils peuvent être décrits ainsi[5] :

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1. COMMISSION DE RÉFORME DU DROIT DU CANADA (ci-après CRD), *Notre procédure pénale*, Rapport n° 32, Ottawa, La Commission, 1988, p. 58.
2. *Id.*, p. 25.
3. L.R.C. (1985), ch. C-46.
4. Voir en particulier le document d'étude de la Commission intitulé *Problématique d'une codification du droit pénal canadien*, Ottawa, Information Canada, 1976.
5. F.F. STONE, «A Primer on Codification» (1955), 29 *Tul. L. Rev.* 303, pp. 307-308.

(1) Le recours à la codification permet d'aborder avec ordre et méthode la multitude des concepts et idées juridiques, de façon à présenter le droit comme un tout homogène et cohérent, et non comme une série de propositions isolées.

(2) La méthode de la codification suppose que l'on fasse le point sur les textes existants; elle nécessite donc l'examen des idées qui ont cours, non seulement dans l'État intéressé, mais aussi dans tous les autres États civilisés.

(3) Elle a pour effet de mettre un terme à l'incertitude du droit, la totalité des règles applicables se trouvant réunies dans un même ouvrage.

(4) La codification rend la loi plus accessible au citoyen moyen.

(5) Ceux qui ont pour mission de commenter le droit ont la tâche plus facile, car ils disposent d'un corpus officiel pour effectuer leurs recherches.

Si l'on voulait résumer ces avantages en quelques mots, on pourrait retenir les suivants : accessibilité, intelligibilité, cohérence, certitude[6].

En vérité, les avantages de la codification devraient ressortir de tout texte législatif digne de ce nom : le législateur devrait toujours viser une clarté et une cohérence optimales.

Essentiellement, la codification donne la possibilité de revêtir le droit pénal d'une plus grande clarté, d'une plus grande logique. Elle atténue en outre la nécessité de répondre de façon ponctuelle aux problèmes appelant des choix sociaux et réduit le risque de donner une rigidité excessive à la loi écrite. Par ailleurs, le code n'est pas un système fermé, que ce soit sur le plan de la forme ou sur le plan du fond. La codification donne en effet le signal d'un processus d'interprétation continu qui, au bout du compte, doit favoriser l'exactitude de la formulation du droit[7].

L'adoption de l'actuel *Code criminel* canadien remonte à 1892. Les dispositions de fond en sont dans une large mesure l'œuvre du codificateur anglais, Sir James Stephen. Quant aux règles de procédure, elles étaient au départ conçues spécialement pour le Canada, à bien des chapitres. Si, pour l'époque, le *Code criminel* canadien est une magnifique réalisation, son contenu laisse maintenant à désirer. Comme le soulignait la Commission dans le rapport n° 31, *Pour une nouvelle codification du droit pénal*, le Code actuel présente bien des défauts :

> L'agencement des dispositions laisse à désirer. Le langage est archaïque et les règles sont difficiles à comprendre. Le *Code criminel* comporte des lacunes, dont certaines ont dû être comblées par les tribunaux. Il contient des dispositions désuètes. Il étend à outrance le domaine strict du droit pénal, et il néglige certains des graves problèmes actuels. Au surplus, il se peut fort bien que quelques-unes de ses dispositions contreviennent à la *Charte canadienne des droits et libertés*[8].

6. THE LAW COMMISSION (Grande-Bretagne), *Codification of the Criminal Law*, Londres, HMSO, 1985, p. 17.

7. G. LÉTOURNEAU et S.A. COHEN, *The Merits and Limitations of Codification: A Canadian Perspective*, communication présentée à la Conférence internationale sur la réforme du droit pénal, *Inns of Court*, Londres, 27 juillet 1987.

8. CRD, *Pour une nouvelle codification du droit pénal — édition révisée et augmentée*, Rapport n° 31, Ottawa, La Commission, 1987, p. 1.

Qui plus est, les dispositions relatives au fond, à la procédure et à la preuve se trouvent dispersées dans le Code, ce qui ajoute encore à sa complexité et à son incohérence.

La Commission s'est engagée à promouvoir une meilleure compréhension des règles qui nous régissent, en favorisant, pour la réforme, une approche cohérente et fondée sur des principes bien établis. Cette préoccupation, dans le présent volume, s'exprime notamment par une démarcation entre les éléments fondamentaux du droit pénal législatif — à savoir, les règles de procédure, les règles de fond et les règles de preuve.

La Commission a déjà publié un projet de code de la preuve[9] et, en 1987, le rapport n° 31 intitulé *Pour une nouvelle codification du droit pénal*, où l'on trouve son projet de code pénal. Ce dernier exprimait sous une forme législative, pour la première fois, les principes généraux de la responsabilité pénale, suivant lesquels la personne déclarée coupable d'un crime peut être emprisonnée.

Le présent document forme la première pièce du code de procédure pénale de la Commission. Comme toujours, il se fonde sur un examen théorique rigoureux de la nature du droit pénal. Le lecteur y trouvera les fruits d'un travail où l'on a soigneusement tenté de favoriser un juste équilibre entre la liberté individuelle et l'obligation de l'État d'assurer la protection de ses citoyens. Une fois terminé, le premier volume s'intitulera *Les pouvoirs de la police*. Il sera formé de deux titres, dont le premier portera sur les fouilles, les perquisitions et les matières connexes. Le deuxième sera consacré aux questions suivantes : l'interrogatoire des suspects, l'arrestation, les mesures visant à assurer la comparution, la mise en liberté provisoire et la détention et, enfin, l'identification par témoins oculaires avant le procès. Les autres volumes du code de procédure pénale énonceront les règles touchant le déroulement du procès ainsi que les voies de recours et les appels.

Les questions traitées dans le présent titre ont déjà été examinées dans plusieurs documents de travail et rapports au Parlement, ainsi que dans un certain nombre de documents d'étude, publiés ou non, notamment :

Rapport n° 19, *Le mandat de main-forte et le télémandat* (1983),

Rapport n° 21, *Les méthodes d'investigation scientifiques : l'alcool, la drogue et la conduite des véhicules* (1983),

Rapport n° 24, *Les fouilles, les perquisitions et les saisies* (1985),

Rapport n° 25, *Les techniques d'investigation policière et les droits de la personne* (1985),

Rapport n° 27, *La façon de disposer des choses saisies* (1986),

Document de travail n° 30, *Les pouvoirs de la police : les fouilles, les perquisitions et les saisies en droit pénal* (1983),

Document de travail n° 34, *Les méthodes d'investigation scientifiques* (1984),

9. CRD, *La preuve*, Rapport n° 1, Ottawa, Information Canada, 1975.

Document de travail n° 39, *Les procédures postérieures à la saisie* (1985),

Document de travail n° 47, *La surveillance électronique* (1986),

Document de travail n° 54, *La classification des infractions* (1986),

Document de travail n° 59, *Pour une cour criminelle unifiée* (1989).

Si ce premier volet du code de procédure pénale s'inspire des travaux de la Commission déjà publiés, on y a également pris en considération les critiques qui nous ont été communiquées à la fois par le grand public et par nos consultants. Nos textes ont fait l'objet de discussions lors d'audiences publiques tenues à de nombreux endroits au Canada, pendant plusieurs années. Nous avons ainsi pu connaître le point de vue de juges, de criminalistes, de professeurs de droit, de chefs de police, ainsi que de représentants des Administrations fédérale et provinciales. Notre dette est immense envers toutes les personnes qui ont participé à ce processus. La récompense de leur contribution consiste dans un nouveau code qui est à la fois logique, organisé, cohérent et exhaustif. Il s'agit pour nous d'un texte qui s'harmonise avec la *Charte canadienne des droits et libertés*[10] et qui répond aux besoins du Canada d'aujourd'hui.

Les mêmes qualités ont été attribuées au code pénal de la Commission. Mais si le code de procédure pénale et le code pénal présentent les mêmes caractéristiques — fidélité aux principes, clarté, logique, organisation — ils paraissent à première vue très dissemblables. En effet, un code qui établit les principes généraux de la responsabilité pénale et définit les crimes peut être rédigé avec une grande économie; il n'est pas nécessaire de donner beaucoup de détails et les règles sont relativement peu techniques. Nous avons réussi, dans notre code pénal, à exprimer l'ensemble des règles de fond en cent trente-deux articles seulement.

Or, une telle concision n'est pas possible dans le domaine de la procédure pénale. Car la procédure, à tout le moins, doit énoncer la succession de mesures ou d'étapes à suivre pour que la justice soit correctement administrée au sein de l'État. Les règles de nature générale s'avèrent fréquemment inadéquates à cette fin. Si l'on omet de fournir des détails importants, la loi devient moins apte à indiquer la façon de procéder. S'ensuit un vide juridique, qu'il faut combler soit par la common law, soit par les pratiques locales. Mais cette solution peut elle-même être source d'incohérence et d'incertitude — ce qu'il faut assurément éviter en matière de droit pénal, vu les atteintes aux libertés individuelles qu'entraîne son application.

Pour être utile et efficace, un code de procédure pénale doit inévitablement être plus volumineux, plus détaillé qu'un code pénal. Nous en avons donné les raisons dans *Notre procédure pénale* :

> Les lois pénales ne font pas que définir les crimes; elles établissent aussi les formalités prescrites pour le déroulement des enquêtes et la détermination de la culpabilité ou de l'innocence. Elles fixent du même coup les limites de la liberté individuelle. La procédure, parce qu'elle remplit cette fonction de réglementation, se caractérise par son caractère technique et son souci du détail [. . .] La complication de la procédure n'en demeure pas moins inévitable, jusqu'à un certain point, si l'on

10. Partie I de la *Loi constitutionnelle de 1982* [annexe B de la *Loi de 1982 sur le Canada* (1982, R.-U., ch. 11)].

veut qu'elle joue correctement son rôle et favorise le règlement juste et équitable des litiges[11].

Au fil des ans, la Commission a démontré que l'exposé des règles de fond, dans le Code actuel, est incomplet. Il «ne comporte pas de partie générale complète, ce qui a forcé les tribunaux à élaborer eux-mêmes, sans l'aide du législateur, bon nombre des principes de base du droit pénal régissant l'élément moral des infractions, l'intoxication par l'alcool, la nécessité, la causalité et d'autres questions[12]». Or, ce caractère incomplet est infiniment plus flagrant dans le domaine de la procédure pénale. Une très grande proportion de règles de procédure ne peuvent être établies qu'en passant la common law au peigne fin ou encore, en vérifiant les pratiques qui ont cours dans diverses régions. Pour être véritablement complet, le code de procédure pénale doit incorporer et clarifier une très large gamme de règles ambiguës, informes et dispersées. Voilà la mission que la Commission s'est donnée dans l'élaboration de son projet de code de procédure pénale. Cela dit, et bien que nous soyons convaincus que notre projet de code de procédure constitue un pas important vers l'élimination des lacunes et de l'incertitude qui caractérisent la procédure pénale actuelle, nous reconnaissons que l'élaboration d'un code de procédure pénale qui soit absolument complet, indépendant et exhaustif est un objectif qui n'est ni possible ni souhaitable. Le lecteur trouvera dans les pages qui suivent un texte de loi d'une portée remarquablement vaste. En cela, notre projet de code clarifie le droit actuel et constitue une grande amélioration par rapport au Code actuel sur le plan processuel.

Le contraste est vif entre le code que nous proposons et le Code actuel. Pour en convaincre le lecteur, nous l'invitons à examiner le domaine des perquisitions et des saisies, par exemple, dans chacun des textes; les différences sautent aux yeux. Quelles sont les dispositions législatives régissant les perquisitions dans une maison d'habitation ? les fouilles, perquisitions et saisies en cas d'urgence ? le droit de fouiller une personne qui vient d'être arrêtée ? la saisie des choses bien en vue ? Il s'agit là de questions traitées en détail dans notre projet de code, mais à l'égard desquelles le *Code criminel* reste dans une large mesure silencieux.

Et notre code ne se limite pas à être plus complet : il est également plus facile à comprendre. Cette qualité tient à ce que nous avons opté, dans toute la mesure du possible, pour la lisibilité et la simplicité du langage dans la rédaction législative. Que ce soit dans l'élaboration des dispositions elles-mêmes ou dans la rédaction des commentaires, nous nous sommes fait un point d'honneur de nous exprimer non seulement avec clarté, mais aussi avec précision. Nous reconnaissons néanmoins que certaines règles, à cause de leur caractère technique, demeureront toujours relativement complexes. Lorsque c'est possible, le code emploie des termes de la langue usuelle. Ainsi, nous avons substitué à certaines expressions latines comme «ex parte», des termes plus accessibles comme «unilatéralement». Nous avons par ailleurs tenté d'adapter bon nombre des formalités anciennes aux réalités du XX^{e} siècle. Nous avons ainsi intégré au code certaines innovations procédurales, en étendant leur application à un grand nombre de domaines

11. *Op. cit.*, note 1, p. 8.

12. CRD, *Pour une nouvelle codification du droit pénal*, vol. 1, Rapport n^{o} 30, Ottawa, La Commission, 1986, p. 3.

du système de justice pénale. Citons à cet égard le mécanisme du télémandat, dont la Commission a été la première à préconiser l'utilisation — et qui a fait depuis lors une timide entrée dans le *Code criminel* —, ainsi que certaines dispositions qui prévoient le recours aux techniques d'enregistrement et de reproduction électroniques.

La structure et l'agencement de ce volet du code se caractérisent par la logique et la simplicité. Viennent d'abord des questions de nature générale — définitions, règles d'interprétation, règles d'application générale, suivies de diverses parties qui portent sur les pouvoirs de la police visés par la division du code intitulée *Fouilles, perquisitions et matières connexes* :

Les fouilles, les perquisitions et les saisies;

La recherche d'indices sur les personnes;

Le dépistage de l'état alcoolique chez les conducteurs;

La surveillance électronique;

La disposition des choses saisies;

Les privilèges en matière de saisie.

Chaque partie est divisée en chapitres et en sections, ce qui facilite l'utilisation et la consultation.

Bien que ce code vise l'intégralité, il ne comporte pas encore toutes les règles qui pourront finalement se retrouver sous le titre général *Fouilles, perquisitions et matières connexes*. Par exemple, on n'y retrouve aucune disposition sur la criminalité organisée. Le législateur a récemment apporté au *Code criminel* des modifications de fond et de forme qui portent sur cette question[13]. Par ailleurs, la Commission a recommandé, dans son document de travail n° 47, *La surveillance électronique* (1986), l'adoption de dispositions législatives sur le recours à des dispositifs de surveillance optique, pour régir les cas où la police se serait introduite clandestinement dans un lieu pour y installer de tels dispositifs, dans le cadre d'une enquête criminelle. Toutefois, la section de notre code consacrée à la surveillance électronique ne comporte aucune disposition sur l'utilisation de dispositifs de surveillance optique. Cette question, comme celle de la criminalité organisée, mérite que la Commission y consacre des travaux distincts et approfondis. Dans l'intervalle, notre code est silencieux à ce chapitre.

D'autres questions importantes ne seront pas traitées dans ce volume. Ainsi, les conséquences de l'inobservation d'une règle de procédure sont un aspect vital de la procédure pénale, et pourtant on ne trouvera aucune disposition à cet égard dans cette partie de notre code. En effet, il est plus opportun de traiter la question des voies de recours avec les autres règles relatives au déroulement du procès et de l'appel. Le fait d'accorder ou de refuser un redressement constitue en effet un acte juridictionnel. Bien que les actions de la police puissent nécessiter réparation ou réprimande, les règles sur les voies de recours ne sont pas traitées ici dans le cadre des règles sur les pouvoirs de

13. Voir *Loi modifiant le Code criminel, la Loi des aliments et drogues et la Loi sur les stupéfiants*, L.C. 1988, ch. 51, art. 1-8, proclamée en vigueur le 1er janvier 1989.

la police. La Commission étudiera dans un prochain document de travail la question de savoir quel est le cadre approprié aux mesures de redressement en matière de procédure pénale. Aussi ces recommandations figureront-elles dans une autre partie du code.

De façon générale, on ne trouvera pas non plus de règles de preuve dans ce volume. Dans une large mesure, elles devraient être réunies dans un code de la preuve, même si certaines d'entre elles, qui revêtent un caractère procédural tout à fait unique et sont indispensables pour la formulation adéquate et complète de notre projet, seront incorporées à d'autres parties du code.

Conformément à la recommandation formulée dans le document intitulé *Égalité pour tous — Rapport du Comité parlementaire sur les droits à l'égalité*[14], nous nous sommes fait un devoir de rédiger notre projet de code dans une langue non sexiste. Dans cette optique, nous nous sommes conformés aux principes énoncés dans l'ouvrage publié sous le titre *Cap sur l'égalité — Réponse au Rapport du Comité parlementaire sur les droits à l'égalité*[15], relativement à la rédaction des textes législatifs, tant en français qu'en anglais.

Dans le présent rapport, nous présentons au législateur un plan de réforme concret qui pourrait être mis en œuvre dès maintenant dans les domaines abordés. Au risque de nous répéter, toutefois, rappelons que le présent ouvrage fait partie d'un projet beaucoup plus vaste dont les différentes parties sont destinées à se compléter les unes les autres, dans l'harmonie et la cohérence. Et bien que le présent document soit un rapport au Parlement et que de ce fait, il représente la position de la Commission à l'heure actuelle, il va sans dire l'adjonction successive des différentes parties de cette œuvre entraînera certaines révisions et modifications.

14. CANADA, PARLEMENT, CHAMBRE DES COMMUNES, SOUS-COMITÉ SUR LES DROITS À L'ÉGALITÉ DU COMITÉ PERMANENT DE LA JUSTICE ET DES QUESTIONS JURIDIQUES, *Égalité pour tous — Rapport du Comité parlementaire sur les droits à l'égalité* (J. Patrick Boyer, député, président), Ottawa, Approvisionnements et Services Canada, 1985, pp. 129-130.

15. GOUVERNEMENT DU CANADA, *Cap sur l'égalité — Réponse au Rapport du Comité parlementaire sur les droits à l'égalité*, Ottawa, Approvisionnements et Services Canada, 1986, pp. 61-62.

PREMIÈRE PARTIE

DISPOSITIONS GÉNÉRALES

Textes à l'origine de la partie I

PUBLICATIONS DE LA CRD

Le mandat de main-forte et le télémandat, Rapport n° 19 (1983)

Les fouilles, les perquisitions et les saisies, Rapport n° 24 (1984)

La classification des infractions, Document de travail n° 54 (1986)

Pour une nouvelle codification du droit pénal, Rapport n° 31 (1987)

Pour une cour criminelle unifiée, Document de travail n° 59 (1989)

LÉGISLATION

Code criminel, art. 2, 487.1, par. 254(1), 487(2)

Loi portant révision et codification de la procédure pénale

CHAPITRE PREMIER
TITRE ABRÉGÉ

Titre abrégé

1. *Code de procédure pénale.*

CHAPITRE II
DÉFINITIONS

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

«agent de la paix» (*peace officer*)

«agent de la paix» Selon le cas,

a) tout shérif, shérif adjoint et mandataire du shérif;

b) tout directeur, sous-directeur, instructeur, gardien, geôlier, garde et tout autre fonctionnaire ou employé permanent d'une prison;

c) tout agent de police, huissier ou autre personne employée à la préservation et au maintien de la paix publique ou à la signification ou à l'exécution des actes judiciaires au civil;

d) tout fonctionnaire ou personne possédant les pouvoirs d'un agent des douanes ou d'un préposé de l'accise lorsqu'il exerce une fonction en application de la *Loi sur les douanes* ou de la *Loi sur l'accise*;

e) les agents des pêches nommés ou désignés en vertu de la *Loi sur les pêches*, dans l'exercice des fonctions que confère cette loi;

f) le pilote commandant un aéronef :

(i) soit immatriculé au Canada en vertu des règlements d'application de la *Loi sur l'aéronautique*,

(ii) soit loué sans équipage et mis en service par une personne remplissant, aux termes des règlements d'application de la *Loi sur l'aéronautique*, les onditions d'inscription comme propriétaire d'un aéronef immatriculé au Canada en vertu de ces règlements,

pendant que l'aéronef est en vol;

g) les officiers et sous-officiers des Forces canadiennes qui sont :

(i) soit nommés pour l'application de l'article 156 de la *Loi sur la défense nationale*,

(ii) soit employés à des fonctions que le gouverneur en conseil, dans des règlements pris en vertu de la *Loi sur la défense nationale* pour l'application du présent alinéa, a prescrites comme étant d'une telle sorte que les officiers et les sous-officiers qui les exercent doivent nécessairement avoir les pouvoirs des agents de la paix.

Rapport n° 31, par. 2(1)
Code criminel, art. 2

«choses saisissables» (*objects of seizure*)

«choses saisissables» Les choses qui constituent ou fournissent un élément de preuve relatif à la perpétration d'un crime, y compris les fonds déposés à un compte dans un établissement financier. Sont cependant exclus :

a) les résidus qui adhèrent à la surface du corps d'une personne;

b) les tissus, les fluides corporels et les autres substances corporelles humaines, comme les échantillons d'haleine, les cheveux ou les ongles, à moins qu'ils aient été retirés du corps de la personne ou en soient dissociés.

Rapport n° 24, art. 3

«cour d'appel» (*court of appeal*)

«cour d'appel»

a) Dans les provinces de la Nouvelle-Écosse et de l'Île-du-Prince-Édouard, la Division d'appel de la Cour suprême;

b) dans les autres provinces, la Cour d'appel.

Code criminel, art. 2

«crime» (*crime*)

«crime» Infraction définie dans le projet de code criminel de la CRD ou dans toute autre loi fédérale, et punissable d'une peine d'emprisonnement. Est exclue l'infraction dont l'auteur ne peut être condamné à l'emprisonnement que pour non-paiement d'une amende.

Document de travail n° 54, art. 2 et 3
Rapport n° 31, Ann. B (projet de code criminel), art. 2

«district judiciaire» (*judicial district*)

«district judiciaire» Chacune des circonscriptions territoriales établies dans les provinces pour l'organisation de la Cour criminelle; en l'absence de circonscriptions territoriales, la province.

«greffier» (*clerk of the court*)

«greffier» Personne qui, sous quelque nom ou titre qu'elle puisse être désignée, remplit les fonctions de greffier de la cour.

Code criminel, art. 2

«huis clos» (*in private*)

«huis clos»

a) Dans le cas d'une demande présentée unilatéralement, en l'absence du public et de toute partie autre que le demandeur;

b) **dans le cas d'une audience devant être notifiée, en l'absence du public.**

«juge» (*judge*)

«juge» Juge de la Cour criminelle.

Document de travail n° 59, rec. 1 et 2

«juge de paix» (*justice*)

«juge de paix» Le juge exerce d'office les attributions du juge de paix.

Code criminel, art. 2

«médecin» (*medical practitioner*)

«médecin» Personne habilitée à exercer la médecine en vertu des lois de la province.

Code criminel, par. 254(1)

«photographie» (*photograph*)

«photographie» Toute image, fixe ou animée, représentant l'apparence d'une chose et produite à l'aide d'un appareil photographique ou d'une caméra.

«poursuivant» (*prosecutor*)

«poursuivant» Le procureur général ou, lorsque celui-ci n'intervient pas, la personne qui intente des poursuites auxquelles s'applique la présente loi. Est visé par la présente définition tout avocat agissant pour le compte de l'un ou de l'autre.

Code criminel, art. 2

«prescrit» (*prescribed*)

«prescrit» Prescrit par règlement.

«unilatéralement» et «unilatérale» (*unilaterally*)

«unilatéralement» et «unilatérale» Se disent de la demande présentée par une partie sans qu'il soit nécessaire de la notifier à quelque autre partie.

COMMENTAIRE[16]

La plupart des définitions présentées dans cet article se passent d'explications. Certaines d'entre elles proviennent du *Code criminel*, d'autres s'inspirent des rapports et documents de travail de la Commission, plusieurs enfin sont nouvelles. Nous avons recherché avant tout, en les rédigeant, la concision et la précision. Elles reflètent l'importance que nous attachons à la lisibilité et à la simplicité du langage.

Certaines observations s'imposent néanmoins. La définition du terme «agent de la paix» est semblable, mais non identique, à celle qui figurait dans le rapport n° 31. Comme nous nous y étions engagés[17], nous avons poursuivi la réflexion sur le point de savoir si elle devrait ici viser les «juges de paix». Or, pour éviter tout risque de confusion entre les fonctions d'enquête et les fonctions juridictionnelles, nous avons conclu que non.

L'expression «choses saisissables», selon la définition présentée ici, n'englobe pas les «renseignements», bien que ceux-ci fussent visés par la recommandation faite dans

16. À moins qu'elle ne s'explique d'elle-même, chaque disposition est suivie d'un commentaire.

17. Voir le rapport n° 31, p. 10, n. 11.

le rapport n° 24 et le projet législatif qui s'y trouvait. C'est que dans le régime de fouilles, perquisitions et saisies prévu au présent code (à la partie II), on envisage la saisie des choses qui contiennent les renseignements (comme un ordinateur et ses disquettes), plutôt que celle des renseignements eux-mêmes. Par ailleurs, d'autres éléments de la définition initiale n'ont pas été repris de manière spécifique. On a ainsi jugé que les mots «constituent ou fournissent un élément de preuve relatif à la perpétration d'un crime» visent nécessairement la plupart des «produits d'une infraction[18]», «preuve[s] de la perpétration d'une infraction[19]» et «choses prohibées[20]». La nouvelle définition exclut par ailleurs expressément un certain nombre de choses, que l'on pourrait généralement regrouper sous le vocable de «substances corporelles», et dont la saisie relève de la partie III du présent code (*La recherche d'indices sur les personnes*).

A priori, le terme «chose saisissable» n'embrasse pas explicitement les choses devant servir à la perpétration d'un crime. Certes, le droit actuel permet la saisie de telles choses dans certaines circonstances[21]. Quoi qu'il en soit, les choses de ce genre seront dans la plupart des cas visées par notre définition de «chose saisissable», puisque, le plus souvent, elles constitueront une preuve de la perpétration d'un crime. Pour la même raison, seraient également incluses les choses dont la possession est illégale en soi et celles qui peuvent être saisies dans le cadre d'une fouille préventive concomitante de l'arrestation. Le régime que nous proposons admet la saisie, dans de telles circonstances, de choses devant servir à la perpétration d'un crime, et c'est là, selon nous, la portée que devrait avoir le pouvoir de saisie à cet égard[22].

La définition du terme «district judiciaire», qui prête moins à confusion que le terme «circonscription territoriale» employé à l'article 2 du Code actuel, découle des propositions faites dans le document de travail n° 59 quant à l'instauration d'une cour criminelle unifiée.

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18. Rapport n° 24, recommandation un, al. 3(1)*a*). Voir la définition de ce terme à la recommandation un, par. 3(2). À remarquer aussi que nous avons pris le parti d'exclure les «produits» qui constituent simplement des biens «acquis par l'échange ou la conversion du bien pris illégalement» (ce sont les termes de notre définition antérieure), à cause des difficultés de preuve.

19. Rapport n° 24, recommandation un, al. 3(1)*b*).

20. *Id.*, al. 3(1)*c*). Voir la définition de ce terme à la recommandation un, par. 3(3).

21. L'alinéa 487(1)*c*)du *Code criminel* actuel permet au juge de paix de décerner un mandat autorisant la saisie de toute «chose dont on a des motifs raisonnables de croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat». D'autre part, l'article 489 permet à quiconque exécute un mandat de «saisir, outre ce qui est mentionné dans le mandat, toute chose qu'il croit, pour des motifs raisonnables, avoir été obtenue au moyen d'une infraction ou avoir été employée à la perpétration d'une infraction.» L'article 11 de la *Loi sur les stupéfiants*, L.R.C. (1985), ch. N-1, autorise quant à lui l'agent de la paix à saisir, au cours d'une perquisition pratiquée en vertu de cette loi, tout «objet qu'il croit, pour des motifs raisonnables, relié à la perpétration d'une infraction» à la même loi. Enfin, le paragraphe 16(2) du même texte permet au tribunal d'ordonner, par suite d'une déclaration de culpabilité, la confiscation de tout «moyen de transport saisi sous le régime de l'article 11».

22. Pour une analyse plus détaillée de la position de la Commission au sujet de la saisie des «instruments du crime», voir : *Les pouvoirs de la police : Les fouilles, les perquisitions et les saisies en droit pénal*, Document de travail n° 30, Ottawa, Approvisionnements et Services Canada, 1983, pp. 172-174; rapport n° 24, p. 17.

Simple et claire, la définition du mot «photographie» inclut non seulement les photographies prises au moyen d'un appareil photographique ordinaire, mais aussi les radiographies. Cette définition sert à l'application de l'article 78 (recherche d'indices sur les personnes) et de la section IX du chapitre III de la partie VI (*La disposition des choses saisies*). Toutefois, le pouvoir de radiographier une personne afin d'obtenir un enregistrement photographique de l'intérieur de son corps est rigoureusement réglementé à l'article 60.

La définition du terme «prescrit» vise à attirer l'attention de l'usager sur le fait que des règlements auront été pris pour régir, entre autres, les droits payables pour la reproduction de renseignements et les formules devant être utilisées pour les différents mandats, demandes et ordonnances prévus au présent code. Le pouvoir de réglementation à cet effet ne figure pas dans le présent volume de notre code de procédure pénale. Les dispositions habilitantes seront en effet ajoutées au moment de la mise en place de toutes les parties qui forment notre code; il en va de même pour les formules prescrites.

Quant aux mots «unilatéralement» et «unilatérale», ils remplacent l'expression latine *ex parte*.

CHAPITRE III
DISPOSITIONS GÉNÉRALES

Pouvoirs conférés par la common law

3. Les dispositions des parties II à VII remplacent les pouvoirs conférés par la common law aux agents de la paix pour l'application des techniques d'investigation suivantes en matière criminelle :

***a*) la fouille d'une personne, d'un lieu ou d'un véhicule, afin de saisir une chose ou de délivrer une personne séquestrée, de même que la rétention et la disposition des choses saisies;**

***b*) les techniques d'investigation visées par la partie III (*La recherche d'indices sur les personnes*);**

***c*) le prélèvement d'échantillons de l'air expiré par une personne ou de son sang, afin de déterminer son alcoolémie ou la présence d'alcool dans son sang;**

***d*) l'interception de communications privées au moyen d'un dispositif de surveillance.**

COMMENTAIRE

Les dispositions de ce premier volume sur les pouvoirs de la police remplacent tous les pouvoirs que la police exerce actuellement en vertu de la common law et dont l'objet est visé au présent article.

Mise en garde par l'agent de la paix

4. L'agent de la paix tenu de faire une mise en garde à une personne, ou de l'informer de quelque chose, doit le faire dans des termes et d'une manière susceptibles d'être compris par cette personne.

COMMENTAIRE

L'objectif et les modalités d'application de cette disposition ne nécessitent pas vraiment d'explications. Plusieurs dispositions du code obligent l'agent de la paix à faire une mise en garde ou à donner des renseignements.

Abrégement du délai de préavis

5. (1) Le délai de préavis prescrit pour toute demande peut être abrégé, soit avec le consentement des destinataires, soit sur l'ordre d'un juge de paix.

Ordonnance d'abrégement

(2) Le juge de paix peut, sur demande unilatérale, ordonner l'abrégement du délai de préavis s'il est convaincu que cela serait raisonnable dans les circonstances et ne serait préjudiciable à aucun destinataire de l'avis.

Mesures visant à accélérer le déroulement de l'audience

6. Le juge de paix peut donner toute directive jugée nécessaire pour accélérer le déroulement de l'audience.

Exécution partout dans la province

7. Tout mandat ou ordonnance émanant d'un juge de paix peut être exécuté partout dans la province, sauf s'il comporte des restrictions à cet égard.

Code criminel, par. 487(2)

COMMENTAIRE

D'une certaine façon, cette disposition a pour objet d'uniformiser, dans le présent code, la compétence des juges de paix au chapitre des ordonnances et des mandats, et de supprimer la règle obligeant à faire viser[23] certains mandats par un juge de paix de la circonscription territoriale où l'exécution doit avoir lieu, fût-ce dans la même province. Nous n'avons cependant pas entièrement abandonné la formalité du visa : les dispositions de l'article 36 (fouilles, perquisitions et saisies) exigent que le mandat soit visé par un juge de paix de la province où il sera exécuté, s'il a été délivré dans une autre province. En revanche, il nous a paru inopportun de conserver les dispositions sur la nécessité du visa «intraprovincial», les embarras de cette procédure dépassant nettement la protection supplémentaire qu'elle peut offrir.

23. Voir le *Code criminel*, par. 487(2).

Présomption d'authenticité

8. Sauf preuve contraire, est réputé authentique l'original de tout mandat ou ordonnance apparemment signé par un juge de paix, sans qu'il soit nécessaire d'établir l'authenticité de cette signature.

COMMENTAIRE

Suivant cette disposition, il n'est normalement pas nécessaire de prouver l'authenticité du mandat ou de l'ordonnance sur lesquels on s'appuie pour exécuter les actes y autorisés. Soulignons toutefois qu'il n'est question que de l'*original* à cet article. Ainsi, dans le cas d'un mandat délivré par téléphone ou à l'aide d'un autre moyen de télécommunication, le fac-similé en possession de l'agent de la paix ne serait pas revêtu du même caractère authentique. Du reste, on trouve la disposition suivante dans d'autres parties du code : «[d]ans toute procédure où il importe au tribunal d'être convaincu que [tel acte] a été autorisé par un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que [cet acte] n'a pas été autorisé par mandat[24].»

CHAPITRE IV
FORMALITÉS GÉNÉRALES DE L'OBTENTION DES MANDATS

SECTION I
CHAMP D'APPLICATION

Application du chapitre

9. Le présent chapitre s'applique aux demandes de mandats présentées sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*), de la partie III (*La recherche d'indices sur les personnes*) et de la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*).

SECTION II
RÈGLES RÉGISSANT L'AUDITION DE LA DEMANDE

Témoignages et éléments de preuve

10. (1) Le juge de paix saisi d'une demande de mandat peut interroger le demandeur. Il peut aussi entendre d'autres

24. Voir les articles 41 (perquisition ou saisie), 70 (application d'une technique d'investigation), 120 (prélèvement d'un échantillon de sang), 206 (interception d'une communication privée).

témoins et recevoir tous éléments de preuve, notamment tout affidavit fondé sur la conviction du souscripteur et sur les renseignements dont il dispose.

Interrogatoire du souscripteur

(2) Le juge de paix peut interroger le souscripteur d'un affidavit reçu en preuve sur le contenu de cet affidavit.

Serment

(3) Le serment est obligatoire pour tout témoin.

Rapport n° 24, art. 10

COMMENTAIRE

Par le paragraphe (1), on entend fournir au juge de paix les moyens de statuer sur la demande de mandat en s'appuyant sur toute une gamme de renseignements donnés sous la foi du serment (voir le par. (3)). Les paragraphes (1) et (2) lui permettent de ne pas se limiter au contenu de la demande elle-même et de vérifier efficacement et activement si, oui ou non, les conditions prévues pour la délivrance sont remplies. Du même coup, on veut éviter que des mandats soient décernés mal à propos et par la suite annulés, et empêcher les atteintes à des droits garantis par la *Charte canadienne des droits et libertés* (notamment, le «droit à la protection contre les fouilles, les perquisitions ou les saisies abusives[25]»).

Le paragraphe (3) doit pour sa part s'interpréter à la lumière des dispositions de l'article 14 de la *Loi sur la preuve au Canada*[26] touchant l'affirmation solennelle.

Enregistrement

11. (1) Les demandes présentées oralement et les témoignages entendus par le juge de paix sont intégralement enregistrés par écrit ou sur support électronique.

Renseignements

(2) L'enregistrement indique l'heure, la date et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

Rapport n° 19, partie II, rec. 2(2)
Code criminel, par. 487.1(2)

COMMENTAIRE

Cette disposition vise à garantir la réalisation d'enregistrements propres à permettre un contrôle ultérieur. Notre code prévoit d'une manière générale la présentation orale des demandes de mandat (voir par. 22(2), 57(2), 91(2), 129(1)) et l'audition de témoins. Aussi la portée de l'article 11 est-elle légèrement plus grande que celle de la recommandation faite dans le rapport n° 19[27] (dont le législateur s'est inspiré au paragraphe

25. Rapport n° 24, p. 26.
26. L.R.C. (1985), ch. C-5.
27. Partie II, rec. 2(2).

487.1(2) du *Code criminel* actuel) quant à l'enregistrement des demandes de mandat présentées par téléphone ou à l'aide d'un autre moyen de télécommunication.

Mandat demandé par téléphone

12. Dans le cas d'un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix :

***a*) remplit le mandat;**

***b*) en transmet deux exemplaires au demandeur ou lui en fait remplir deux exemplaires selon les directives qu'il lui donne.**

Rapport n° 19, partie II, rec. 6*a*) et *b*)
Code criminel, al. 487.1(6)*a*) et *b*)

COMMENTAIRE

Cet article énonce les formalités à suivre pour la délivrance de mandats par téléphone ou à l'aide d'un autre moyen de télécommunication. Ces mandats ne diffèrent en rien des mandats ordinaires, si ce n'est par la façon dont la demande est présentée, vu la distance qui sépare le juge ou le juge de paix de l'agent de la paix demandeur. Ce serait donc faire fausse route que de les considérer comme formant une catégorie distincte de mandats. C'est pourquoi nous avons évité d'utiliser le terme «télémandat» dans les dispositions de notre code, bien qu'il soit employé à l'occasion dans les commentaires pour désigner le mandat décerné par téléphone ou à l'aide d'un autre moyen de télécommunication. L'alinéa *a*) de l'article 12 a pour objet la conservation de l'original du document, pour le cas où il y aurait quelque divergence entre le mandat décerné par le juge de paix et les copies remplies par l'agent selon les directives du juge de paix, en conformité avec les dispositions de l'alinéa *b*)[28]. Celles-ci, un peu moins rigoureuses que le texte proposé dans le rapport n° 19[29] et repris à l'alinéa 487.1(6)*b*) du *Code criminel*, permettent au juge de paix de «transmet[tre] deux exemplaires au demandeur». Ce dernier n'est donc pas tenu de remplir à la main ses exemplaires dans tous les cas. Si, par exemple, il a fait sa demande au moyen d'un bélinographe, la solution la plus simple consistera sans aucun doute à recourir à la même technique pour lui faire parvenir des copies fidèles du mandat signé par le juge de paix.

SECTION III
DÉPÔT DE DOCUMENTS

Dépôt de documents

13. Le juge de paix saisi d'une demande de mandat fait déposer, dès que cela est matériellement possible, auprès du

28. Rapport n° 19, p. 99.
29. Partie II, rec. 6*b*).

greffier du district judiciaire où la demande a été reçue, les documents suivants :

a) **la demande, son enregistrement ou sa transcription;**

b) **l'enregistrement des témoignages qu'il a entendus, ou la transcription de cet enregistrement;**

c) **les éléments de preuve qu'il a reçus;**

d) **l'original du mandat qui, le cas échéant, a été décerné.**

Code criminel, al. 487.1(6)*c*)

COMMENTAIRE

Il s'agit ici de garantir la conservation et l'accessibilité de tous les renseignements et pièces sur lesquels le juge de paix s'est appuyé, afin que les intéressés puissent par la suite vérifier la régularité de la délivrance du mandat. L'article 13 énumère les pièces devant être déposées. Si le demandeur a présenté une demande écrite, c'est la demande elle-même qui doit être déposée. Si par contre la demande a été présentée oralement, on déposera l'enregistrement de la demande (la bande sonore, par exemple) ou la transcription de l'enregistrement. Doivent être produites avec la demande toutes les autres pièces invoquées à l'appui de celle-ci, telles que les affidavits reçus en preuve et l'enregistrement des témoignages entendus. Enfin, s'il est fait droit à la demande, l'original du mandat doit être produit. L'article 13 indique que les documents sont déposés dans le district où la demande a été reçue, mais il faut aussi tenir compte des dispositions de l'article 14.

Exécution dans un autre district judiciaire

14. (1) L'agent de la paix qui exécute un mandat dans un district judiciaire autre que celui où il a été décerné en informe, dès que cela est matériellement possible, le greffier du district judiciaire d'origine, en lui indiquant le lieu d'exécution.

Dépôt de documents

(2) Une fois informé de ce fait, le greffier fait déposer, dès que cela est matériellement possible, les documents énumérés à l'article 13, ou une copie de ces documents, auprès du greffier du district judiciaire où le mandat a été exécuté.

Code criminel, al. 487.1(6)*c*)

COMMENTAIRE

Cette disposition précise que tous les documents relatifs à la demande de mandat doivent être déposés dans le district judiciaire d'exécution. Comme nous le signalions dans le rapport n° 19 (p. 96), c'est là, selon toute vraisemblance, la meilleure façon de permettre aux intéressés de les consulter sans retard.

Il peut arriver que le mandat soit exécuté ailleurs qu'à l'endroit prévu; d'où la procédure en deux étapes exposée à l'article 14.

PARTIE II

LES FOUILLES, LES PERQUISITIONS ET LES SAISIES

Textes à l'origine de la partie II

PUBLICATIONS DE LA CRD

Les pouvoirs de la police : les fouilles, les perquisitions et les saisies en droit pénal, Document de travail n° 30 (1983)

Le mandat de main-forte et le télémandat, Rapport n° 19 (1983)

Les fouilles, les perquisitions et les saisies, Rapport n° 24 (1984)

Les techniques d'investigation policière et les droits de la personne, Rapport n° 25 (1985)

La façon de disposer des choses saisies, Rapport n° 27 (1986)

Pour une cour criminelle unifiée, Document de travail n° 59 (1989)

LÉGISLATION

Code criminel, art. 2, 101, 103, 164, 199, 320, 395, 487, 487.1, 488, 488.1, 489; par. 339(3), 447(2); partie XXVIII, formules 1, 5, 5.1, 5.2

Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148; S.C. 1970-71-72, ch. 63, art. 231

Loi sur les aliments et drogues, L.R.C. (1985), ch. F-27, art. 42, 51

Loi sur les stupéfiants, L.R.C. (1985), ch. N-1, art. 10-12, 14

OBSERVATIONS PRÉLIMINAIRES

On trouve dans cette partie les règles générales régissant, en matière criminelle, la recherche des «choses saisissables» et des personnes «séquestrées» (ces termes sont définis aux articles 2 et 15, respectivement) ainsi que leur saisie ou leur délivrance, selon le cas. Quant à la recherche et à la saisie de choses saisissables dans le corps d'une personne (notamment dans sa bouche), elles font l'objet de dispositions particulières (partie III, *La recherche d'indices sur les personnes*).

Les dispositions de la présente partie confèrent des pouvoirs à la police, principalement, mais aussi aux simples citoyens; elles précisent les circonstances dans lesquelles ces pouvoirs peuvent être exercés et les modalités applicables. On y indique en particulier les cas où la délivrance d'un mandat est possible, les formalités à suivre à cet effet et les circonstances dans lesquelles sont autorisées les fouilles, perquisitions et saisies sans mandat.

Ces dispositions remplacent les diverses règles découlant de la common law ou énoncées au *Code criminel* ainsi que dans d'autres lois fédérales comportant des dispositions pénales, comme la *Loi sur les stupéfiants*, la *Loi sur les aliments et drogues* et la *Loi de l'impôt sur le revenu*[30]. L'objectif fondamental consiste à accroître la protection contre les fouilles, les perquisitions et les saisies abusives, tout en favorisant l'efficacité des enquêtes criminelles et de l'application de la loi.

La *Charte canadienne des droits et libertés* dispose : «Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives» (art. 8)[31]; sont inopérantes «les dispositions incompatibles de toute autre règle de droit» (art. 52). Il s'ensuit que les pouvoirs de fouille, de perquisition et de saisie — sources d'atteintes aux possessions, aux biens et à des droits fondamentaux comme l'inviolabilité et la dignité de la personne, ainsi que la sécurité et l'intimité du domicile — doivent être strictement réglementés.

Selon la Commission, la législation en cette matière doit être fondée sur trois grands objectifs : autorisation judiciaire, précision du mandat, possibilité de contrôler la régularité de l'opération.

Dans l'arrêt clé *Hunter* c. *Southam Inc.*[32], la Cour suprême du Canada a jugé que le mandat, «lorsqu'[il] peut être obtenu[33]», constitue une condition préalable de la

30. Voir N.C. BROOKS et J. FUDGE, *Search and Seizure Under the Income Tax Act*, document d'étude préparé pour la Commission de réforme du droit du Canada, inédit, 1985, p. 64; sommaire publié en français : J. FUDGE et N.C. BROOKS, *Les fouilles, les perquisitions et les saisies en matière fiscale*, Ottawa, La Commission, 1985. Les auteurs sont venus à la conclusion que les pouvoirs de perquisition en matière d'enquête devraient être identiques dans toutes les lois fédérales et que des pouvoirs plus étendus que ceux prévus au *Code criminel* ne sauraient être justifiés. Parallèlement, la Commission a recommandé, dans le rapport n° 24 (rec. 2*f*) et pp. 52-57), l'abolition des pouvoirs spéciaux de perquisition et de saisie conférés par la *Loi sur les stupéfiants* et la *Loi sur les aliments et drogues*.

31. Une fouille ne sera pas tenue pour abusive «si elle est autorisée par la loi, si la loi elle-même n'a rien d'abusif et si la fouille n'a pas été effectuée d'une manière abusive». *R.* c. *Collins*, [1987] 1 R.C.S. 265, le juge Lamer, p. 278.

32. [1984] 2 R.C.S. 145.

33. *Id.*, p. 161.

validité de la perquisition. Elle a donc confirmé l'importance du mécanisme que nous qualifions d'«autorisation judiciaire». Pour qu'une loi qui autorise perquisitions et saisies ne soit pas tenue pour abusive à l'aune de la Charte, a déclaré la Cour, elle doit comporter un mécanisme par lequel un arbitre neutre et impartial décide, avant d'autoriser l'opération, s'il existe des motifs raisonnables et probables (donnés sous la foi du serment) de croire qu'une infraction a été commise et que des éléments de preuve se trouvent dans le lieu où l'on veut perquisitionner[34]. Il s'agit là d'une caractéristique historique du mandat, destinée à limiter les atteintes aux droits individuels de la part de l'État; elle favorise l'exercice raisonnable des pouvoirs de perquisition et de saisie.

L'obligation de définir avec une certaine *précision* l'objet du mandat en est elle aussi venue à caractériser la plupart des textes canadiens sur les perquisitions. Dans la demande de mandat comme dans le mandat lui-même, il faut décrire clairement le lieu de la perquisition, les choses recherchées et le crime sur lequel porte l'enquête. Ici encore, il s'agit en dernière analyse de restreindre les atteintes aux droits individuels.

À l'heure actuelle, au Canada, la délivrance des mandats de perquisition repose principalement sur des documents : les renseignements et dépositions doivent tous être transcrits ou enregistrés sur support électronique, versés au dossier et mis à la disposition des intéressés. Cela ne peut que favoriser le respect des formalités prévues et le contrôle a posteriori de la légalité des fouilles, perquisitions et saisies.

La situation est plus délicate lorsque les policiers agissent sans mandat. Dans ce cas, en effet, les préjugés individuels peuvent jouer un rôle déterminant, puisque celui qui effectue la perquisition ou la saisie est seul à décider si toutes les exigences de la loi sont remplies. Par ailleurs, il est malaisé de vérifier la régularité de l'opération, les policiers n'étant pas tenus de préparer de pièces justificatives qui seraient versées au dossier et mises à la disposition des intéressés ou des tribunaux.

Suivant le régime proposé ici, le mandat est obligatoire dans tous les cas où il peut être obtenu, de sorte que les atteintes arbitraires aux droits individuels de la part de l'État se trouvent rigoureusement limitées. Conforme à l'interprétation donnée à la Charte par la Cour suprême du Canada, cette solution est aussi en harmonie avec la nécessité de garantir la régularité des perquisitions et des saisies. La réalisation de cet objectif est du reste favorisée par d'autres dispositions de la présente partie, notamment celle qui exige que, d'une manière générale, les mandats soient exécutés «en présence de la personne qui occupe le lieu ou le véhicule fouillé, ou qui en est apparemment responsable» (art. 39), et cette autre qui rend obligatoire le dépôt auprès du greffier du mandat non exécuté, accompagné d'explications (art. 34). Les exceptions, clairement énoncées, se limitent aux fouilles et perquisitions effectuées avec le consentement des intéressés, à l'occasion d'une arrestation ou en cas d'urgence, et à la saisie de choses «bien en vue» dans certaines circonstances bien précises.

Dans l'intérêt du public comme celui des forces de l'ordre, nous avons ajouté des dispositions destinées à favoriser l'exercice raisonnable des pouvoirs de fouille, de perquisition et de saisie. En effet, des règles claires ont été établies sur diverses questions : pouvoir général conféré par le mandat; personnes autorisées à exécuter celui-ci;

34. *Id.*, le juge Dickson, pp. 159-168.

modalités de l'opération et moment où elle peut être effectuée; notification aux intéressés; procédure à suivre lorsqu'une opposition fondée sur un privilège est soulevée au cours d'une perquisition; etc.

CHAPITRE PREMIER
DÉFINITIONS

Définitions

15. Les définitions qui suivent s'appliquent à la présente partie.

«nuit» (*night*)

«nuit» La période comprise entre vingt et une heures et six heures le lendemain.

Code criminel, art. 2

«séquestrée» (*confined*)

«séquestrée» Séquestrée ou enlevée, au sens des dispositions des articles 49 (séquestration), 50 (enlèvement) ou 51 (rapt d'enfant) du projet de code criminel de la CRD.

«véhicule» (*vehicle*)

«véhicule» Toute chose utilisée ou destinée à être utilisée comme moyen de transport.

COMMENTAIRE

Ainsi que nous l'avons vu, la présente partie ne concerne pas uniquement les perquisitions effectuées pour rechercher une chose et la saisir; elle s'applique aussi à celles qui ont pour objet de retrouver et de délivrer une personne détenue illégalement. Or, comme il est essentiellement question ici de perquisitions en matière criminelle, la définition du terme «séquestrée» vise à restreindre l'application des dispositions de cette partie aux cas où la détention de la personne recherchée constitue un crime.

Quant à la définition du mot «véhicule», nous l'avons rédigée en des termes suffisamment larges pour embrasser tous les types de moyens de transport; elle s'écarte donc en cela de la définition figurant dans la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*). Car s'il est opportun de limiter l'application des dispositions sur le dépistage de l'état alcoolique à la conduite des véhicules qui ne sont pas mus par la force musculaire, nous avons tenu compte ici de l'illogisme d'une telle restriction en matière de perquisitions.

Définition du pouvoir de fouille corporelle

16. Le pouvoir de fouiller une personne non consentante pour rechercher une chose saisissable ou une personne séquestrée est limité à l'accomplissement des actes suivants :

***a*) interpeller et retenir cette personne;**

***b*) pratiquer une fouille préventive sur cette personne;**

***c*) fouiller toute chose que porte cette personne et dans laquelle il est raisonnable de croire que pourrait se trouver la chose saisissable ou la personne séquestrée;**

d) examiner les parties de la surface du corps de cette personne où il est raisonnable de croire que pourrait se trouver la chose saisissable;

e) fouiller les vêtements de cette personne où il est raisonnable de croire que pourrait se trouver la chose saisissable ou la personne séquestrée;

f) enlever à cette personne les vêtements qu'il est raisonnable et nécessaire de lui enlever, soit pour voir si elle porte ou dissimule la chose saisissable ou la personne séquestrée, soit pour saisir cette chose ou délivrer cette personne.

COMMENTAIRE

Outre la disposition de la Charte qui interdit les fouilles, perquisitions et saisies «abusives», il existe actuellement peu de critères, dans la loi, pour savoir jusqu'où peut aller la fouille corporelle. La police, dans les faits, a ainsi pu se faire reconnaître en la matière des pouvoirs étendus, mais mal définis. Certaines dispositions du présent chapitre, de même que certains articles de la partie III, consacrée aux techniques d'investigation, répondent à un souci de clarté en définissant précisément la nature et les limites du pouvoir en question. L'article 16 est déjà très éclairant sous ce rapport : il circonscrit le pouvoir de fouiller une personne pour rechercher sur elle une chose saisissable ou une personne séquestrée.

D'une manière générale, le *Code criminel* ne prévoit pas la délivrance de mandats autorisant la fouille d'une personne[35]. Le mandat dont il est question au paragraphe 487(1) ne peut en effet autoriser que la fouille d'un «bâtiment, contenant ou lieu». C'est pourquoi les fouilles corporelles, en matière criminelle, s'effectuent surtout, soit avec le consentement de l'intéressé, soit en vertu des pouvoirs conférés par la common law en cas d'arrestation. Dans notre régime, les fouilles corporelles demeurent possibles dans chacun de ces cas. On pourra en plus obtenir un mandat autorisant la fouille d'une personne pour rechercher une chose saisissable ou une personne séquestrée, et se dispenser du mandat en cas d'urgence.

L'alinéa *a*) de l'article 16 vise tout simplement à faciliter la fouille corporelle. Il précise qu'il n'est pas nécessaire d'obtenir une autorisation distincte pour interpeller ou retenir la personne que l'on entend fouiller. Partant, l'absence d'autorisation expresse à cet égard ne rendrait pas la détention arbitraire (voir l'article 9 de la Charte) ni ne pourrait justifier une poursuite civile pour arrestation arbitraire.

L'alinéa *b*) repose sur le fait que la fouille — préalablement autorisée ou non — d'une personne non consentante est susceptible de provoquer des réactions imprévisibles, et que la personne habilitée à l'effectuer doit aussi avoir le pouvoir de prendre les mesures appropriées pour assurer sa propre protection. Il n'est pas nécessaire, pour pratiquer une fouille préventive, de croire effectivement que la personne porte une arme ou

35. Voir cependant les dispositions du paragraphe 395(1), qui portent sur le mandat autorisant la recherche de «métaux précieux», etc.

un instrument susceptible de faciliter son évasion : on peut agir par simple précaution. Le pouvoir de fouille préventive est défini à l'article 17.

Les autres alinéas de l'article 16 s'appuient sur l'idée que la portée de la fouille corporelle doit être fonction de l'objectif au regard duquel celle-ci est permise, tout en étant suffisamment étendue pour que les agents de la paix puissent trouver et saisir les choses qu'ils sont autorisés à chercher. Il ne s'agit pas du pouvoir discrétionnaire d'examiner toute partie du corps ou tout vêtement jusqu'à la découverte d'un objet. Il faut avant tout tenir compte des caractéristiques de ce qui est recherché, la fouille devant se limiter aux parties du corps et aux vêtements où pourrait raisonnablement se trouver l'objet[36].

Dans l'arrêt récent *Cloutier* c. *Langlois*[37], la Cour suprême du Canada a jugé que le pouvoir de fouiller une personne à l'occasion de son arrestation afin de chercher sur elle des indices de la commission d'un crime, était limité à la «fouille sommaire» ou fouille par palpation, laquelle est définie dans les termes suivants :

> La fouille sommaire constitue à cet égard un mécanisme relativement peu intrusif : les vêtements sont palpés de façon à vérifier par l'extérieur la présence d'objets sur la personne mise en état d'arrestation. Les poches peuvent être examinées mais les vêtements ne sont pas retirés et aucune force n'est appliquée[38].

Certes, les modalités du pouvoir de fouille prévu à l'article 16 — notamment les dispositions de l'alinéa 16*f*) qui permettent de dévêtir la personne — pourraient sembler dépasser les limites établies par la Cour suprême. En revanche, la définition des circonstances justifiant l'exercice de ce pouvoir, que l'on trouvera ci-dessous à l'article 44, est à certains égards plus rigoureuse. Suivant le régime proposé, l'existence de motifs raisonnables est nécessaire lorsque la fouille vise la découverte d'éléments de preuve, mais non lorsqu'il s'agit de vérifier si la personne est armée (c'est-à-dire pratiquer une fouille *préventive*). Ainsi, la règle établie ici se distingue de celle de l'arrêt *Cloutier* en ce que l'arrestation ne justifie pas en soi l'exercice d'une fouille sans mandat en vue de découvrir des indices, sauf en cas d'urgence. Ce compromis nous paraît propre à éliminer les fouilles et perquisitions abusives au regard de la Charte.

Définition de la fouille préventive

17. Le pouvoir de pratiquer une fouille préventive sur une personne s'entend du pouvoir :

***a*) de pratiquer sur elle une fouille par palpation et de fouiller ses vêtements ainsi que toute chose qu'elle porte ou**

36. Soulignons à ce sujet les dispositions de l'article 50, suivant lesquelles la fouille corporelle doit être exécutée d'une manière qui respecte la dignité et l'intimité de la personne visée, et être limitée au strict nécessaire. Il faut aussi tenir compte des dispositions de l'article 55 (recherche d'indices sur les personnes); elles énoncent clairement que le droit d'effectuer une fouille corporelle ne comprend pas, par exemple, le pouvoir d'examiner une personne dévêtue, de s'introduire les doigts dans ses orifices corporels ou d'accomplir des actes chirurgicaux ou «médicaux», même lorsqu'il serait raisonnable de penser que le recours à de telles méthodes permettrait la découverte de l'objet recherché. Ces techniques dangereuses ou très attentatoires à l'intégrité corporelle font l'objet de dispositions particulières.

37. [1990] 1 R.C.S. 158.

38. *Id.*, p. 185.

à sa portée, pour déceler l'éventuelle présence d'armes ou d'instruments susceptibles de faciliter son évasion;

***b*) si la fouille permet de découvrir qu'une chose considérée, pour des motifs raisonnables, comme une arme ou un instrument susceptible de faciliter l'évasion de la personne, se trouve sous ou dans ses vêtements, de lui enlever tout vêtement qu'il est raisonnable et nécessaire d'enlever pour pratiquer la saisie;**

***c*) de saisir toute chose considérée, pour des motifs raisonnables, comme une arme ou un instrument susceptible de faciliter l'évasion de la personne.**

Rapport n° 24, al. 20*a*)

COMMENTAIRE

L'article 17 définit la portée du pouvoir (conféré par l'alinéa 16*b*) et l'article 43) de soumettre une personne à une fouille préventive. D'emblée, l'alinéa *a*) établit ce que l'on peut chercher : des armes et des instruments susceptibles de faciliter une évasion. Il permet à celui ou celle qui effectue une fouille corporelle de procéder soit par palpation, soit en fouillant les vêtements de la personne et tout objet qu'elle porte ou à sa portée. Par «palpation», on entend simplement ici la «fouille sommaire» dont la portée a été définie par la Cour suprême du Canada dans l'affaire *Cloutier* (dont nous avons déjà parlé à propos de l'article 16). Quant aux mots «à sa portée», ils déterminent l'étendue de la fouille, qui est fonction de son objectif : lorsqu'on pratique une fouille à corps, on n'a pas besoin de fouiller des lieux autres que ceux où, logiquement, pourraient être dissimulés une arme ou un instrument susceptible de faciliter l'évasion de la personne fouillée.

Les alinéas *b*) et *c*), pour leur part, confèrent des pouvoirs complémentaires ayant pour but de faciliter la saisie. Ces dispositions découlent tout naturellement du pouvoir de fouille préventive.

L'article 54 établit un mécanisme pour la restitution ou la disposition de choses saisies temporairement au cours d'une fouille préventive effectuée en application du présent article.

Définition du pouvoir de fouiller un véhicule

18. Sauf s'il est obtenu par consentement, le pouvoir de perquisitionner dans un véhicule pour rechercher une chose saisissable ou une personne séquestrée se limite à immobiliser et à retenir le véhicule, à pénétrer dans le véhicule et à fouiller les parties du véhicule, ou de toute chose s'y trouvant, où il est raisonnable de croire que pourrait se trouver cette chose ou cette personne.

Rapport n° 24, art. 14, par. 28(2)

COMMENTAIRE

Les articles 18 et 19 sont le pendant, pour les perquisitions effectuées dans des lieux ou des véhicules, de la définition du pouvoir de fouille corporelle (voir l'article 16 et le commentaire y afférent).

D'emblée, le pouvoir de fouiller un lieu ou un véhicule suppose le pouvoir d'immobiliser et de retenir le véhicule, et celui de pénétrer dans le véhicule ou dans le lieu. Les autres pouvoirs conférés par les dispositions de ces deux articles, relativement aux parties du véhicule ou du lieu pouvant être fouillées, visent encore une fois à permettre à la personne pratiquant une perquisition de trouver ce qu'elle recherche, tout en imposant des limites raisonnables au pouvoir de fouille et de perquisition.

Définition du pouvoir de fouiller un lieu

19. Sauf s'il est obtenu par consentement, le pouvoir de perquisitionner dans un lieu pour rechercher une chose saisissable ou une personne séquestrée se limite à pénétrer dans le lieu et à fouiller les parties du lieu, ou de toute chose s'y trouvant, où il est raisonnable de croire que pourrait se trouver cette chose ou cette personne.

Rapport n° 24, art. 14, par. 28(2)

COMMENTAIRE

Voir le commentaire afférent à l'article 18.

Définition du pouvoir de saisie

20. Le pouvoir de saisie s'entend du pouvoir,

***a*) dans le cas d'une chose, d'en prendre possession ou de retirer à quiconque la possibilité d'en disposer;**

***b*) dans le cas de fonds déposés à un compte dans un établissement financier, le pouvoir de retirer à quiconque la possibilité d'en disposer.**

Rapport n° 24, art. 4

COMMENTAIRE

C'est traditionnellement par la prise de possession matérielle qu'on saisit une chose, et les dispositions du *Code criminel* actuel sont rédigées dans cette perspective. Le présent article 20 reprend cette conception traditionnelle, mais prévoit aussi une autre méthode : lorsqu'une saisie est légalement autorisée, on pourra la réaliser en retirant à quiconque la possibilité de disposer de la chose ou des fonds visés, sans qu'il soit nécessaire d'en acquérir la détention matérielle.

Dans le cas de fonds déposés à un compte dans un établissement financier, la possession matérielle est à proprement parler impossible; la saisie ne peut être réalisée qu'en obtenant la maîtrise du compte. D'autre part, certains objets peuvent s'avérer difficiles à transporter ou à entreposer sous surveillance policière. Le fait que la saisie d'une chose puisse se faire en retirant à quiconque la possibilité d'en disposer devrait

réduire les difficultés administratives et d'entreposage actuellement éprouvées par la police.

L'article 20 traduit aussi l'adhésion de la Commission à un grand principe : il y a lieu de limiter dans toute la mesure du possible les atteintes aux droits de possession individuels. Cette disposition encourage le recours à une solution de rechange à l'acquisition de la détention matérielle lorsque rien ne s'y oppose et que l'application de la loi ne saurait en souffrir.

Contrairement à l'alinéa 4*b*) de la première recommandation du rapport n° 24, l'article 20 n'envisage pas la réalisation d'une saisie par «la prise ou l'obtention de photographies ou de représentations visuelles d'une chose saisissable». Si nous n'avons pas donné suite à cette recommandation, c'est pour trois raisons principales.

En premier lieu, la recommandation visait, du moins en partie, à encourager le recours, pour la saisie de «renseignements[39]» à des méthodes moins attentatoires que la prise de possession matérielle des choses contenant ces renseignements[40]. Nous avions pensé que la saisie de renseignements «sous une forme secondaire ou enregistrée[41]», en application de l'alinéa 4*b*), permettrait de réaliser cet objectif. Nous en sommes venus depuis à la conclusion qu'un renseignement n'est pas une chose qui peut matériellement faire l'objet d'une saisie. Comme nous l'avons déjà signalé[42], nous avons éliminé les «renseignements» de la définition du terme «chose saisissable[43]», et le pouvoir de saisie défini à l'article 20 ne vise désormais que les choses, de même que les fonds déposés à un compte dans un établissement financier. Par conséquent, la saisie de «renseignements» ne peut s'effectuer que par la saisie de la chose contenant ces renseignements ou sur laquelle ils sont enregistrés. Cela dit, l'objectif visé par la recommandation initiale peut encore être réalisé, et l'atteinte portée aux droits du saisi, être atténuée par le recours aux procédures subsidiaires prévues aux articles 266 à 269. Ainsi, dans le cas où une chose est saisie en raison des renseignements qu'elle contient, l'agent de la paix pourra faire une copie des renseignements et cette copie, dûment certifiée, pourra être produite en preuve et aura la même force probante que les renseignements eux-mêmes. La chose saisie pourra donc être restituée sans délai.

En second lieu, bon nombre des dispositions de la partie VI (*La disposition des choses saisies*) — notamment celles qui ont trait à la garde des choses saisies, à l'accès à celles-ci, à la vente des choses périssables et à la destruction des choses dange reuses — ne peuvent logiquement s'appliquer qu'aux choses dont on peut matériellement prendre possession ou dont on peut empêcher quiconque de disposer.

En troisième lieu, la recommandation n'est susceptible d'application que si elle est appuyée par une autre disposition conférant à la photographie ou autre représentation visuelle la même force probante que la chose elle-même. Or, nous en sommes venus à

39. À l'article 3 de la première recommandation du rapport n° 24, la définition du terme «chose saisissable» incluait les «renseignements».

40. Rapport n° 24, pp. 18-19.

41. *Id.*, p. 18.

42. Voir le commentaire afférent à l'article 2.

43. Voir l'article 2.

la conclusion qu'une règle aussi globale quant à la valeur probante ne pouvait s'appliquer à tous les cas, mais seulement lorsque les renseignements sont contenus dans la chose ou servent à l'identifier; il fallait donc réduire et préciser sa portée. C'est pourquoi nous avons opté pour la prompte restitution des choses de ce genre, soit, dans le cas de renseignements, par le recours à la procédure décrite ci-dessus, soit, dans le cas de choses devant être identifiées (il s'agira en général de choses présumées volées), en précisant que la photographie dûment certifiée d'une chose saisie conformément à l'article 20 est admissible en preuve pour identifier la chose et a, à cette fin et sauf preuve contraire, la même force probante que la chose.

Par conséquent, afin d'éviter toute ambiguïté quant à l'objet des dispositions de la partie VI, nous avons resserré la définition de la saisie et incorporé aux articles 266 et 267 le pouvoir distinct de réaliser des photographies et des copies.

CHAPITRE II
FOUILLES, PERQUISITIONS ET SAISIES AUTORISÉES PAR MANDAT

SECTION I
DEMANDE DE MANDAT

Recevabilité

21. Chacun peut demander un mandat de fouille ou de perquisition.

COMMENTAIRE

Toute personne peut à l'heure actuelle demander un mandat de perquisition en vertu de l'article 487 du *Code criminel*. Mais pour les mandats décernés par téléphone ou à l'aide d'un autre moyen de télécommunication, la demande ne peut être faite que par un agent de la paix[44]. Les demandes de mandat de perquisition présentées par de simples citoyens sont chose rare, et tout porte à conclure à la quasi-inexistence des abus à ce chapitre. L'article 21 continue de permettre ces demandes; toutefois, l'article 35 énonce très clairement que seul l'agent de la paix peut exécuter le mandat.

Suivant le paragraphe 22(1), la demande de télémandat doit, comme c'est actuellement le cas, émaner d'un agent de la paix.

44. *Code criminel*, par. 487.1(1); cette disposition découle d'une recommandation de la Commission. Voir le rapport n° 19, partie II, rec. 2(1). Le commentaire qui accompagne cette recommandation, p. 95, justifie cette restriction par le fait que la procédure de délivrance par téléphone vise à faciliter l'accès des policiers au juge de paix.

Demande en personne ou par téléphone

22. (1) La demande est présentée en personne. Toutefois, elle peut aussi l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, si elle émane d'un agent de la paix à qui il est matériellement impossible de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement, à huis clos et sous serment, de vive voix ou par écrit.

Rapport n° 24, art. 6

Forme de la demande écrite

(3) La demande présentée par écrit doit l'être selon la formule prescrite.

Rapport n° 19, partie II, rec. 2(1)
Rapport n° 24, art. 6
Code criminel, par. 487(1) et 487.1(1)

COMMENTAIRE

L'article 22 explique les modalités de présentation de la demande de mandat. Cette procédure vise tous les mandats de perquisition et remplace un certain nombre de dispositions du *Code criminel* renfermant diverses exigences[45].

Le paragraphe (1) énonce les deux méthodes actuellement prévues au *Code criminel*. La Commission, si elle encourage la mise à contribution des techniques modernes, considère néanmoins la demande faite «en personne» comme la façon normale de procéder. L'utilisation du téléphone ou d'autres moyens de télécommunication devrait demeurer une exception à la règle.

Le paragraphe (2), consacré à la forme de la demande, énonce d'abord que celle-ci est présentée unilatéralement[46] et à huis clos[47]; cela, pour favoriser l'efficacité de la procédure. Au paragraphe (2), on conserve la règle suivant laquelle la délivrance du mandat doit être fondée sur des renseignements donnés sous serment. Mais la demande présentée en personne peut l'être de vive voix, ce qui n'est pas le cas en ce moment. Nous avons ici tenu compte des méthodes modernes qui permettent d'enregistrer tous les renseignements fournis par le demandeur et facilitent donc le contrôle ultérieur de la validité du mandat. Vu les dispositions de l'article 11, la demande présentée en personne ne pourra l'être de vive voix que si le juge de paix est en mesure d'en faire un enregistrement intégral, ainsi que de toute déposition complémentaire, le cas échéant. Comme le juge de paix peut, en vertu du paragraphe 10(1), interroger le demandeur, entendre d'autres dépositions et recevoir tout élément de preuve, la demande faite de vive voix lui donne autant d'informations qu'une demande écrite.

Pour favoriser la réalisation de l'objectif de précision, on exige au paragraphe (3) que la demande écrite soit présentée selon la formule prescrite. Le paragraphe 487(1)

45. Voir les paragraphes 103(1), 164(1), 199(1), 320(1), 395(1), 487(1) et 487.1(1). Voir aussi l'article 12 de la *Loi sur les stupéfiants* ainsi que le paragraphe 42(3) et l'article 51 de la *Loi sur les aliments et drogues*.

46. «Unilatéralement» est défini à l'article 2 et signifie, en parlant d'une demande, «sans qu'il soit nécessaire de la notifier à quelque autre partie.»

47. Le terme «huis clos» est défini à l'article 2 et suppose, dans le cas d'une demande unilatérale, que celle-ci est présentée «en l'absence du public et de toute partie autre que le demandeur».

du Code actuel impose lui aussi l'utilisation d'une formule (la formule 1), mais des réserves ont été exprimées sur le contenu de celle-ci. Les problèmes qu'elle présente seront étudiés de manière plus approfondie dans le commentaire relatif à l'article 24.

Compétence, demande en personne

23. (1) La demande présentée en personne est adressée à un juge de paix du district judiciaire où est censé avoir été commis le crime ou de celui où le mandat doit être exécuté.

Compétence, demande par téléphone

(2) La demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication est présentée à un juge de paix désigné par le juge en chef de la Cour criminelle pour exercer cette fonction.

Rapport n° 19, partie II, rec. 2(1)
Code criminel, par. 487.1(1)

COMMENTAIRE

L'article 487 du *Code criminel* ne précise pas le lieu où la demande de mandat faite «en personne» doit être présentée. Le mandat peut être délivré dans un district judiciaire différent de celui où l'infraction est censée avoir été commise; et le «bâtiment, contenant ou lieu» à fouiller peut être situé à l'extérieur du district judiciaire de délivrance. L'article 487 prévoit seulement, en effet, que la demande est présentée à un juge de paix. Le paragraphe (1) de l'article 23 de notre code est plus rigoureux : on exige un lien concret entre l'enquête et le district judiciaire où est portée la demande.

Dans le contexte du télémandat, par contre, en raison de la nature de la demande, une telle exigence ne paraît ni opportune ni utile. Dans certaines régions, on a établi un système centralisé pour la présentation des demandes. Au Québec, par exemple, toutes les demandes sont acheminées à Montréal, où elles sont examinées par certains juges de paix désignés à cet effet. Dans de telles conditions, il est plus que probable que le juge de paix saisi de la demande n'aura aucun lien particulier avec la région où se déroule l'enquête, ce qui est actuellement la règle au paragraphe 487.1(1) du *Code criminel*, aux termes duquel la demande de télémandat est présentée à un juge de paix désigné à cet effet par le juge en chef de la cour provinciale qui a compétence. Le paragraphe (2) de l'article 23 reprend l'essentiel de la pratique actuelle. Toutefois, compte tenu de l'unification de la juridiction criminelle proposée par la Commission (document de travail n° 59), le paragraphe (2) dispose que le juge en chef de la Cour criminelle désigne les juges de paix habilités à recevoir les demandes de mandat présentées par téléphone ou à l'aide d'un autre moyen de télécommunication.

Contenu de la demande

24. La demande contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le lieu et la date où elle est présentée;**

***c*) le crime faisant l'objet de l'enquête;**

d) la personne, le lieu ou le véhicule devant être fouillé;

Rapport n° 19, partie II, rec. 2(4)*b*)
Code criminel, al. 487.1(4)*b*)

e) lorsque la demande vise l'obtention d'un mandat autorisant la recherche de choses saisissables :

(i) les choses saisissables recherchées,

(ii) les motifs sur lesquels le demandeur se fonde pour croire que ces choses seront trouvées sur la personne, dans le lieu ou dans le véhicule visé par la fouille ou la perquisition,

(iii) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne, au même lieu, au même véhicule ou aux mêmes choses saisissables, et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

Rapport n° 19, partie II, rec. 2(4)*b*) et *c*)
Rapport n° 24, art. 5 et 7
Code criminel, al. 487.1(4)

f) lorsque le mandat demandé vise la recherche et la délivrance d'une personne séquestrée :

(i) la personne recherchée,

(ii) les motifs sur lesquels le demandeur se fonde pour croire que cette personne sera trouvée dans le lieu ou le véhicule où l'on veut perquisitionner ou sur la personne que l'on veut fouiller,

(iii) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne, au même lieu, au même véhicule ou à la même personne séquestrée, et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

Rapport n° 24, art. 5, 7, par. 28(2)

g) le cas échéant, les motifs sur lesquels le demandeur se fonde pour croire que l'exécution de nuit est nécessaire;

Rapport n° 24, art. 12

h) le cas échéant, et à condition que la demande soit présentée en personne, les motifs sur lesquels le demandeur se fonde pour croire qu'il est nécessaire que le mandat puisse être exécuté plus de dix jours après sa délivrance;

Rapport n° 24, art. 13

i) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les

circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

Rapport n° 19, partie II, rec. 2(4)a)
Code criminel, par. 487.1(4)

COMMENTAIRE

Le *Code criminel* actuel fournit bien peu d'indications sur la forme et le contenu des documents requis pour la demande de mandat de perquisition. On en trouve quelques-unes dans la formule 1, au sujet des mandats prévus à l'article 487. Mais cette formule n'est pas en accord avec les exigences de l'article 487, tant sur le plan du fond que sur celui de la preuve[48]. Cet état de choses a ouvert la voie aux improvisations et, partant, à des différences considérables dans la forme et le contenu des demandes; on a ainsi pu, à l'occasion, utiliser des formules qui en fait entravaient la divulgation des renseignements exigés par la loi.

L'article 24, au contraire, indique quels éléments spécifiques doivent obligatoirement faire partie de la demande de mandat de perquisition. Cette liste détaillée devrait réduire le nombre des mandats approuvés suivant des critères vagues ou inadéquats, et faciliter le contrôle ultérieur de la validité de la délivrance, tous les renseignements étant enregistrés fidèlement.

À l'heure actuelle, il n'est pas nécessaire de distinguer, dans la demande de mandat présentée en vertu de l'article 487 du *Code criminel*, les éléments touchant le «fond» de la demande et les éléments relevant de la «preuve». Cela est toutefois requis pour la demande de télémandat[49].

Les alinéas *a*) et *b*) concernent l'inclusion de certaines indications de base et se passent d'explications. Aux termes de l'alinéa *c*), la demande doit indiquer le crime faisant l'objet de l'enquête.

L'alinéa *d*), ainsi que les sous-alinéas *e*)(i) et *f*)(i), énoncent les exigences essentielles sur le plan du substantiel : le demandeur doit indiquer la personne, le lieu ou le véhicule à fouiller, de même que la chose ou la personne que l'on recherche.

Quant aux sous-alinéas *e*)(iii) et *f*)(iii), qui ne seront pas applicables dans tous les cas, ils obligent le demandeur à fournir, le cas échéant, certains renseignements sur toute demande analogue présentée antérieurement. L'agent de la paix qui vient d'essuyer un refus sera sans doute moins tenté ainsi de se mettre sans motif valable à la recherche d'un juge de paix plus complaisant (pratique susceptible de battre en brèche le caractère judiciaire de la procédure de délivrance). Ces renseignements sont exigés seulement, à l'heure actuelle, pour la demande de télémandat[50]; nous ne voyons pas pourquoi la règle ne devrait pas être étendue à toutes les demandes.

48. Voir les observations critiques du juge Osler dans l'affaire *R.* c. *Colvin, Ex Parte Merrick* (1971), 1 C.C.C. (2d) 8, p. 11 (H.C.J. Ont.).

49. *Code criminel*, par. 487.1(4); cette disposition découle d'une recommandation de la Commission. Voir rapport n° 19, partie II, rec. 2(4); rapport n° 24, rec. 6, commentaire, pp. 20-22 et annexe A, pp. 83-84.

50. *Code criminel*, al. 487.1(4)*d*). Il existe des dispositions analogues pour les demandes antérieures d'autorisation en matière d'écoute électronique : *Code criminel*, al. 185(1)*f*).

Aux sous-alinéas *e*)(ii) et *f*)(ii) sont énoncés les éléments clés de toute demande de mandat de perquisition sur le plan de la preuve; ils découlent directement des conditions devant être remplies en vertu des paragraphes (1) et (2) de l'article 25 pour que le juge de paix puisse délivrer le mandat.

L'alinéa *g*), qui ne s'appliquera que dans certains cas, est lié aux critères établis à l'article 28 pour l'autorisation d'exécuter le mandat de nuit. Par essence, les fouilles et perquisitions revêtent pour les personnes visées un caractère troublant et portent atteinte à l'intimité de la vie privée; et cela, davantage encore lorsqu'elles ont lieu de nuit. Nos propositions encouragent l'exécution de jour chaque fois que c'est possible. L'article 488 du *Code criminel* dispose que les mandats délivrés sous le régime des articles 487 et 487.1 sont exécutés de jour, à moins que l'exécution de nuit ne soit expressément autorisée. Mais il ne pose aucun critère quant à cette autorisation. Qui plus est, l'exécution des mandats délivrés sous le régime de certaines lois fédérales (par exemple, en vertu de l'article 10 de la *Loi sur les stupéfiants*) peut avoir lieu en tout temps. Il faut reconnaître que les perquisitions de nuit, si perturbatrices soient-elles sur le plan de la vie quotidienne et de l'intimité de la vie privée, n'en sont pas moins indispensables dans certains cas. L'article 28 les permet donc, à une double condition : le demandeur doit avoir indiqué les motifs de leur nécessité, et le juge de paix doit être «convaincu de l'existence de tels motifs». Le demandeur pourra par exemple établir que la chose saisissable sera enlevée ou détruite si l'on n'opère pas de nuit.

L'alinéa *h*) n'est pas d'application systématique lui non plus; il découle directement du critère énoncé au paragraphe 31(3) pour la prolongation, par le juge de paix, du délai d'exécution normal de dix jours. En ce moment, le *Code criminel* ne prescrit aucun délai pour l'exécution du mandat de perquisition. Or, il paraît souhaitable qu'elle suive d'assez près sa délivrance, de façon qu'elle ait lieu dans les mêmes circonstances, pour l'essentiel, que celles ayant amené le juge de paix à décerner le mandat[51]. Si le demandeur estime qu'un délai plus long s'impose, il doit indiquer ses motifs dans la demande elle-même.

L'alinéa *i*), lié à l'obligation de se présenter en personne, s'appliquera uniquement aux demandes «faites par téléphone ou à l'aide d'un autre moyen de télécommunication». Il découle directement de la condition supplémentaire établie à l'article 26 pour la délivrance d'un mandat dans ces cas-là. Le plus souvent — mais pas toujours —, «matériellement impossible» sera synonyme d'«urgence». Le mandat devrait pouvoir être obtenu de cette façon lorsque, pour des considérations de temps ou de distance, il serait inopportun d'exiger la présence du demandeur. Cela se produira le plus souvent dans les régions éloignées, lorsque l'obtention du mandat est urgente mais qu'on n'aurait pas le temps de se rendre chez le juge de paix. Il ne s'agit pas de faciliter la tâche des agents de la paix qui préféreraient simplement ne pas se présenter en personne devant lui. Le juge de paix, en cette matière, jouit du même pouvoir discrétionnaire que pour la délivrance du mandat lui-même[52].

51. Voir le rapport n° 24, rec. 3.

52. Rapport n° 19, partie II, note 10, p. 114.

SECTION II
DÉLIVRANCE DU MANDAT

Motifs, mandat concernant une chose saisissable

25. (1) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant la fouille d'une personne, d'un lieu ou d'un véhicule et la saisie d'une chose saisissable, s'il est convaincu qu'il existe des motifs raisonnables de croire que cette chose sera trouvée sur cette personne, dans ce lieu ou dans ce véhicule.

Rapport n° 19, partie II, rec. 2(5)*c*)
Rapport n° 24, art. 5
Code criminel, par. 487(1) et 487.1(5)

Motifs, mandat concernant une personne séquestrée

(2) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant la fouille d'une personne, d'un lieu ou d'un véhicule et la délivrance d'une personne y séquestrée, s'il est convaincu qu'il existe des motifs raisonnables de croire que la personne séquestrée sera trouvée sur cette personne, dans ce lieu ou dans ce véhicule.

Rapport n° 24, art. 5, par. 28(2)

COMMENTAIRE

L'article 25 remplace plusieurs dispositions, diversement rédigées, du *Code criminel* et d'autres lois fédérales[53]. Contrairement au texte central du Code actuel en matière de mandats de perquisition (art. 487), il prévoit d'une manière générale la délivrance de mandats autorisant la fouille d'une personne. L'étendue du «pouvoir de fouiller une personne non consentante pour rechercher une chose saisissable ou une personne séquestrée» est définie à l'article 16; quant au pouvoir de perquisitionner dans un véhicule ou un lieu (sauf avec le consentement de l'intéressé) pour rechercher une chose saisissable ou une personne séquestrée, ses limites sont établies aux articles 18 et 19. L'article 37 précise de plus les actes que «[l]e mandat autorise l'agent de la paix à accomplir».

Rédigé en termes larges, le paragraphe (1) constitue le fondement de la délivrance du mandat de perquisition et de saisie visant des choses saisissables. Il confère au juge de paix le pouvoir discrétionnaire d'accorder ou de rejeter la demande, ce pouvoir devant être exercé d'une manière judiciaire[54]. En gros, les règles en vigueur sont conservées. Le critère à appliquer est objectif[55] : le juge de paix doit être convaincu, au regard des faits présentés dans la demande, qu'il existe des motifs raisonnables de croire qu'une chose saisissable reliée à une infraction spécifique sera trouvée, soit sur la personne visée par la fouille, soit dans le lieu ou le véhicule où la perquisition doit être opérée. Le critère des «motifs raisonnables» signifie que de simples soupçons ne

53. Voir le *Code criminel*, par. 103(1), 164(1), 199(1), 320(1), 395(1), 487(1), 487.1(5); la *Loi sur les stupéfiants*, art. 12; la *Loi sur les aliments et drogues*, par. 42(3).

54. Voir *Descôteaux* c. *Mierzwinski*, [1982] 1 R.C.S. 860, le juge Lamer, pp. 888-890.

55. *Re Bell Telephone Co. of Canada* (1947), 89 C.C.C. 196 (H.C. Ont.), le juge en chef McRuer, p. 198.

suffisent pas, mais le juge n'est pas tenu de décider si le crime mentionné a bien été commis, ou si les effets recherchés permettront réellement d'établir sa perpétration[56]. Il doit exister, entre les choses recherchées, le lieu ou la personne devant être fouillés et les faits visés par l'enquête, un lien permettant raisonnablement de croire que les choses en question se trouvent là où la fouille doit avoir lieu[57] et qu'elles sont saisissables[58].

Le paragraphe (2), de droit nouveau, confère au juge de paix le pouvoir de décerner un mandat autorisant la recherche et la délivrance d'une personne «séquestrée» (ce terme étant défini à l'article 15). Nous l'avons ajouté par souci de précaution, afin de reconnaître expressément et sans aucune ambiguïté que les fouilles répondant à cet objectif forment un aspect légitime des pouvoirs de la police. Le juge de paix doit rendre sa décision à la lumière des critères établis pour la demande de mandat visant une chose saisissable.

Motifs supplémentaires, demande par téléphone

26. Dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix refuse la délivrance du mandat s'il n'est pas en outre convaincu de l'existence de motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

Rapport n° 19, partie II, rec. 2(5)
Code criminel, al. 487.1(5)*b)*

COMMENTAIRE

L'article 26 énonce les autres critères applicables pour les demandes présentées par téléphone ou à l'aide d'un autre moyen de télécommunication. C'est le pendant de l'alinéa 487.1(5)*b*) du *Code criminel* actuel.

Conditions d'exécution

27. Le juge de paix qui décerne un mandat peut y fixer toutes conditions qu'il juge opportunes quant à son exécution.

COMMENTAIRE

L'article 27 donne au juge de paix un nouveau pouvoir discrétionnaire quant aux conditions régissant l'exécution du mandat. Comme il pourra demander plus de renseignements que maintenant (et partant devrait être en mesure de mieux apprécier l'ensemble des circonstances), l'attribution de ce pouvoir paraît opportune. L'un des cas d'application de ce pouvoir sera, par exemple, celui où l'on s'attend à ce que la fouille ou la perquisition permette d'avoir accès à des documents privilégiés. Dans un tel cas,

56. *R.* c. *Johnson & Franklin Wholesale Distributors Ltd.* (1972), 16 C.R.N.S. 107 (C.A. C.-B.); permission d'interjeter appel à la C.S.C. refusée, *id.*, p. 114.

57. *R.* c. *Johnson & Franklin Wholesale Distributors Ltd.*, [1973] 5 W.W.R. 187 (C.A. C.-B.).

58. Voir *Re Worrall* (1965), 44 C.R. 151 (C.A. Ont.).

le juge de paix voudra sans doute assortir l'exécution du mandat de modalités particulières, afin de protéger le caractère confidentiel des documents en question.

Exécution de nuit

28. Si le demandeur a précisé les motifs sur lesquels il se fonde pour croire que le mandat doit être exécuté de nuit, le juge de paix, s'il est convaincu de l'existence de tels motifs, peut, sur le mandat, en autoriser l'exécution de nuit.

Rapport n° 24, art. 12
Code criminel, art. 488

COMMENTAIRE

L'article 28 permet au juge de paix d'autoriser l'exécution de nuit du mandat de perquisition. Il est directement lié à l'alinéa 24*g*), qui énumère les renseignements à fournir au juge de paix à l'appui d'une demande à cet effet. On y trouve les critères suivant lesquels ce pouvoir doit être exercé, ce qui n'est pas le cas à l'actuel article 488 du Code.

Forme du mandat

29. Le mandat est rédigé selon la formule prescrite et porte la signature du juge de paix qui le délivre.

Rapport n° 19, partie II, rec. 2(6)*a*)
Code criminel, par. 487(3), al. 487.1(6)*a*)

COMMENTAIRE

Nous incorporerons aux volumes à venir du présent code des formules spécifiques indiquant les éléments fondamentaux des mandats de perquisition[59]. En ce moment, le paragraphe 487(3) du *Code criminel* prévoit que le mandat de perquisition décerné en vertu de l'article 487 «peut être rédigé selon la formule 5 de la partie XXVIII, ajustée selon les circonstances». Si l'utilisation de cette formule n'est pas obligatoire, on doit d'une façon ou d'une autre en retrouver les éléments essentiels dans le mandat[60]. Elle n'est cependant pas sans présenter des déficiences ni prêter à confusion. Par exemple, elle n'exige pas expressément la mention d'une infraction spécifique, ni l'établissement d'un lien quelconque entre l'infraction et les choses recherchées. Le mandat devrait pourtant indiquer, avec suffisamment de précision pour que les intéressés puissent savoir de quoi il retourne, la nature de l'infraction à l'égard de laquelle les éléments de preuve sont recherchés. On devrait aussi y trouver des renseignements permettant de savoir exactement de quel lieu ou de quel véhicule le mandat autorise la fouille. En conséquence, pour empêcher les recherches à l'aveuglette et pour obtenir une plus grande précision qu'avec les formules actuellement proposées dans le *Code criminel*, cet article exige l'utilisation des formules prescrites pour tous les types de mandats; on énumère par ailleurs les éléments et les renseignements que le mandat doit comporter.

59. Dans les rapports antérieurs de la Commission, cela n'avait été fait que pour le «télémandat» : rapport n° 19, partie II, p. 110.

60. *Rex* c. *Solloway Mills & Co.* (1930), 53 C.C.C. 261 (C.S. Alb., Div. app.), le juge Hyndman, p. 263.

Contenu du mandat

30. Le mandat contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le crime faisant l'objet de l'enquête;**

***c*) la chose saisissable ou la personne séquestrée qui est recherchée;**

***d*) la personne, le lieu ou le véhicule à fouiller;**

***e*) les conditions fixées, le cas échéant, pour son exécution;**

***f*) la date où il expire s'il n'est pas exécuté;**

***g*) le lieu et la date où il est délivré;**

***h*) le nom du juge de paix et son ressort.**

SECTION III
EXPIRATION DU MANDAT

Demande en personne

31. (1) Le mandat décerné à la suite d'une demande présentée en personne expire dix jours après sa délivrance.

Abrégement du délai

(2) Le juge de paix peut fixer un délai plus court s'il est convaincu que ce délai est suffisant.

Prolongation du délai

(3) Le juge de paix peut fixer un délai de plus de dix jours mais d'au plus vingt jours, s'il est convaincu qu'il existe des motifs raisonnables de croire que cela est nécessaire.

Rapport n° 24, al. 13(1), 13(2)*a*) et *b*)

COMMENTAIRE

De l'avis de la Commission, il est indispensable de fixer un délai raisonnable pour l'exécution du mandat, par souci de précision d'une part, et d'autre part en raison du caractère judiciaire de la procédure. On s'assure ainsi, jusqu'à un certain point, que l'exécution n'aura pas lieu dans des circonstances radicalement différentes de celles qui ont incité le juge de paix à accéder à la demande[61].

D'une manière générale, le *Code criminel* ne fixe pas de délai d'exécution (l'existence d'un délai de sept jours pouvant toutefois être inférée des paragraphes 164(2) et 320(2) en matière de publications obscènes et d'histoires illustrées de crimes). Or, nos recherches nous ont permis de constater que les juges de paix imposent parfois une date limite et que les mandats en comportant une sont exécutés plus rapidement[62].

61. Voir le rapport n° 24, p. 30.

62. Rapport n° 19, partie II, p. 104; rapport n° 24, pp. 29-30.

La plupart des mandats de perquisition, avons-nous aussi découvert, sont exécutés dans les deux jours suivant leur délivrance[63]. L'imposition d'un délai de dix jours, dans le cas du mandat de perquisition délivré à la suite d'une demande présentée en personne, devrait donc s'avérer adéquate, à notre sens. Car, plus long, le délai perdrait tout son sens. C'est pourquoi le paragraphe 31(1) dispose que le mandat expire dix jours après sa délivrance. De toute façon, le paragraphe (3) permet au juge de paix de prolonger la durée de validité du mandat, pour les cas où le délai normal paraîtrait insuffisant. Par ailleurs, le paragraphe (2) lui donne la faculté de fixer un délai plus court, soit de sa propre initiative, soit en s'appuyant sur les renseignements contenus dans la demande. Mais, comme nous l'avons vu, la prolongation devra quant à elle avoir été expressément requise par le demandeur, qui aura indiqué les motifs sur lesquels il se fonde.

Demande par téléphone

32. Le mandat délivré à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication expire trois jours après sa délivrance.

Rapport n° 19, partie II, rec. 2(9)

COMMENTAIRE

Les dispositions sur la délivrance du mandat par téléphone ou à l'aide d'un autre moyen de télécommunication visent les cas où l'affaire est urgente et où il est matériellement impossible au demandeur de se présenter en personne devant le juge de paix. Dans cette perspective, le délai de trois jours prévu à cet article nous paraît amplement suffisant.

Aux termes de l'alinéa 487.1(5)*c*) du *Code criminel*, le juge de paix a en ce moment toute latitude pour fixer la durée de validité du mandat. La formule 5.1, applicable aux mandats décernés sous le régime de l'article 487.1, prescrivait auparavant le délai de trois jours que nous préconisons; mais à la suite de modifications récentes[64], ce n'est plus le cas.

Lorsque la Commission a recommandé un délai de trois jours dans le rapport n° 19 (p. 104), elle s'appuyait sur des recherches ayant démontré que 82,5 % de tous les mandats traditionnels étaient exécutés dans les deux jours, et que dans 97,1 % des cas, ils l'étaient dans un délai d'une journée lorsqu'une date d'expiration avait été fixée.

Exécution

33. Le mandat exécuté avant la date d'échéance qui y est fixée expire au moment de son exécution.

63. Rapport n° 24, p. 30.

64. *Loi corrective de 1987*, L.C. 1988, ch. 2, art. 26.

COMMENTAIRE

L'article 33 prévoit que le mandat expire au moment de son exécution si celle-ci a lieu avant la date d'expiration figurant sur le mandat. Nous avons voulu ainsi éviter que la police puisse s'autoriser du même mandat pour effectuer (à l'intérieur du délai prévu) une succession de fouilles concernant la même personne, le même lieu ou le même véhicule.

Dépôt du mandat expiré

34. Lorsque le mandat expire sans avoir été exécuté, les raisons pour lesquelles il ne l'a pas été sont notées sur une copie du mandat. Celle-ci est déposée dès que cela est matériellement possible auprès du greffier du district judiciaire où le mandat a été délivré.

Rapport n° 19, rec. 2(9)*a*)
Rapport n° 27, rec. 2(2)
Code criminel, al. 487.1(9)*a*)

COMMENTAIRE

Quelques observations seulement au sujet de cette disposition. Sauf pour les télémandats[65], le droit actuel n'exige pas la remise d'un rapport aux autorités en cas de non-exécution. L'article 34 modifierait donc cet état de choses, des explications devant être fournies peu importe le type de mandat.

SECTION IV
EXÉCUTION DU MANDAT

Compétence

35. Le mandat peut être exécuté dans la province où il est délivré par tout agent de la paix de la province.

Rapport n° 24, par. 11(1)

COMMENTAIRE

Les dispositions actuelles du *Code criminel* ne sont pas uniformes quant à la désignation des personnes habilitées à exécuter les mandats de perquisition. Certaines sont tout à fait silencieuses à cet égard. L'article 103, s'il prévoit la délivrance d'un mandat «sur demande du procureur général ou de son représentant», n'indique cependant pas qui peut l'exécuter, ni du reste les articles 164, 320 et 395. L'article 199 précise que l'exécution est confiée à «un agent de la paix», tandis qu'aux termes de l'article 487.1, le juge de paix «peut décerner à un agent de la paix un mandat[. . .]». Dans le cas de l'article 487, le mandat peut être exécuté par «une personne qui y est nommée ou un agent de la paix». (Les tribunaux ont conclu que cette dernière disposition autorise la délivrance du mandat à tous les agents de la paix de la province[66].)

65. Voir le *Code criminel*, al. 487.1(9)*a*).
66. *R.* c. *Solloway and Mills* (1930), 53 C.C.C. 271 (C.A. Ont.).

Quant aux mandats décernés sous le régime de la *Loi sur les stupéfiants* et de la *Loi sur les aliments et drogues*, leur exécution est nécessairement confiée à «l'agent de la paix qui y est nommé». Par conséquent, le mandat peut être exécuté par plusieurs agents, si celui qui est spécifiquement désigné est présent et dirige les opérations; mais le document qui n'indiquerait le nom d'aucun agent ne serait pas valable[67].

Suivant l'article 35, l'exécution des mandats de perquisition doit être confiée à des agents de la paix. Les pouvoirs conférés en cette matière (à certaines conditions) aux simples citoyens, rarement invoqués, sont de l'avis de la Commission superflus; elle estime du reste que les perquisitions devraient être effectuées par des personnes désintéressées[68]. La présente disposition exige que le mandat soit exécuté par un agent de la paix de la province où il est délivré, mais nous ne voyons pas au nom de quel principe pourrait se justifier la limitation des pouvoirs d'exécution à un agent nommément désigné[69], qui n'atténuerait aucunement le caractère attentatoire de la perquisition. En outre, le juge de paix n'est normalement pas en mesure d'apprécier l'opportunité de confier l'exécution du mandat à la personne qui y serait désignée. Il s'agit là d'une décision de nature administrative qu'il vaut mieux laisser au corps de police compétent.

Exécution dans une autre province

36. (1) Le mandat peut aussi être exécuté dans une autre province, s'il est visé par un juge de paix de cette province.

Visa du juge de paix

(2) Le juge de paix peut viser le mandat décerné à la suite d'une demande présentée en personne, s'il est convaincu que la personne, le lieu ou le véhicule à fouiller se trouve dans cette province.

Formule

(3) Le visa est apposé selon la formule prescrite.

Effet du visa

(4) Le mandat peut être exécuté dans la province où il a été visé, par tout agent de la paix de celle-ci ou de la province où il a été délivré.

Code criminel, par. 487(2) et (4)

COMMENTAIRE

Suivant les dispositions du paragraphe 487(2) du *Code criminel* actuel, le mandat de perquisition ne peut être exécuté hors de la circonscription territoriale du juge de paix dont il émane — fût-ce dans la même province — sans au préalable «avoir été

67. Voir *R.* c. *Genest*, [1989] 1 R.C.S. 59; *Re Goodbaum and the Queen* (1977), 38 C.C.C. (2d) 473 (C.A. Ont.).

68. Voir le rapport n° 24, p. 28.

69. Dans l'arrêt *R.* c. *Genest*, précité, note 67, p. 84, la Cour suprême a qualifié de «capitale» l'obligation de nommer l'agent dans le cas des perquisitions en matière de drogues, parce que cette règle fait contrepoids aux pouvoirs de perquisition extraordinaires dont jouissent à l'heure actuelle les agents pour perquisitionner dans des lieux d'habitation. Mais comme ces pouvoirs sont supprimés dans notre régime et que de nouveaux mécanismes sont ajoutés, à l'égard de toutes les perquisitions, pour garantir l'observation des prescriptions législatives, la nécessité de cette exigence s'évanouit.

visé [. . .] par un juge de paix ayant juridiction dans [la] circonscription» où se trouve le «bâtiment, contenant ou lieu». Il s'agit là essentiellement d'une formalité administrative : en termes concrets, une signature représente l'approbation d'un fonctionnaire judiciaire de la circonscription où doit avoir lieu la perquisition.

L'article 7 autorise (pour les raisons exposées dans le commentaire qui l'accompagne) l'exécution des mandats de perquisition, sans visa, partout dans la province où ils sont délivrés. Le paragraphe 36(1) complète cette disposition : il permet l'exécution du mandat dans une autre province, après apposition du visa requis. Si nous avons conservé la règle du visa dans ce cas, c'est pour que les juges de paix soient au courant de l'exécution de mandats de perquisition dans leur province et aient voix au chapitre à cet égard.

Le paragraphe (2) constitue selon nous une amélioration par rapport au paragraphe 487(2) du *Code criminel*, en ce qu'il énonce clairement le critère suivant lequel le juge de paix doit décider de l'opportunité de viser le mandat.

Le paragraphe (3) se passe d'explications. C'est le pendant du paragraphe 487(2) du Code actuel, suivant lequel le mandat doit être visé «selon la formule 28».

Le paragraphe (4), tout aussi limpide, correspond au paragraphe 487(4) du *Code criminel.*

Selon le régime proposé, le mandat décerné par téléphone ou à l'aide d'un autre moyen de télécommunication ne peut être visé ni exécuté à l'extérieur de la province de délivrance il serait en effet illogique qu'on prenne le temps d'obtenir un visa dans une autre province, alors que le mécanisme du télémandat est justement conçu pour les cas où il est matériellement impossible au demandeur de se présenter en personne devant le juge de paix. Car de deux choses l'une : ou bien l'agent de la paix est en mesure de comparaître personnellement, et la délivrance par téléphone est inopportune; ou bien cela lui est impossible, et il peut alors faire sa demande par téléphone ou à l'aide d'un autre moyen de télécommunication dans la province où la perquisition doit avoir lieu.

Pouvoirs conférés par le mandat

37. Le mandat autorise l'agent de la paix à accomplir les actes suivants :

***a*) fouiller toute personne, tout lieu ou tout véhicule désigné dans le mandat;**

***b*) fouiller toute personne trouvée dans le lieu ou le véhicule désigné dans le mandat, s'il croit, pour des motifs raisonnables, qu'elle porte ou dissimule la chose saisissable ou la personne séquestrée désignée dans le mandat;**

***c*) saisir toute chose que, pour des motifs raisonnables, il tient pour la chose saisissable désignée dans le mandat;**

***d*) délivrer toute personne que, pour des motifs raisonnables, il tient pour la personne séquestrée désignée dans le mandat.**

Rapport n° 24, art. 5, al. 24*a*), *b*), par. 28(1)

COMMENTAIRE

L'article 37 définit les limites du pouvoir de perquisition et de saisie en vertu d'un mandat.

L'alinéa *a*) se passe d'explications. En rédigeant l'alinéa *b*), nous avons voulu faire en sorte que l'exécution des mandats de perquisition dans des lieux ou des véhicules ne soit pas entravée du simple fait que des personnes présentes portent ou dissimulent sur elles les choses saisissables (ou les personnes séquestrées) recherchées. À l'heure actuelle, lorsqu'un mandat délivré en vertu de l'article 487 du *Code criminel* autorise une perquisition dans un lieu, l'agent ne peut en effet fouiller les personnes qui s'y trouvent même s'il est fondé à croire qu'elles ont sur elles une chose désignée dans le mandat[70]. Or, à notre sens, cette disposition est trop rigoureuse : il n'y a pas lieu de considérer systématiquement la fouille corporelle comme une perquisition distincte nécessitant une nouvelle autorisation. Autrement, on risque de faire échouer des enquêtes importantes à cause d'une règle arbitraire[71]. Aussi l'alinéa *b*) confère-t-il le pouvoir de fouiller, à l'occasion de la perquisition, les personnes trouvées dans le lieu ou le véhicule désigné au mandat. Il n'autorise néanmoins pas l'agent à fouiller quiconque est présent : il doit avoir des motifs raisonnables de croire que la personne «porte ou dissimule la chose saisissable ou la personne séquestrée désignée dans le mandat».

Les alinéas *c*) et *d*) permettent à l'agent de la paix de saisir toute chose ou de délivrer toute personne qu'il considère pour des motifs raisonnables comme visée par le mandat. Quant aux autres choses saisissables, leur saisie relève des dispositions des articles 48 et 49 (choses bien en vue).

Exécution de jour

38. Le mandat est exécuté entre six heures et vingt et une heures, à moins que le juge de paix qui l'a délivré n'en ait autorisé, par une mention expresse, l'exécution de nuit.

Rapport n° 24, art. 12
Code criminel, art. 488

COMMENTAIRE

Voir les commentaires relatifs à l'alinéa 24*g*) et à l'article 28.

Présence de l'occupant

39. Sauf impossibilité matérielle, le mandat est exécuté en présence de la personne qui occupe le lieu ou le véhicule fouillé, ou qui en est apparemment responsable.

70. Voir par exemple *R.* c. *Ella Paint* (1917), 28 C.C.C. 171 (C.S. N.-É.); *R.* c. *Mutch* (1986), 26 C.C.C. (3d) 477 (B.R. Sask.).

71. La règle actuelle est du reste susceptible d'amener les agents de la paix à chercher d'autres prétextes pour justifier les fouilles corporelles. Par exemple, on pourra procéder à une arrestation inutile, simplement pour fouiller la personne en cause.

COMMENTAIRE

Selon le régime proposé ici, les perquisitions ne doivent normalement pas être effectuées d'une manière clandestine, ni en l'absence des personnes qui ont un droit sur les choses dont la saisie est autorisée ou sont touchées de quelque autre manière[72]. L'article 39 vise à garantir que, dans la mesure du possible, la personne qui occupe le bien ou le véhicule fouillé, ou qui en est apparemment responsable, soit au courant de la perquisition et à même de constater de visu la manière dont elle est effectuée. Elle sera ainsi en mesure, notamment, de s'assurer que les méthodes utilisées ne sont pas excessives. Par exemple, si l'occupant ou la personne apparemment responsable de la maison fouillée est présent, il pourra vouloir donner aux policiers les clés d'armoires, de placards, etc., qui, sinon, risqueraient d'être forcés et endommagés. Les intéressés peuvent aussi vérifier que seules sont emportées les choses dont la saisie est autorisée et que les policiers ne mettent pas tout sens dessus dessous inutilement. Cette disposition ne peut donc qu'inciter les agents de la paix à respecter les prescriptions de la loi.

Remise d'une copie du mandat

40. (1) Avant d'entreprendre la fouille ou la perquisition, ou dès que cela est matériellement possible, l'agent de la paix remet une copie du mandat, selon le cas :

***a*) à la personne dont le mandat autorise la fouille;**

***b*) à toute personne présente et apparemment responsable du lieu ou du véhicule dont le mandat autorise la fouille.**

Rapport n° 19, partie II, rec. 2(7)
Rapport n° 24, par. 15(1)
Code criminel, par. 487.1(7)

Affichage d'une copie du mandat

(2) Après avoir exécuté un mandat dans un lieu ou un véhicule sans qu'il y ait de personne présente et apparemment responsable, l'agent de la paix indique sur une copie du mandat la date et l'heure de l'exécution et, le cas échéant, le fait que des choses ont été saisies. Il affiche cette copie bien en vue dans le lieu ou le véhicule.

Rapport n° 19, partie II, rec. 2(8)
Rapport n° 24, par. 15(2)
Code criminel, par. 487.1(8)

COMMENTAIRE

Il s'agit ici de faire savoir aux personnes concernées l'étendue et l'objet de la fouille ou perquisition, et de leur assurer (le plus tôt possible) que celle-ci a été dûment autorisée au préalable par les autorités compétentes[73]. Cela devrait faciliter dans bien

72. Bien entendu, certaines perquisitions devront avoir lieu sans que personne d'autre soit présent, par exemple sur des terrains vagues ou dans des immeubles abandonnés. Par ailleurs, si le propriétaire ou l'occupant a disparu ou que ses allées et venues demeurent inconnues, il serait inopportun d'exiger qu'il assiste à la perquisition.

73. Voir le rapport n° 24, pp. 31-32.

des cas le travail des agents de la paix[74]. Malgré les légers inconvénients que cette formalité risque parfois de leur occasionner, nous estimons que, tout compte fait, ses avantages, tant pour la police que pour les personnes touchées par la perquisition, l'emportent nettement[75].

Aux termes du paragraphe 29(1) du Code actuel (dont le titre ne parle que d'arrestations), «[q]uiconque exécute un acte judiciaire ou un mandat est tenu de l'avoir sur soi, si la chose est possible, et de le produire lorsque demande lui en est faite.» Par ailleurs, les paragraphes 487.1(7) et (8) du Code renferment des dispositions très semblables à notre article 40, applicables aux agents de la paix chargés d'exécuter un télémandat (à l'exception du mandat délivré en vertu du paragraphe 258(1)). L'article 40, à l'instar des paragraphes 487.1(7) et (8), a une plus grande portée que l'actuel paragraphe 29(1) du *Code criminel*, la personne visée n'ayant pas à demander la production du mandat pour que l'agent soit tenu de lui en remettre une copie. Nous avons également supprimé l'expression «si la chose est possible», de façon que l'agent doive impérativement être muni d'une copie du mandat. Enfin, cette copie doit en général être remise avant le début de la perquisition; c'est à ce moment que les renseignements fournis sont le plus susceptible d'être utiles à l'intéressé[76].

Le paragraphe (2) permet, suivant certaines conditions, l'affichage du mandat exécuté lorsque personne ne se trouve dans le lieu ou le véhicule fouillé, ou n'en est apparemment responsable. Cette disposition n'exige aucune explication.

SECTION V
RÈGLE DE PREUVE EN CAS D'ABSENCE DE L'ORIGINAL DU MANDAT

Absence de l'original du mandat

41. Dans toute procédure où il importe au tribunal d'être convaincu qu'une perquisition ou une saisie a été autorisée par un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que la perquisition ou la saisie n'a pas été autorisée par mandat.

Rapport n° 19, partie II, rec. 2(12)
Code criminel, par. 487.1(11)

COMMENTAIRE

Dans le régime proposé ici, le juge de paix qui délivre un mandat par téléphone ou à l'aide d'un autre moyen de télécommunication conserve l'original. Le demandeur reçoit deux copies transmises électroniquement, ou encore en prépare deux à la main,

74. *Id.*, p. 32.
75. *Ibid.*
76. *Ibid.*

suivant les directives du juge de paix. Dans ces conditions, l'agent de la paix n'est pas en possession de l'original du mandat au moment de la perquisition; par ailleurs, il peut avoir fait une erreur en établissant les copies. Il est donc essentiel que l'original ait été produit devant le tribunal lorsque celui-ci sera appelé à contrôler la légalité du mandat ou de son exécution.

L'article 41 reprend en partie les dispositions du paragraphe 487.1(11) du *Code criminel* actuel. Celui-ci énonce que l'absence de la dénonciation sous serment transcrite et certifiée ou du mandat original est, en l'absence de toute preuve contraire[77], une preuve que la perquisition ou la saisie n'a pas été autorisée par mandat. En revanche, l'article 41 dispose pour sa part que cette présomption s'appliquera seulement en cas d'absence de l'original du mandat. On évite ainsi une conséquence bizarre du texte actuel, suivant lequel une perquisition pourrait être tenue pour non autorisée par mandat (parce que la dénonciation sous serment ne peut être trouvée), alors que le mandat original a été produit auprès du tribunal.

CHAPITRE III
FOUILLES, PERQUISITIONS ET SAISIES SANS MANDAT

SECTION I
FOUILLES, PERQUISITIONS ET SAISIES EN CAS D'URGENCE

Pouvoir de fouille et de perquisition

42. (1) L'agent de la paix peut, sans mandat, fouiller une personne, un lieu ou un véhicule pour rechercher une chose saisissable ou une personne séquestrée, s'il croit pour des motifs raisonnables :

***a*) d'une part qu'elle sera trouvée sur la personne, dans le lieu ou dans le véhicule en question;**

***b*) d'autre part, que le délai nécessaire à l'obtention d'un mandat mettrait en péril la vie ou la sécurité de quelque personne.**

Pouvoir de saisie

(2) L'agent de la paix qui, au cours de la fouille ou de la perquisition, trouve une chose ou une personne que, pour des motifs raisonnables, il tient pour celle qui est recherchée, peut saisir cette chose ou délivrer cette personne, selon le cas.

Rapport n° 24, art. 21, par. 28(1)

77. Voir la décision *R.* c. *Titus*, non publiée, C. prov. N.-B., 20 sept. 1988. Il y est dit (p. 35 du jugement original) que la «preuve contraire» pourrait consister dans [TRADUCTION] «une transcription intégrale de la totalité de l'audience», et non simplement dans la déposition sous serment d'un agent de police fondée sur ses souvenirs.

COMMENTAIRE

Les dispositions de l'article 42 définissent les limites du pouvoir de perquisitionner sans mandat en cas d'urgence (en dehors du cas de l'arrestation). Elles sont fondées sur le fait que, du point de vue de la Commission, il y a lieu de renoncer en partie à la protection des droits individuels en matière de perquisitions lorsque la vie ou la sécurité d'une personne est en péril.

Cet article permet uniquement les fouilles et perquisitions qui seraient susceptibles d'être autorisées par mandat. Le pouvoir d'interpeller une personne qui est conféré ici est subordonné à l'application d'un critère rigoureux[78].

Lorsque les conditions prévues sont remplies, les limites du pouvoir de fouille et de perquisition ainsi conféré sont établies aux articles 16, 17, 18, 19 et 50. L'article 42 englobe les pouvoirs de saisie d'armes et d'explosifs actuellement prévus aux articles 101, 102 et 492 du *Code criminel*.

SECTION II
FOUILLES, PERQUISITIONS ET SAISIES EN CAS D'ARRESTATION

Fouille préventive

43. Toute personne qui en a arrêté une autre peut, à l'occasion de cette arrestation, pratiquer sur elle sans mandat une fouille préventive.

Rapport n° 24, al. 20*a*)

COMMENTAIRE

Cette disposition s'interprète à la lumière de l'article 17, où l'on définit la portée de la «fouille préventive».

Les fouilles pratiquées sans mandat, à l'occasion d'une arrestation, constituent vraisemblablement la très grande majorité de toutes les fouilles et perquisitions effectuées au Canada. La jurisprudence récente a eu tendance à élargir considérablement l'étendue de ce pouvoir de common law (qui à l'origine visait simplement à permettre aux policiers d'assurer leur propre protection, d'empêcher une évasion appréhendée ou la destruction imminente d'éléments de preuve). Ainsi, la Cour suprême du Canada vient de reconnaître l'existence d'un pouvoir discrétionnaire permettant au policier de fouiller

78. Le pouvoir conféré à l'article 42 ne correspond pas au pouvoir d'interpeller et de fouiller sommairement une personne qui existe en droit américain. Aux États-Unis, la loi permet aux policiers d'interpeller des personnes dans des lieux publics lorsqu'ils sont fondés à soupçonner (il faut des soupçons précis et objectifs, et non pas une simple intuition) qu'un crime a été commis ou est sur le point de l'être. Lorsque une telle interpellation légitime a eu lieu, une fouille «préventive» (plus rudimentaire qu'une fouille en bonne et due forme) est autorisée si l'agent estime pour des motifs raisonnables qu'il est en danger. Cette fouille sommaire se limite à ce qui est nécessaire pour découvrir des armes susceptibles d'être utilisées pour blesser l'agent ou des personnes se trouvant dans les environs; normalement, il s'agit d'une simple palpation des vêtements. *Terry* c. *Ohio*, 392 U.S. 1 (1968); *Sibron* c. *New York*, 392 U.S. 40 (1968).

par palpation la personne arrêtée, tant pour découvrir des indices que pour vérifier si elle est armée, et ce, même en l'absence de motifs raisonnables de croire que cette fouille sera fructueuse[79].

Il convient, selon nous, d'intégrer ce pouvoir aux dispositions du code de procédure pénale, pour établir d'une manière claire et précise les conditions de son exercice. C'est toujours le même principe qui s'applique : l'étendue de la fouille concomitante de l'arrestation doit être définie et limitée selon l'objectif au regard duquel elle est autorisée. Et cet objectif doit pour sa part être fonction du contexte dans lequel la fouille a lieu. Or, l'article 43 découle de l'idée que la personne faisant l'objet d'une arrestation risque d'avoir des réactions imprévisibles et violentes. Le pouvoir d'arrestation doit, partant, pouvoir être exercé efficacement et comporter celui de prévenir tout geste dangereux ou tentative d'évasion. L'article 17, dans l'esprit de la position adoptée par la Cour suprême du Canada dans l'affaire *Cloutier*, définit les limites du pouvoir de fouille préventive au regard de ces objectifs. Étant donné la situation visée, ce pouvoir peut être exercé sans autorisation spécifique; et il n'est pas nécessaire d'avoir des motifs raisonnables de croire que la personne arrêtée possède effectivement quelque objet susceptible de faciliter son évasion ou de constituer un danger. Selon nous, l'attribution du pouvoir limité d'accomplir des actes propres à empêcher une évasion et à protéger la vie au moment d'une arrestation doit primer l'inviolabilité de la personne.

Pouvoirs supplémentaires de l'agent de la paix

44. L'agent de la paix qui a arrêté une personne peut, à l'occasion de cette arrestation, exercer sans mandat les pouvoirs suivants :

***a*) s'il croit, pour des motifs raisonnables, qu'il trouvera une chose saisissable sur cette personne et que le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de cette chose, il peut fouiller la personne et saisir toute chose que, pour des motifs raisonnables, il tient pour la chose saisissable;**

Rapport n° 24, art. 19

***b*) si la personne arrêtée se trouve dans un véhicule ou en est responsable à ce moment, et que l'agent de la paix croie, pour des motifs raisonnables, qu'une chose saisissable sera trouvée dans ce véhicule et que le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de cette chose, il peut fouiller le véhicule et saisir toute chose que, pour des motifs raisonnables, il tient pour la chose saisissable.**

Rapport n° 24, art. 22

79. Voir *Cloutier* c. *Langlois*, précité, note 37; *R.* c. *Morrison* (1987), 58 C.R. (3d) 63 (C.A. Ont.); *R.* c. *Miller* (1987), 62 O.R. 97, pp. 100-101 (C.A.).

COMMENTAIRE

L'article 44 confère un pouvoir complémentaire de fouille visant les personnes et les véhicules, en cas d'arrestation, à l'égard cette fois de choses saisissables. Comme nous l'avons vu à propos de l'article 16, ce pouvoir peut être exercé seulement si l'agent de la paix croit pour des motifs raisonnables que la fouille lui permettra de découvrir, sur la personne arrêtée ou dans le véhicule qu'occupe cette personne ou dont elle a à ce moment la responsabilité, une chose saisissable et qu'il lui serait matériellement impossible de se procurer un mandat. Selon nous, ces conditions répondent aux exigences de la Charte sans nuire à l'application de la loi. Le principe fondamental est toujours le même : les limites du pouvoir de perquisition doivent être fonction de l'objectif au regard duquel il est attribué.

SECTION III
FOUILLES ET PERQUISITIONS AVEC LE CONSENTEMENT DE L'INTÉRESSÉ

Pouvoir de fouille et de perquisition

45. (1) L'agent de la paix peut fouiller sans mandat :

***a)* toute personne, de même que tout objet qu'elle porte, si elle consent à la fouille;**

***b)* tout lieu ou véhicule, avec le consentement d'une personne présente qui en est apparemment responsable et paraît habile à donner ce consentement.**

Rapport n° 24, par. 18(1)

Restriction

(2) Nul ne peut consentir, en vertu de la présente partie, à une fouille visant à rechercher une chose saisissable à l'intérieur de son corps.

COMMENTAIRE

La common law tolère les fouilles et perquisitions pratiquées avec le consentement de la personne visée. On considère ce consentement comme une renonciation aux protections normales s'appliquant en la matière, y compris l'obligation d'établir une justification légitime et de satisfaire aux conditions prévues par les règles de procédure. Avant l'entrée en vigueur de la Charte, il n'existait pratiquement aucune jurisprudence sur la question du consentement aux perquisitions. Essentiellement, on considérait que le simple fait de coopérer avec les policiers en leur permettant de perquisitionner équivalait à un consentement, sans beaucoup s'intéresser aux motifs et aux circonstances de cette coopération[80]. La Cour suprême du Canada a toutefois adopté une position différente lorsqu'elle a défini les principes régissant, d'une manière générale, la renonciation aux garanties procédurales inscrites dans des dispositions législatives. Elle a jugé que cette renonciation doit être claire, non équivoque, faite en pleine connaissance de cause

80. Voir *Reynen* c. *Antonenko* (1975), 20 C.C.C. (2d) 342 (C.S. Alb., Div. 1re inst.), pp. 348-349.

des droits en jeu et des conséquences découlant de leur abandon[81]. Puis la Cour a appliqué des principes similaires au sujet de la renonciation aux garanties constitutionnelles ou fondées sur la Charte, par exemple le droit de consulter un avocat avant de subir un interrogatoire policier[82].

Les mêmes principes peuvent très bien régir la question de la renonciation ou du consentement en matière de fouilles et perquisitions. Car si le législateur n'établit pas de garanties procédurales à l'égard des perquisitions pratiquées avec le consentement de l'intéressé, il risque d'empêcher le contrôle de la légalité de ces opérations, d'inciter les policiers à user de subterfuges; en dernière analyse, la coopération des citoyens aux enquêtes policières pourrait en souffrir. Les dispositions de la Charte rendent aussi très souhaitable l'adoption de règles écrites dans ce domaine, pour éviter que des fouilles ou perquisitions soient jugées abusives par les tribunaux.

Le paragraphe 45(1) pose le principe de la légitimité des fouilles pratiquées avec le consentement de l'intéressé — qu'elles visent la personne elle-même, les choses qu'elle porte, les lieux ou véhicules dont elle est responsable. Le paragraphe (2) restreint le champ d'application de cette disposition; il précise qu'elle est inapplicable aux fouilles relevant des techniques d'investigation régies par la partie III (*La recherche d'indices sur les personnes*), qui comporte des règles distinctes sur la question du consentement.

Renseignements à fournir

46. (1) Lorsqu'il demande à une personne son consentement, l'agent de la paix lui fournit les renseignements suivants :

a) le crime faisant l'objet de l'enquête;

b) ce qu'il recherche;

c) ce en quoi consiste la fouille proposée;

d) le fait qu'elle peut refuser de donner ce consentement ou, une fois qu'il est donné, le retirer en tout temps.

Rapport n° 24, par. 18(2)

Forme du consentement

(2) Le consentement peut être donné de vive voix ou par écrit.

Rapport n° 24, par. 18(3)

COMMENTAIRE

Pour être valide, le consentement doit être volontaire et donné en toute connaissance de cause. Il s'agit là d'une condition minimale pour la Commission.

Le paragraphe 46(1) énumère donc d'une manière détaillée les renseignements que l'agent de la paix est obligé de fournir à la personne dont il veut obtenir le

81. Voir, par exemple, *Korponay* c. *Procureur général du Canada*, [1982] 1 R.C.S. 41.

82. Voir *Clarkson* c. *R.*, [1986] 1 R.C.S. 383; *R.* c. *Manninen*, [1987] 1 R.C.S. 1233, le juge Lamer, pp. 1241-1244. Voir également *R.* c. *Turpin*, [1989] 1 R.C.S. 1296, au sujet de la renonciation au droit de subir un procès devant jury.

consentement. Le paragraphe (2) découle du fait qu'il peut s'avérer matériellement impossible d'obtenir un consentement par écrit.

Pouvoir de saisie

47. L'agent de la paix qui, au cours de la fouille, trouve une chose que, pour des motifs raisonnables, il tient pour saisissable, ou une personne que, pour des motifs raisonnables, il tient pour séquestrée, peut saisir cette chose ou délivrer cette personne.

Rapport n° 24, par. 18(1)

COMMENTAIRE

Cet article confère le pouvoir exprès de saisir les choses découvertes au cours d'une fouille ou perquisition effectuée avec le consentement de l'intéressé (et de délivrer les personnes séquestrées que l'on pourrait trouver). L'exercice de ce pouvoir n'est pas quant à lui subordonné au consentement de la personne visée.

CHAPITRE IV
SAISIE DE CHOSES BIEN EN VUE

Saisie

48. (1) L'agent de la paix peut saisir toute chose qu'il trouve, bien en vue, dans l'exercice légitime de ses fonctions si, pour des motifs raisonnables, il la croit saisissable.

Rapport n° 24, art. 25

Lieu privé

(2) Le pouvoir prévu au paragraphe (1) n'emporte pas celui de pénétrer dans un lieu privé.

COMMENTAIRE

Les articles 48 et 49 visent à donner aux agents de la paix le pouvoir de saisir les choses saisissables découvertes par hasard dans l'exercice légitime de leurs fonctions. Ainsi, l'agent de la paix qui perquisitionne dans un lieu pour rechercher des biens volés peut tomber sur une cachette de drogues illégales ou, en effectuant une arrestation, apercevoir une arme interdite à proximité (mais pas à la portée du suspect et de ce fait non saisissable en vertu des articles 43 et 17). Or, il est à l'évidence indispensable que les policiers soient dotés du pouvoir de saisir de telles choses lorsqu'elles se trouvent sous leurs yeux.

L'actuel article 489 du *Code criminel* permet à quiconque exécute un mandat décerné en vertu des articles 487 ou 487.1 de saisir toute chose non mentionnée dans le mandat mais qu'il croit, pour des motifs raisonnables, «avoir été obtenue au moyen d'une infraction ou avoir été employée à la perpétration d'une infraction.» Or cette disposition, a-t-on pu faire valoir, ne prévoit pas la saisie de simples éléments de preuve, qui nécessiterait donc l'obtention d'un autre mandat. Et dans ces conditions, il y a risque de perte ou de destruction des choses découvertes par hasard par les policiers.

Dans le rapport n° 24 (pp. 47-49), la Commission a rejeté une proposition qui eût autorisé la saisie de toute chose saisissable trouvée au cours d'une perquisition. Nous craignions qu'une pareille règle n'encourage les saisies arbitraires et, dans la pratique, n'invite les agents de la paix à fureter au petit bonheur pour trouver des choses tout à fait étrangères à l'objet initial de la perquisition. Nous continuons à penser que l'instauration d'une règle relative aux choses «bien en vue» constitue une solution raisonnable, propre à empêcher ce genre d'atteintes à l'intimité de la vie privée.

Certains éléments de la «plain view doctrine» américaine ont été intégrés à ces dispositions. Premièrement, l'opération au cours de laquelle l'agent découvre par hasard des choses saisissables doit avoir été légalement autorisée. Si un agent, effectuant une ronde dans la rue, aperçoit dans une maison une chose saisissable en jetant un coup d'œil par la fenêtre, il lui faudra tout de même obtenir un mandat : le simple fait de voir la chose en question ne l'autorise pas à entrer dans un lieu privé. En revanche, s'il se trouve déjà dans la maison muni d'un mandat lui donnant le droit de perquisitionner pour rechercher certains objets, il pourra saisir sans mandat les autres choses saisissables qui lui tombent sous les yeux. Cet élément de la règle est énoncé à l'article 48. Deuxièmement, conformément à la jurisprudence antérieure mais en dépit de certaines décisions récentes de la Cour suprême des États-Unis, la découverte doit être due au hasard et ne pas avoir été prévue. Les policiers ne doivent pas avoir connu à l'avance l'emplacement de la chose ni avoir eu l'intention de la saisir, car dans ce cas ils auraient été tenus d'obtenir un mandat. C'est là le sens qu'il y a lieu de donner au verbe «trouver» employé à l'article 48. Troisièmement, l'agent doit immédiatement pouvoir conclure qu'il se trouve en présence d'une chose saisissable, juste en la voyant et sans avoir à la manipuler ni à la déplacer. En posant cette exigence, l'article 49 vise à éviter que la police se mette à fouiller dans tous les coins dans l'espoir de trouver quelque objet saisissable non visé par le mandat. Par contre, la perquisition autorisée par mandat et visant la saisie d'objets déterminés implique que les agents manipulent ou déplacent certaines choses pour être en mesure de découvrir ce qu'ils recherchent. Si, dans le cours d'une perquisition effectuée en vertu d'un mandat, on trouve bien en vue des choses saisissables en déplaçant ou en manipulant des objets, elles pourront être saisies, à la condition bien sûr que la perquisition ne fût pas un simple prétexte pour effectuer une recherche à l'aveuglette. Il faut aussi tenir compte de la façon dont la perquisition elle-même est effectuée. On ne saurait par exemple chercher des téléviseurs volés dans un tiroir! Si on le fait, c'est qu'en réalité on effectue une perquisition au hasard, et alors la découverte de choses éventuellement saisissables n'est pas légalement suffisante pour en justifier la saisie. Ces éléments de la règle ressortent d'une lecture correcte de l'article 49.

Si toutes les conditions de la règle des choses «bien en vue» sont remplies, on pourra saisir sans mandat les objets ainsi découverts[83].

83. Voir *Coolidge* c. *New Hampshire*, 403 U.S. 443 (1971), pp. 466-471; *Horton* v. *California*, 110 S. Ct. 2301 (1990); *R.* c. *Askov* (1987), 60 C.R. (3d) 261, pp. 270-271 (C. distr. Ont.); *R.* c. *Neilsen* (1988), 43 C.C.C. (3d) 548 (C.A. Sask.).

Chose saisissable qui n'est pas bien en vue

49. Nulle chose saisissable n'est tenue pour bien en vue si l'agent de la paix ne peut avoir des motifs raisonnables de la croire saisissable sans la déplacer ni la manipuler.

COMMENTAIRE

Voir le commentaire afférent à l'article 48.

CHAPITRE V
EXERCICE DES POUVOIRS DE FOUILLE, DE PERQUISITION ET DE SAISIE

Modalités de la fouille corporelle

50. (1) La fouille corporelle est exécutée d'une manière qui respecte la dignité de la personne visée. Compte tenu de sa nature et des circonstances,

***a*) d'une part, sa portée est limitée au strict nécessaire;**

***b*) d'autre part, elle respecte le plus possible l'intimité de la personne.**

Rapport n° 25, rec. 11

Renonciation

(2) La personne devant être fouillée peut renoncer, de vive voix ou par écrit, aux exigences prévues aux alinéas (1)*a*) ou *b*).

COMMENTAIRE

Les dispositions de l'article 50, fondées sur le bon sens, s'appliquent à toute fouille corporelle. Tout en reconnaissant que l'objectif spécifique de la fouille détermine dans une certaine mesure la manière dont elle est effectuée, nous avons voulu limiter le plus possible l'atteinte à l'intimité qu'elle suppose inévitablement. Si, par exemple, on veut fouiller une personne pour chercher une chose saisissable précise et identifiable, il serait nécessaire, aux termes de cet article — et vu les dispositions de l'alinéa 16*f*) — de lui enlever ses vêtements progressivement (et non pas tous en même temps) jusqu'à ce que l'on constate la présence ou l'absence de cette chose[84]. Cette disposition exigerait aussi que, dans la mesure du possible, la fouille ait lieu à l'abri des regards du public et soit confiée à des agents du même sexe que la personne visée.

Le principe du respect de la dignité humaine mis en œuvre à l'article 50 revêt par ailleurs un caractère fondamental. En termes concrets, ce principe suppose une décence et une courtoisie minimales; il interdirait les actes ayant pour objet d'humilier la personne soumise à une fouille corporelle.

Toute dérogation sensible aux dispositions de cet article risquerait fort d'être inconstitutionnelle et serait susceptible, de toute façon, d'entraîner l'exclusion des

84. Voir l'arrêt *R.* c. *Simmons*, [1988] 2 R.C.S. 495.

éléments de preuve saisis. Les voies de recours applicables en cas de manquement aux dispositions du code de procédure pénale seront étudiées dans un prochain document de travail de la Commission et formeront une partie distincte de ce code.

Le paragraphe 50(2) se passe quant à lui d'explications. Pour une analyse plus poussée de la question de la renonciation, on se reportera au commentaire afférent à l'article 45.

Aide aux fouilles et aux perquisitions

51. L'agent de la paix qui effectue une fouille ou une perquisition peut obtenir l'aide de toute personne s'il est fondé à croire que cela est nécessaire à l'efficacité de l'opération.

Rapport n° 24, par. 11(2)

COMMENTAIRE

Dans certains cas, l'aide d'un particulier (par exemple, un comptable pour les perquisitions relatives à un crime économique complexe) peut favoriser l'efficacité de l'opération tout en limitant l'atteinte aux droits individuels. L'article 51 ne modifie pas l'état du droit[85]; il reconnaît clairement à l'agent de la paix le pouvoir de requérir de l'aide, à sa discrétion et sans avoir à demander une autorisation spéciale ou supplémentaire, s'il est fondé à croire que cela est nécessaire.

Le projet de code pénal de la Commission n'oblige néanmoins pas les citoyens à apporter leur concours à l'exécution des perquisitions[86]. Par voie de conséquence, la personne qui refuse ou omet d'aider un agent de la paix à effectuer une perquisition ne saurait être inculpée du crime d'entrave prévu à ce code[87].

Sommation d'ouvrir

52. Avant d'entrer dans un lieu privé où il est autorisé à perquisitionner, l'agent de la paix informe l'occupant de sa qualité et du but de sa présence, le somme de le laisser entrer et lui accorde un délai raisonnable pour ce faire. Il est dispensé de ces formalités s'il croit pour des motifs raisonnables que cela entraînerait la perte ou la destruction d'une chose saisissable à l'égard de laquelle la perquisition est autorisée, ou mettrait en danger la vie ou la sécurité de quelque personne.

Rapport n° 24, par. 27(1) et (2)

COMMENTAIRE

L'article 52, qui oblige l'agent de la paix à déclarer le but de sa présence et à sommer l'occupant de lui ouvrir, reprend la règle de common law sur les perquisitions

85. Voir l'arrêt *R.* c. *Strachan*, [1988] 2 R.C.S. 980.

86. Par contre, chacun est tenu, sur la demande d'un agent public, de prendre des mesures raisonnables pour l'aider à effectuer une arrestation dans l'exécution de ses fonctions. Voir le rapport n° 31, rec. 25(3).

87. Rapport n° 31, rec. 25(1) et pp. 132-133.

dans les maisons d'habitation, en lui donnant une portée plus large[88]. À notre sens, il est légitime d'étendre cette protection de l'intimité de la vie privée à tous les lieux privés (y compris, par exemple, les bureaux[89]), sans la limiter aux résidences. Quant à la disposition obligeant l'agent de la paix à accorder un délai raisonnable à l'occupant, elle va de pair avec l'exigence de la sommation.

L'agent est toutefois dispensé d'accomplir ces formalités dans les cas où des intérêts supérieurs sont en jeu[90]. Ainsi, lorsque la sommation est inutile ou que l'occupant n'y obtempère pas dans un délai raisonnable, le recours à la force est autorisé pour entrer dans les lieux. La force autorisée en de telles circonstances est déterminée par les dispositions du paragraphe 23(1) du projet de code criminel de la Commission[91].

Dans le domaine de la lutte contre les stupéfiants, on aura sans doute fréquemment recours à cette dispense. Mais les critères qui la régissent sont le reflet d'une approche différente et plus rationnelle, par rapport à celle qui sous-tend actuellement l'article 14 de la *Loi sur les stupéfiants*, ainsi que le paragraphe 42(5) et l'article 51 de la *Loi sur les aliments et drogues*. Ces dispositions autorisent en effet l'agent de la paix, sans préavis ni sommation, à forcer l'entrée des lieux et à fracturer virtuellement tout objet s'y trouvant, lorsqu'il perquisitionne en vue de trouver des stupéfiants ou des drogues.

Opposition

53. (1) Nul agent de la paix ne peut examiner ou saisir une chose, ni examiner des renseignements contenus dans une chose, s'il est au fait de l'existence possible d'un privilège relatif à cette chose ou à ces renseignements, sans donner aux intéressés une occasion raisonnable de formuler une opposition fondée sur ce privilège; est également visée par cette interdiction toute personne qui aide l'agent de la paix.

Rapport n° 27, rec. 3(5)
Code criminel, par. 488.1(8)

Procédure à suivre

(2) Lorsqu'un privilège est invoqué, l'agent de la paix, sans examiner la chose ou les renseignements, ni les photographier ou en faire faire de copies, procède à la saisie de l'une des deux façons suivantes :

***a)* il retire à quiconque la possibilité de disposer de la chose, et prend les mesures nécessaires pour empêcher que la chose ou les renseignements y contenus fassent l'objet de quelque examen ou action;**

88. *Semayne's Case* (1604), 5 Co. Rep. 91a, p. 91b; *Wah Kie* c. *Cuddy* (1914), 23 C.C.C. 383 (C.A. Alb.); *R.* c. *Landry*, [1986] 1 R.C.S. 145; *Eccles* c. *Bourque*, [1975] 2 R.C.S. 739.

89. Voir *R.* c. Rao (1984), 40 C.R. (3d) (C.A. Ont.), le juge Martin, pp. 32-33.

90. Voir *Eccles* c. *Bourque*, *et Wah Kie* c. *Cuddy*, précités, note 88.

91. Voir le rapport n° 31, p. 199 et rec. 3(13)*a*), pp. 43-45. N'engage pas sa responsabilité pénale, aux termes du paragraphe 23(1) du projet de code criminel de la Commission, la personne qui, «accomplissant un fait prescrit ou autorisé par une loi fédérale ou provinciale, fait usage à cette fin d'une force raisonnable et nécessaire dans les circonstances, pourvu que le recours à la force ne soit pas destiné à tuer autrui ou à lui infliger des blessures graves.»

b) il prend possession de la chose, en fait un paquet qu'il scelle et identifie convenablement, et qu'il confie à la garde du shérif du district judiciaire ou du comté où la saisie a été effectuée ou, s'il existe entre l'agent et la personne qui invoque le privilège une entente écrite désignant une personne qui agira en qualité de gardien, à la garde de cette dernière.

Rapport n° 27, rec. 3(5)
Code criminel, par. 488.1(2)

Gardien de la chose saisie

(3) Pour l'application de la partie VII (*Les privilèges en matière de saisie*), est tenu pour le gardien de la chose saisie, l'agent de la paix qui saisit la chose en retirant à quiconque la possibilité d'en disposer, ou encore la personne ou le shérif à la garde duquel le paquet est confié.

COMMENTAIRE

L'article 53 énonce les formalités générales de la saisie de biens à l'égard desquels une opposition fondée sur un privilège est susceptible d'être formulée. Il s'agit de veiller au respect de ce privilège tout en nuisant le moins possible à l'exercice du pouvoir de saisie.

Le paragraphe 53(1) reprend les dispositions du paragraphe 488.1(8) du *Code criminel* actuel, mais leur donne une portée plus large. En effet, les dispositions en vigueur s'appliquent uniquement lorsqu'il s'agit d'examiner, de copier ou de saisir des documents en possession d'un avocat qui invoque le privilège des communications entre client et avocat pour un client nommément désigné. Dans le cas de l'article 53, il suffit en revanche que l'agent sache qu'un privilège est susceptible d'être invoqué par quelque personne à propos d'une chose ou d'un renseignement enregistré sur elle, peu importe qui la détient. Grâce à cette nouvelle rédaction, les formalités spéciales du paragraphe 53(2) protègent tous les objets et types de renseignements à l'égard desquels un privilège peut être invoqué.

On trouve au paragraphe 53(2) les formalités applicables lorsqu'un privilège est invoqué au sujet d'une chose que l'agent de la paix s'apprête à saisir. La procédure de mise sous scellés a été conçue de façon à empêcher la violation du privilège avant qu'il ait pu être statué sur sa validité. L'alinéa 53(2)*a*) concerne les choses qui ne peuvent matériellement être placées dans un paquet scellé. D'autre part, nous avons repris pour l'essentiel, à l'alinéa *a*), les formalités prévues à l'actuel paragraphe 488.1(2) du *Code criminel*.

La partie VII (*Les privilèges en matière de saisie*) décrit les modalités suivant lesquelles l'opposition fondée sur un privilège est entendue et tranchée. Elle prévoit aussi la façon de disposer des choses saisies après qu'une décision a été rendue sur le bien-fondé de l'opposition. (En ce moment, leur sort est réglé par les paragraphes (3) à (11) de l'article 488.1 du *Code criminel*.)

Restitution des armes saisies

54. (1) L'agent de la paix qui, au cours d'une fouille préventive, saisit une chose qu'il tient pour une arme ou un instrument susceptible de faciliter l'évasion, fait restituer cette chose à la personne à qui elle a été saisie dès que cela est matériellement possible et ne pose aucun risque, à moins que la saisie ou la rétention n'en soit par ailleurs autorisée.

Remise à un agent de la paix

(2) La personne autre qu'un agent de la paix qui, au cours d'une fouille préventive, saisit une chose qu'elle tient pour une arme ou un instrument susceptible de faciliter l'évasion, remet cette chose à un agent de la paix, dès que cela est matériellement possible, pour qu'il en dispose conformément au paragraphe (1).

COMMENTAIRE

L'article 54 prévoit un mécanisme simple pour la restitution des objets saisis temporairement lors d'une fouille préventive pratiquée par un agent de la paix ou un simple citoyen. En effet, lorsque des choses ont été saisies simplement par précaution (par exemple, une lime à ongles pourvue d'un bout effilé peut présenter un danger), la nécessité de les conserver disparaît normalement lorsque la personne est relâchée ou que tout risque a disparu[92].

92. En fait, il s'agissait d'éviter que tout ce qui est enlevé à une personne au moment d'une fouille préventive soit considéré comme une chose saisie ne pouvant être restituée qu'en conformité avec les dispositions de la partie VI (*La disposition des choses saisies*).

PARTIE III

LA RECHERCHE D'INDICES SUR LES PERSONNES

Textes à l'origine de la partie III

PUBLICATIONS DE LA CRD

Les méthodes d'investigation scientifiques, Document de travail n° 34 (1984)

Les techniques d'investigation policière et les droits de la personne, Rapport n° 25 (1985)

La classification des infractions, Document de travail n° 54 (1986)

OBSERVATIONS PRÉLIMINAIRES

Le régime établi à la partie III porte sur certaines techniques d'investigation, non régies par quelque autre partie du présent code, qui consistent à chercher des indices sur la personne même du suspect ou de l'accusé, ou avec son concours direct. Il s'agit de techniques, aux termes de l'article 55, «utilisée[s], par un agent de la paix ou à sa demande, afin d'obtenir des indices ou des renseignements concernant l'imputabilité d'un crime à une personne, et qui suppose[nt] un contact physique avec cette personne ou sa participation consciente». Sont notamment visés des procédés aussi différents que la recherche de signes caractéristiques sur le corps d'une personne, le prélèvement d'empreintes dentaires, le prélèvement de cheveux ou de sang, le recours à des tests de performance physique. Cette partie ne s'applique pas, comme le précise l'article 55, «aux techniques d'investigation consistant uniquement dans l'interrogatoire, la fouille corporelle pratiquée sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*) ou le prélèvement d'échantillons d'haleine ou de sang effectué sous le régime de la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*)».

Seules quelques-unes des techniques d'investigation visées par la présente partie font à l'heure actuelle l'objet de dispositions législatives claires en droit canadien. Et leur application repose dans bien des cas sur la collaboration involontaire de sujets parfois mal renseignés, ou encore sur l'ingéniosité des enquêteurs. Dans quels cas peut-on y recourir? Selon quelles formalités devraient-elles être appliquées? Quels sont les droits et obligations des sujets? Il n'existe aucun texte de loi réglementant de façon nette et globale ces questions.

La common law n'est pas plus éclairante. Par exemple, il n'existe en droit canadien aucune règle (législative ou autre) prévoyant la délivrance d'un mandat qui autoriserait le recours à la chirurgie pour extraire du corps d'une personne un élément de preuve[93]; quant au prélèvement d'un échantillon du sang d'un suspect sans son consentement ou sans autorisation légale spécifique, les tribunaux y ont vu une perquisition et une saisie abusives[94]; et la jurisprudence n'est pas fixée sur le point de savoir si le prélèvement de cheveux est possible au cours d'une fouille pratiquée à l'occasion d'une arrestation[95]. D'autres questions encore demeurent empreintes d'incertitude : par exemple, l'étendue exacte du pouvoir des policiers concernant le prélèvement de substances corporelles ou l'extraction de substances dissimulées dans le corps, la mesure dans laquelle les pouvoirs d'arrestation et d'enquête emportent le pouvoir de soumettre une personne par la

93. *Re Laporte and The Queen* (1972), 8 C.C.C. (2d) 343 (B.R. Qc).

94. R. *c. Pohoretsky*, [1987] 1 R.C.S. 383.

95. Voir *R.* c. *Alderton* (1985), 44 C.R. (3d) 254 (C.A. Ont.); *R.* c. *Legere* (1988), 43 C.C.C. (3d) 502 (C.A. N.-B.).

force à l'application de techniques d'investigation[96], les conséquences de l'omission ou du refus de collaborer avec les enquêteurs[97].

À cause de cette absence de réglementation et de cette incertitude, les poursuivants doivent malheureusement, lorsqu'ils veulent produire des éléments de preuve découlant de l'utilisation de certaines techniques d'investigation, s'en remettre au principe de common law suivant lequel les éléments de preuve pertinents, même illégalement obtenus, sont a priori recevables. Or, à notre avis, il est préférable en matière pénale que l'admission des éléments de preuve soit subordonnée à leur légalité au regard de l'observation de règles claires.

Notre régime répond aux objectifs suivants : (1) favoriser la certitude, la clarté, la cohérence et l'accessibilité du droit, tant pour les enquêteurs que pour les suspects et le grand public; (2) reconnaître la légitimité d'un certain nombre de techniques modernes relevant de la criminalistique et en réglementer l'application; (3) susciter un juste équilibre entre droits individuels et intérêts de l'État, dans le respect de la lettre et de l'esprit de la *Charte canadienne des droits et libertés* (art. 8)[98]. Tout en maintenant et en favorisant l'efficacité des enquêtes criminelles et de l'application de la loi, nous avons voulu instaurer des principes fondés sur la notion de modération, limiter le plus possible l'attribution inutile de pouvoirs discrétionnaires aux policiers et enfin, garantir l'équité, l'égalité et le respect des prescriptions de la loi de la part des personnes chargées de son application.

Voici, résumée à grands traits, l'approche que nous avons adoptée :

(1) À une exception près, toutes les techniques d'investigation visées par la présente partie peuvent être appliquées par un agent de la paix (ou à sa demande) si le sujet y consent. Des conditions précises sont fixées quant à la validité du consentement.

(2) Certaines techniques peuvent être utilisées sans le consentement du sujet, si un mandat l'autorise. Les formalités et conditions applicables à l'obtention des mandats sont clairement définies.

(3) À l'exception de la radiographie et de l'ultrasonographie, les techniques à l'égard desquelles il serait normalement possible d'obtenir un mandat peuvent

96. Le droit est confus sur la possibilité de forcer un suspect à participer à une séance d'identification. Voir l'arrêt *Marcoux et Solomon* c. *La Reine*, [1976] 1 R.C.S. 763. Il faut cependant tenir compte de la récente décision de la Cour suprême dans l'affaire *R.* c. *Ross*, [1989] 1 R.C.S. 3. Il a été décidé que le fait d'exiger d'un suspect qu'il participe à une séance d'identification, lorsqu'il a auparavant manifesté le désir de consulter un avocat, est une violation de la Charte, et les éléments de preuve ainsi obtenus doivent être écartés. Voir également *R.. c. Beare; R.* c. *Higgins*, [1988] 2 R.C.S. 387; suivant cet arrêt, les dispositions législatives obligeant les personnes inculpées d'une infraction mais non encore condamnées à se soumettre à la prise d'empreintes digitales ne sont pas contraires à la Charte. En *obiter*, p. 404, on reconnaît aux policiers un pouvoir très large, soit celui de dévêtir le suspect, après une arrestation, et d'examiner son corps pour y déceler des signes distinctifs.

97. Voir les observations et la jurisprudence citée dans le document de travail n° 34, pp. 63-66.

98. On trouvera dans le rapport n° 25, pp. 15-24, des observations détaillées sur les rapports entre le régime ici proposé et la Charte (notamment en ce qui a trait au droit de ne pas être contraint à témoigner contre soi-même, à la présomption d'innocence, à la sécurité de la personne, aux fouilles, perquisitions et saisies abusives et aux châtiments cruels et inusités).

être appliquées sans le consentement du sujet et sans mandat dans les cas d'urgence (qui sont définis).

(4) Aucun mandat ne peut être délivré pour l'administration «d'une drogue destinée à modifier l'humeur, les inhibitions, le jugement ou la pensée»; et nul ne peut consentir à l'administration d'une telle drogue (pour reprendre les termes du paragraphe 55(1) «par un agent de la paix ou à sa demande, afin d'obtenir des indices ou des renseignements concernant l'imputabilité d'un crime à [cette] personne».

(5) Certaines techniques consistant dans l'examen de la surface du corps (à l'exception des parties désignées) peuvent être appliquées sans consentement ni mandat, lorsque le sujet a été arrêté pour un crime punissable d'une peine d'emprisonnement de plus de deux ans.

(6) Les suspects et accusés peuvent utiliser pour leur propre compte toute technique d'investigation. Ce régime ne réglemente d'aucune façon le recours à de telles méthodes par la défense.

CHAPITRE PREMIER
CHAMP D'APPLICATION

Application

55. (1) La présente partie s'applique à toute technique d'investigation utilisée, par un agent de la paix ou à sa demande, afin d'obtenir des indices ou des renseignements concernant l'imputabilité d'un crime à une personne, et qui suppose un contact physique avec cette personne ou sa participation consciente.

Exception

(2) Elle ne s'applique pas aux techniques d'investigation consistant uniquement dans l'interrogatoire, la fouille corporelle pratiquée sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*) ou le prélèvement d'échantillons d'haleine ou de sang effectué sous le régime de la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*).

Rapport n° 25, rec. 1

COMMENTAIRE

L'article 55 précise quelles techniques d'investigation sont régies par la présente partie. D'emblée, le paragraphe (1) énonce que celle-ci vise uniquement les techniques utilisées par un agent de la paix ou à sa demande. Sont donc exclues du champ d'application de ces dispositions les techniques appliquées à la demande de l'avocat du suspect ou de l'accusé, par exemple. En outre — comme l'indique le terme «investigation» —, on ne vise que les techniques utilisées *avant* toute décision judiciaire sur la culpabilité. Cette partie ne concerne pas, par exemple, le recours à des fouilles ou techniques d'identification dans les prisons, après la condamnation. Car dans ce cas, le but n'est pas «d'obtenir des indices ou des renseignements concernant l'imputabilité

d'un crime à une personne». La même conclusion s'impose pour les techniques ou analyses répondant à un objectif médical (bien que certains actes relevant de cette partie puissent d'une certaine façon présenter un caractère médical).

Le paragraphe (1) établit clairement que les contacts avec les victimes ou les témoins, pour les fins d'une enquête, ne sont pas visés. Il est seulement question ici des techniques dont l'utilisation suppose un contact physique avec le suspect, ou sa participation consciente. L'emploi du terme «participation consciente» exclut par ailleurs les techniques appliquées clandestinement ou au moyen de stratagèmes, lorsqu'il n'y a pas de contact physique avec la personne visée.

En interprétant le paragraphe (1) hors contexte et à la lettre, on pourrait conclure que cette partie s'applique à plusieurs autres techniques d'investigation régies par d'autres dispositions de notre code, par exemple les perquisitions ou encore les interrogatoires. Aussi le paragraphe (2) précise-t-il, au moyen d'exclusions expresses, le champ d'application des règles ici énoncées.

CHAPITRE II
APPLICATION DE TECHNIQUES D'INVESTIGATION EN VERTU D'UN MANDAT

SECTION I
DEMANDE DE MANDAT

Demandeur et nature du mandat

56. L'agent de la paix peut demander un mandat autorisant l'application d'une ou plusieurs des techniques d'investigation énumérées ci-dessous :

a) **l'examen visuel de la surface du corps d'une personne;**

b) **l'examen visuel des orifices corporels d'une personne, ainsi que la recherche, l'extraction et la saisie de toute chose saisissable dissimulée dans un orifice corporel;**

c) **le prélèvement d'empreintes de toute partie externe du corps d'une personne;**

d) **le prélèvement d'empreintes dentaires sur une personne;**

e) **le prélèvement de cheveux sur une personne;**

f) **le prélèvement de rognures ou de raclures sur les ongles des doigts ou des orteils d'une personne;**

g) **le prélèvement de résidus ou de substances sur la surface du corps d'une personne, par lavage ou encore au moyen de tampons ou d'adhésifs;**

h) **le prélèvement d'échantillons de salive dans la bouche d'une personne, au moyen d'un tampon ou autrement,**

dans un but autre que celui de déceler la présence de drogues ou d'alcool;

***i)* l'examen physique d'une personne par un médecin;**

***j)* l'examen d'une personne au moyen de la radiographie ou de l'ultrasonographie.**

Rapport n° 25, rec. 4

COMMENTAIRE

Dans le rapport n° 25[99], nous avions réparti les techniques d'investigation en trois grandes catégories : celles qui étaient totalement interdites; celles qui ne pouvaient être utilisées qu'avec le consentement de la personne visée; celles à l'égard desquelles il était possible d'obtenir une autorisation judiciaire, et dont l'application, en cas d'urgence, ne nécessitait ni le consentement de la personne visée ni l'obtention d'une autorisation judiciaire. Mais après les consultations sur le rapport n° 25, nous avons décidé d'ajouter au régime proposé un pouvoir limité de recourir à certaines techniques d'investigation à l'occasion d'une arrestation, sans nécessité d'obtenir un mandat ni le consentement de l'intéressé[100]. On nous a aussi convaincus de permettre l'utilisation, subordonnée à l'obtention d'un mandat ou du consentement, d'un certain nombre de techniques jusque-là incluses dans la catégorie «interdiction absolue[101]».

L'administration de drogues destinées à modifier l'humeur, les inhibitions, le jugement ou la pensée — ou ayant notoirement cet effet — demeure la seule technique dont nous recommandions l'interdiction pure et simple[102]. Cette interdiction découle indirectement du fait que la technique en question ne peut être appliquée avec le consentement du sujet (art. 73), et ne figure pas non plus dans la liste de celles à l'égard desquelles un mandat peut être obtenu (art. 56). Enfin, une technique dont nous recommandions au départ l'interdiction — soit l'examen effectué au moyen de la radiographie ou de l'ultrasonographie (al. 56*j*)) — peut maintenant faire l'objet d'une autorisation judiciaire, pourvu que son utilisation ne présente aucun risque pour la santé ou la sécurité de la personne visée.

Les techniques dont l'application est susceptible d'être autorisée par mandat sont celles qui visent l'obtention de «preuves matérielles» (au sens où la Cour suprême du Canada a employé cette expression dans l'arrêt *Collins*[103]). Dans chaque cas, nous avons mis dans la balance l'atteinte aux droits individuels avec la force probante éventuelle des éléments de preuve susceptibles d'être obtenus.

Aux termes de l'article 56, seul l'agent de la paix peut demander un mandat autorisant le recours à une technique d'investigation. Il s'agit là d'une différence par rapport aux règles régissant la demande de mandat de perquisition.

99. Recommandations 2, 3 et 6.

100. Voir l'article 72 et le commentaire qui l'accompagne.

101. Voir l'article 73 et le commentaire qui l'accompagne.

102. Voir le commentaire relatif à l'article 73.

103. *R.* c. *Collins*, précité, note 31, p. 284.

Demande en personne ou par téléphone

57. (1) La demande est présentée en personne. Toutefois, elle peut aussi l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, s'il est matériellement impossible au demandeur de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement, à huis clos et sous serment, de vive voix ou par écrit.

Forme de la demande écrite

(3) La demande présentée par écrit doit l'être selon la formule prescrite.

COMMENTAIRE

Les articles 57 à 59 énoncent les formalités de base relatives à l'obtention de ce type de mandat (il faut aussi se reporter aux dispositions de la partie I).

La rédaction de l'article 57 indique que c'est normalement en personne que la demande de mandat sera présentée (comme dans le cas des fouilles et perquisitions). Ici encore, elle pourra toutefois l'être par téléphone ou à l'aide d'un autre moyen de télécommunication s'il est matériellement impossible au demandeur de procéder autrement.

Comme pour les autres mandats prévus au présent code, la demande sera faite de vive voix ou par écrit, unilatéralement, à huis clos et sous serment, et, dans le cas d'une demande écrite, selon la formule prescrite.

Compétence, demande en personne

58. (1) La demande présentée en personne est adressée à un juge de paix du district judiciaire où est censé avoir été commis le crime ou de celui où le mandat doit être exécuté.

Compétence, demande par téléphone

(2) La demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication est présentée à un juge de paix désigné par le juge en chef de la Cour criminelle pour exercer cette fonction.

COMMENTAIRE

L'article 58 est identique à l'article 23 (demande de mandat de perquisition). Suivant le paragraphe (1), il doit exister un lien tangible entre l'enquête et le district judiciaire où la demande est présentée. Excepté cette exigence, l'agent de la paix a toute latitude quant au choix du lieu.

Le paragraphe (2) n'impose aucune obligation à ce chapitre pour la demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication; c'est la règle pour toutes les demandes de ce type faites en vertu de notre code.

Contenu de la demande

59. La demande contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le lieu et la date où elle est présentée;**

c) le crime faisant l'objet de l'enquête;

d) la personne qui doit être soumise à l'application de la technique d'investigation;

e) le cas échéant, le fait que la personne a été arrêtée, inculpée ou a reçu une citation à comparaître, relativement au crime faisant l'objet de l'enquête;

f) la technique d'investigation devant être appliquée;

g) les motifs pour lesquels le demandeur croit que l'application de la technique fournira un indice probant relatif à l'implication de la personne dans le crime en question et qu'il est matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne;

h) s'il s'agit d'une demande de mandat autorisant l'examen de la personne au moyen de la radiographie ou de l'ultrasonographie, les motifs pour lesquels le demandeur croit que cet examen ne risque pas de mettre en danger la vie ou la santé du sujet;

i) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

j) le nom d'une personne qui, de l'avis du demandeur, est compétente, de par sa formation ou son expérience, pour l'application de la technique en cause, ou le nom d'une catégorie de personnes répondant à ce critère;

k) le cas échéant, et à condition que la demande soit présentée en personne, les motifs sur lesquels le demandeur se fonde pour croire qu'il est nécessaire que le mandat puisse être exécuté plus de dix jours après sa délivrance;

l) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

COMMENTAIRE

Pour les mêmes raisons que le contenu obligatoire des demandes de mandat de perquisition a été défini avec précision, l'article 59 énumère les éléments que doit comporter la demande de mandat autorisant le recours à une technique d'investigation. Ici encore, nous avons séparé nettement les renseignements touchant le fond et ceux touchant la preuve, comme à l'article 24 en matière de fouilles, perquisitions et saisies.

Les alinéas 59*i*), *j*), *k*) et *l*) portent sur des renseignements qui viennent compléter les éléments de fond ou de preuve que comportent les demandes relatives aux mandats traités dans cette partie. Il s'agit notamment du nom de la personne ou catégorie de personnes jugée compétente pour l'application de la technique, des motifs pour lesquels le demandeur veut obtenir, le cas échéant, un délai d'exécution plus long que le délai normal, et des motifs justifiant la présentation de la demande par téléphone ou à l'aide d'un autre moyen de télécommunication. Ces indications s'ajoutent aux autres éléments exigés, sur le plan de la forme, aux alinéas 59*a*) à *c*).

Les alinéas *d*) à *g*) énoncent les renseignements que la demande doit comporter sur les plans du fond et de la preuve, notamment : la désignation de la personne visée, le fait, le cas échéant, qu'elle a été arrêtée, inculpée ou a reçu une citation à comparaître relativement au crime faisant l'objet de l'enquête, la technique devant être appliquée et les motifs pour lesquels le demandeur croit que son application fournira un indice quant à l'implication de la personne dans le crime et qu'il est matériellement impossible de recourir à une méthode moins attentatoire à la dignité de la personne pour l'obtenir.

L'alinéa *h*) ajoute un élément tout à fait particulier, relatif à la preuve, dont il faut tenir compte lorsqu'on veut recourir à la radiographie ou à l'ultrasonographie : l'obligation d'indiquer les motifs pour lesquels on croit que cela ne risque pas de mettre en danger la vie ou la santé du sujet. Cette disposition découle du sous-alinéa 60(1)*b*)(iii), suivant lequel le juge de paix doit être convaincu de l'absence de tel risque avant d'accéder à la demande.

En indiquant clairement tous les éléments que doit comporter la demande, nous voulons faire en sorte que le recours à des techniques d'investigation ne soit autorisé que lorsqu'il s'avère raisonnable, nécessaire et expressément justifié. Ainsi, la demande dûment remplie constituera le fondement objectif de la décision; elle sera versée au dossier, d'où la possibilité d'un contrôle ultérieur.

SECTION II
DÉLIVRANCE DU MANDAT

Motifs justifiant la délivrance

60. (1) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant l'application d'une technique d'investigation énumérée à l'article 56 si les conditions suivantes sont réunies :

a) la personne qui doit être soumise à l'application de cette technique a été inculpée d'un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou elle a été arrêtée ou a reçu une citation à comparaître relativement à un tel crime;

b) le juge de paix est convaincu qu'il existe des motifs raisonnables de croire :

(i) que l'application de la technique fournira un indice probant concernant l'implication de cette personne dans le crime,

(ii) qu'il est matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne,

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(iii) dans le cas d'une demande de mandat autorisant l'examen de la personne au moyen de la radiographie ou de l'ultrasonographie, que cet examen ne risque pas de mettre en danger la vie ou la santé du sujet.

Motifs supplémentaires, demande par téléphone

(2) Dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix refuse la délivrance du mandat s'il n'est pas en outre convaincu de l'existence de motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

COMMENTAIRE

L'article 60 fixe les conditions devant être réunies pour la délivrance d'un mandat. L'alinéa (1)*a*) vise à empêcher que des atteintes à l'intégrité corporelle du type de celles énumérées à l'article 56 puissent être autorisées à l'égard d'infractions de gravité relativement mineure — et cela, au nom du principe de la modération. L'exigence de motifs justifiant une arrestation, une inculpation ou une citation à comparaître constitue une protection essentielle contre les atteintes injustifiées à la liberté ou à la sécurité de la personne.

Les dispositions de l'alinéa *b*) traduisent notre volonté de faire obstacle aux atteintes abusives à la liberté individuelle, de garantir la sécurité de la personne et de promouvoir le respect du principe de la modération.

Les dispositions du paragraphe (2), identiques à celles de l'article 26 (fouilles, perquisitions et saisies), tiennent au caractère exceptionnel du télémandat et à l'objectif auquel il répond.

Conditions d'exécution

61. Le juge de paix qui décerne un mandat peut y fixer toutes conditions qu'il juge opportunes quant à son exécution.

COMMENTAIRE

L'article 61 confère au juge de paix le pouvoir de fixer des conditions quant à l'exécution du mandat. La nécessité de le faire pourra se manifester au cours de l'enquête approfondie susceptible d'être menée au sujet de la demande[104]. Le juge de paix

104. Ce pouvoir est semblable à celui qui est conféré au juge de paix pour la délivrance des mandats de perquisition : voir l'article 27 et le commentaire qui l'accompagne.

estimera peut-être souhaitable d'imposer des conditions quant à la personne ou catégorie de personnes à qui sera confiée l'application de la technique, ou encore voudra préciser que la technique doit être appliquée par une personne du même sexe que le sujet, etc.

Forme du mandat

62. Le mandat est rédigé selon la formule prescrite et porte la signature du juge de paix qui le délivre.

COMMENTAIRE

Les dispositions des articles 62 et 63 répondent à un objectif de précision (objectif poursuivi dans les autres parties du présent code). Il s'agit ici de veiller à ce que le mandat autorisant une atteinte à l'intimité ou à la sécurité d'une personne soit empreint de précision et puisse facilement être compris par toutes les parties en cause. Il faut aussi éviter les variations, d'un district à l'autre, sur le plan de la forme comme celui du fond. En dernière analyse, ces dispositions visent d'une part à favoriser l'équité et l'accessibilité, d'autre part à empêcher les atteintes abusives ou inutiles à des droits fondamentaux. Comme pour les autres mandats prévus au présent code, on exige l'utilisation de la formule prescrite. Les renseignements devant figurer dans le mandat ne nécessitent pas d'explications.

L'article 69 exige la remise d'une copie du mandat à la personne visée, généralement avant qu'elle soit soumise à l'application d'une technique d'investigation. Les agents de la paix comme le sujet disposent donc d'un document qui indique clairement ce qui peut et ce qui doit être fait; on limite ainsi les risques d'abus et d'interprétations erronées (qui existent dans tous les cas où l'étendue d'un pouvoir demeure vague)[105].

Contenu du mandat

63. Le mandat contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le crime faisant l'objet de l'enquête;**

***c*) la personne qui doit être soumise à l'application de la technique d'investigation;**

***d*) la technique d'investigation devant être appliquée;**

***e*) les conditions fixées, le cas échéant, pour son exécution;**

***f*) la date où il expire s'il n'est pas exécuté;**

***g*) le lieu et la date où il est délivré;**

***h*) le nom du juge de paix et son ressort.**

COMMENTAIRE

Voir le commentaire qui accompagne l'article 62.

105. Voir le commentaire qui accompagne l'article 40, à l'égard des fouilles et des perquisitions.

SECTION III
EXPIRATION DU MANDAT

Demande en personne

64. (1) Le mandat décerné à la suite d'une demande présentée en personne expire dix jours après sa délivrance.

Abrégement du délai

(2) Le juge de paix peut fixer un délai plus court s'il est convaincu que ce délai est suffisant.

Prolongation du délai

(3) Le juge de paix peut fixer un délai de plus de dix jours, mais d'au plus vingt jours, s'il est convaincu qu'il existe des motifs raisonnables de croire que cela est nécessaire.

COMMENTAIRE

Nous avons déjà souligné que, vu les objectifs de la précision et du caractère judiciaire de l'opération, il faut une proximité temporelle raisonnable entre la délivrance du mandat de perquisition et son exécution, celle-ci devant aussi avoir lieu dans des circonstances correspondant essentiellement à celles qui ont incité le juge de paix à délivrer le mandat. Nos recherches nous ont par ailleurs permis de constater que les mandats portant une date d'expiration tendent à être exécutés plus rapidement que les autres. Ces observations gardent toute leur importance et toute leur pertinence lorsqu'il s'agit de mandats autorisant le recours à des techniques d'investigation. Il est normalement facile de procéder à l'application d'une telle technique dans le délai de dix jours fixé au présent code pour l'exécution des mandats de perquisition. C'est pourquoi l'on a retenu ce délai au paragraphe 64(1). Et comme dans le cas du mandat de perquisition, le juge de paix se voit conférer le pouvoir, en vertu des paragraphes (2) et (3), d'abréger le délai ou de le prolonger (jusqu'à un maximum de vingt jours). Pour décider s'il y a lieu de fixer un délai plus long, il devra prendre en considération les motifs invoqués par le demandeur (exigés dans la demande par l'alinéa 59*k*)). Comme pour le mandat de perquisition, le juge de paix a également la faculté d'abréger le délai de sa propre initiative.

En précisant, à l'article 66, que le mandat expire au moment de son exécution si elle a lieu avant la date d'expiration, nous avons voulu empêcher la police de soumettre à plusieurs reprises une personne à l'application d'une technique d'investigation en s'appuyant sur une seule et même autorisation. Si le mandat permet le recours à plusieurs techniques d'investigation, l'application de l'une d'elles ne provoque l'expiration du mandat qu'à l'égard de la technique en question.

Mandat obtenu par téléphone

65. Le mandat délivré à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication expire trois jours après sa délivrance.

COMMENTAIRE

L'article 65 établit, pour le mandat décerné par téléphone ou à l'aide d'un autre moyen de télécommunication et autorisant l'application d'une technique d'investigation, un délai d'expiration identique à celui prévu à l'article 32 pour le télémandat en matière de fouilles et de perquisitions. On peut donc se reporter au commentaire qui accompagne cette disposition.

Exécution

66. Malgré la date d'échéance qui y est fixée, le mandat expire dès que toutes les techniques d'investigation dont il autorisait l'application ont été appliquées.

COMMENTAIRE

Voir le commentaire accompagnant l'article 64.

Mandat non exécuté

67. (1) Lorsque le mandat expire sans qu'aucune des techniques d'investigation qui y étaient autorisées ait été appliquée, les raisons pour lesquelles il n'a pas été exécuté sont notées sur une copie du mandat.

Dépôt

(2) La copie est déposée, dès que cela est matériellement possible, auprès du greffier du district judiciaire où le mandat a été délivré.

COMMENTAIRE

Tout comme celles de l'article 34, relatives aux fouilles, perquisitions et saisies, les dispositions du paragraphe 67(1) visent à obliger les agents de la paix à rendre compte de leurs actes. Le paragraphe (2) complète les règles d'application générale concernant le dépôt des mandats établies à l'article 13.

SECTION IV
EXÉCUTION DU MANDAT

Compétence

68. Le mandat peut être exécuté par tout agent de la paix de la province où il est délivré.

Remise d'une copie du mandat

69. Avant d'exécuter le mandat, ou dès que cela est matériellement possible, l'agent de la paix en remet une copie à la personne soumise à l'application de la technique d'investigation.

COMMENTAIRE

Cette règle est semblable à celle qui est établie à l'alinéa 40(1)*a*), à l'égard des mandats autorisant les fouilles corporelles. Comme nous l'avons souligné dans le commentaire accompagnant cette disposition, il s'agit de faire en sorte que la personne sache (le plus tôt possible) que le recours à la technique d'investigation a fait l'objet d'une autorisation judiciaire[106]. On trouvera des précisions dans le commentaire relatif à l'alinéa 40(1)*a*).

SECTION V
RÈGLE DE PREUVE EN CAS D'ABSENCE DE L'ORIGINAL DU MANDAT

Absence de l'original du mandat

70. Dans toute procédure où il importe au tribunal d'être convaincu que l'application d'une technique d'investigation a été autorisée par un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que l'application de la technique n'a pas été autorisée par mandat.

COMMENTAIRE

La présomption établie à l'article 70 est semblable aux dispositions de l'article 41, qui s'appliquent aux mandats de perquisition obtenus par téléphone ou à l'aide d'un autre moyen de télécommunication. Il s'agit encore une fois de faciliter un éventuel contrôle ultérieur. Nous insistons sur la production de l'original du mandat au cours des procédures subséquentes : s'il y a lieu, par souci d'efficacité, de prévoir l'utilisation de mécanismes comme celui du télémandat, il importe en revanche de garantir la rigueur et l'intégrité du processus de délivrance. Le lecteur est invité à lire à ce sujet le commentaire accompagnant l'article 41.

106. Voir le rapport n° 24, pp. 31-32.

CHAPITRE III
APPLICATION DE TECHNIQUES D'INVESTIGATION SANS MANDAT

SECTION I
APPLICATION DE TECHNIQUES D'INVESTIGATION EN CAS D'URGENCE

Motifs justifiant l'application de techniques d'investigation

71. Lorsqu'une personne a été inculpée d'un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou qu'elle a été arrêtée ou a reçu une citation à comparaître relativement à un tel crime, l'agent de la paix peut, sans mandat, soumettre ou faire soumettre cette personne à l'application de toute technique d'investigation énumérée aux alinéas 56*a*) à *i*), s'il croit, pour des motifs raisonnables, que les conditions suivantes sont réunies :

***a*) cela permettra d'obtenir un indice probant concernant l'implication de la personne dans le crime en question;**

***b*) le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de l'indice en question;**

***c*) il est matériellement impossible d'obtenir l'indice en question par des moyens moins attentatoires à la dignité de la personne.**

Rapport n° 25, rec. 6

COMMENTAIRE

On trouve à l'article 71 une exception restreinte à la règle suivant laquelle le recours aux techniques d'investigation relevant de la présente partie est subordonné, soit au consentement de la personne visée, soit à l'obtention d'un mandat. L'agent de la paix peut passer outre à ces exigences en cas d'urgence manifeste, pourvu que les conditions prévues à cet article soient réunies. Mais, à l'exception de la radiographie ou de l'ultrasonographie (al. 56*j*), seules les techniques à l'égard desquelles l'obtention d'un mandat est normalement possible sous le régime de l'article 56 peuvent être utilisées dans ces conditions.

L'article 71 est presque en tous points conforme à la recommandation 6 du rapport n° 25. L'exercice de ce pouvoir est subordonné à la réunion des quatre conditions suivantes :

(1) La personne visée doit avoir «été inculpée d'un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou [avoir] été arrêtée ou [avoir] reçu une citation à comparaître relativement à un tel crime». En d'autres termes, l'agent de la paix doit déjà avoir des motifs raisonnables de croire qu'elle a commis le crime en question. Est partant exclu le recours à une technique d'investigation qui viserait à obtenir des motifs justifiant l'arrestation ou

l'inculpation d'une personne. Les seuls changements par rapport à notre recommandation initiale[107] consistent dans la substitution des mots «d'une peine d'emprisonnement de plus de deux ans» aux mots «d'une peine d'emprisonnement de cinq ans ou plus» (en raison de la classification des infractions[108] devant être utilisée dans notre code), et dans l'adjonction des personnes qui ont été inculpées ou ont reçu une citation à comparaître. Pourvu que soient remplies les conditions fixées, nous sommes d'avis que la nécessité, au nom de l'intérêt public, d'empêcher la perte ou la destruction d'éléments de preuve justifie le recours aux techniques d'investigation même si le sujet n'est pas à ce moment détenu.

(2) L'agent de la paix doit croire pour des motifs raisonnables que l'application de la technique «permettra d'obtenir un indice probant concernant l'implication de la personne dans le crime en question». On ne saurait donc recourir à la technique à l'aveuglette, simplement parce que l'on espère ou soupçonne découvrir ainsi un indice.

(3) L'agent de la paix doit croire, pour des motifs raisonnables, qu'«il est matériellement impossible d'obtenir l'indice en question par des moyens moins attentatoires à la dignité de la personne.» Les atteintes abusives ou inutiles sont interdites.

(4) L'agent de la paix doit croire, pour des motifs raisonnables, que «le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de l'indice en question». Cette condition sera le plus souvent remplie lorsque des personnes sont arrêtées juste avant que l'on constate la nécessité de recourir à une technique d'investigation; mais elle pourra également l'être dans d'autres situations. La possibilité d'obtenir un mandat par téléphone ou à l'aide d'un autre moyen de télécommunication devrait cependant réduire le nombre de cas où l'agent de la paix pourra prétendre avoir des motifs raisonnables de croire que l'obtention d'un mandat entraînera la perte ou la destruction de l'indice.

Une dernière observation : les garanties établies dans la section I du chapitre II, y compris la règle suivant laquelle l'application des techniques d'investigation doit être confiée à des personnes qualifiées et compétentes, s'appliquent aussi lorsque les techniques sont utilisées en cas d'urgence. Les dispositions des articles 80 et 81, touchant l'établissement et le dépôt d'un rapport, doivent aussi être suivies.

SECTION II
APPLICATION DE TECHNIQUES D'INVESTIGATION EN CAS D'ARRESTATION

Examen visuel

***72. L'agent de la paix qui a arrêté une personne pour un crime punissable d'une peine d'emprisonnement de plus de**

107. Rapport n° 25, rec. 6*a*).

108. Ce régime a été élaboré dans le document de travail n° 54 de la Commission.

* Certains commissaires s'opposent à l'inclusion de cette disposition dans le code.

deux ans peut, à l'occasion de cette arrestation, procéder ou faire procéder sans mandat à l'examen visuel de la surface du corps de cette personne, à l'exclusion de ses parties génitales, de ses fesses et, s'il s'agit d'une femme, de ses seins, s'il croit, pour des motifs raisonnables,

***a*) d'une part, que cela permettra d'obtenir un indice probant concernant l'implication de la personne dans le crime en question;**

***b*) d'autre part, qu'il est matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne.**

COMMENTAIRE

Cet article donne à l'agent de la paix le droit, dans des circonstances bien précises, de procéder sans mandat à l'examen visuel de la surface du corps de la personne arrêtée dans le but de découvrir des indices. Ce pouvoir, qui ne porte pas gravement atteinte aux droits fondamentaux, complète le pouvoir de fouiller une personne à l'occasion de son arrestation, établi aux articles 43 et 44.

L'article 72 s'écarte des recommandations antérieures de la Commission. Dans le rapport n° 25, nous exprimions en effet le point de vue que l'examen de la surface du corps d'une personne, en vue de découvrir des éléments de preuve, ne saurait être permis qu'avec le consentement du sujet, en vertu d'une autorisation judiciaire (rec. 3, 4*b*) ou en cas d'urgence (rec. 6). Cependant, la majorité des commissaires estime maintenant que la légère atteinte à la dignité découlant de l'examen purement visuel de la surface du corps (à l'exclusion des parties génitales) d'une personne arrêtée pour un crime punissable d'une peine d'emprisonnement de plus de deux ans est justifiée dans les circonstances énoncées à l'article 72. Il paraît inopportun, par exemple, d'obliger l'agent de la paix à obtenir une autorisation judiciaire simplement pour relever une manche de chemise, afin de vérifier la présence d'une blessure ou d'un tatouage, surtout quand on pense qu'il serait dispensé de cette formalité dans le cas où la personne arrêtée porterait par hasard une chemise à manches courtes. Par surcroît, à défaut du pouvoir restreint conféré par cette disposition, le policier d'avis que l'examen visuel permettra de découvrir un indice serait tenté de recourir à d'autres moyens : par exemple, il pourrait mettre sous garde la personne arrêtée, de façon à pouvoir en toute légalité faire procéder sur elle à une fouille à corps nu, encore plus attentatoire à sa dignité. Il semble du reste que la common law reconnaît ce pouvoir aux policiers[109].

Une minorité parmi les commissaires n'adhère pas à cette solution et s'en tient au point de vue exprimé dans le rapport n° 25. Dans la partie II (*Les fouilles, les perquisitions et les saisies*) du présent code, la Commission adopte l'approche rigoureuse préconisée par la Cour suprême du Canada dans l'arrêt *Southam* (nécessité d'obtenir, lorsque c'est possible, une autorisation judiciaire avant toute atteinte importante à l'intimité de la vie privée ou à la sécurité des biens). Or, les commissaires minoritaires concluent que cette règle devrait s'appliquer avec encore plus de force quand il s'agit

109. Voir l'arrêt *R.* c. *Beare; R.* c. *Higgins*, précité, note 96, pp. 403-404.

de l'examen du corps d'une personne. Eu égard aux droits en cause, quelques inconvénients de nature administrative ne sauraient être considérés comme un prix trop élevé à payer. Et comme de toute façon la personne sera en état d'arrestation, rien ne s'oppose à ce que l'on exige l'obtention d'un mandat et la justification au préalable par la police de la nécessité de l'examen corporel. La majorité d'entre nous avons néanmoins été convaincus par l'argument suivant lequel la solution préconisée dans le rapport n° 25 impose des formalités trop lourdes à la police. Chose peut-être plus importante, les garanties ainsi établies s'avéreraient dans une large mesure illusoires, la police étant en mesure de les contourner en recourant à d'autres mécanismes tout à fait légaux pour procéder à l'examen souhaité. Les commissaires minoritaires répondent à cela qu'appliqué systématiquement, ce raisonnement supposerait l'élimination de toutes les règles exigeant l'obtention d'un mandat.

SECTION III
APPLICATION DE TECHNIQUES D'INVESTIGATION AVEC LE CONSENTEMENT DE L'INTÉRESSÉ

Techniques pouvant être appliquées

73. (1) Tout agent de la paix peut, sans mandat, soumettre ou faire soumettre une personne, avec le consentement de celle-ci, à l'application de toute technique d'investigation, à l'exception de celles qui supposent l'administration d'une drogue destinée à modifier l'humeur, les inhibitions, le jugement ou la pensée, ou d'une drogue qui a notoirement cet effet.

Rapport n° 25, rec. 2*a*) et 3*a*)

Renseignements à fournir

(2) Le consentement n'est valide que si les conditions suivantes ont été préalablement remplies :

***a*) on a donné au sujet une description de la technique d'investigation, on lui en a expliqué la nature et on l'a informé des raisons qui motivent le recours à cette technique;**

***b*) la personne qui doit procéder à l'application de la technique a informé le sujet, le cas échéant, des risques non négligeables que cela pose pour sa santé ou sa sécurité;**

***c*) un agent de la paix a informé le sujet qu'il a le droit de consulter un avocat avant de décider s'il consent ou non à l'application de la technique, et qu'il peut refuser de donner ce consentement ou, une fois qu'il est donné, le retirer en tout temps.**

Rapport n° 25, rec. 10(1)

Forme du consentement

(3) Le consentement peut être donné de vive voix ou par écrit.

COMMENTAIRE

Comme nous le rappelions dans le commentaire accompagnant l'article 56, la Commission avait proposé dans son rapport n° 25 de répartir les techniques d'investigation en trois grandes catégories : celles qui étaient totalement interdites; celles qui ne pouvaient être utilisées qu'avec le consentement de la personne visée; celles qui pouvaient être appliquées en vertu d'une autorisation judiciaire (celle-ci n'étant pas obligatoire en cas d'urgence). La catégorie «interdiction pure et simple» regroupait des techniques de caractère «médical» dont l'utilisation à des fins autres que thérapeutiques devrait être prohibée, estimions-nous, même lorsque le sujet est consentant. Étaient notamment visées les techniques supposant l'administration de certaines substances (lavements, utilisation d'émétiques ou du «sérum de vérité»)[110]; «toute technique chirurgicale nécessitant la perforation de la peau ou de tissus humains» (à l'exclusion du prélèvement d'échantillons de sang, jugé moins attentatoire à l'intégrité corporelle)[111]; les techniques destinées à extraire le contenu de l'estomac du sujet[112]; et «toute technique destinée à fournir une représentation par images d'une partie interne du sujet qui n'est pas exposée à la vue» (par exemple, la radiographie, l'ultrasonographie et d'autres techniques qui présentent des risques et visent le même objectif)[113].

Nous étions d'avis que le consentement à des méthodes aussi discutables ne pourrait jamais être donné en pleine connaissance de cause[114]. En revanche, nous disions aussi dans le rapport n° 25 (pp. 39-40) que le fait de refuser à des personnes le droit de consentir à l'utilisation de techniques normalement susceptibles d'être autorisées par mandat, constituerait une atteinte injustifiée aux droits individuels; ce serait un peu comme si l'on empêchait les accusés ou les suspects de faire de leur plein gré des déclarations à la police.

Sous réserve de l'exception touchant les drogues destinées à modifier l'état psychique du sujet, et conformément à l'importance que nous attachons au respect de l'autonomie de la personne, l'article 73 permet donc l'application de toute technique d'investigation lorsque le sujet y consent au préalable, en pleine connaissance de cause. Nous persistons cependant à croire que l'administration des drogues visées par l'exception est une façon tellement répugnante, attentatoire et peu fiable d'obtenir des éléments de preuve que l'interdiction absolue s'impose à cet égard.

Le paragraphe (2) est d'une manière générale conforme aux conditions établies à l'article 46 pour l'obtention d'un consentement valide à une fouille ou à une perquisition; il comporte toutefois des dispositions plus sévères sous certains rapports, parce que certaines des techniques d'investigation régies par la présente partie portent davantage atteinte à la dignité de la personne. Comme lorsqu'il cherche à obtenir le consentement à une perquisition ordinaire, l'agent de la paix doit informer l'intéressé qu'il peut refuser de donner son consentement ou le retirer en tout temps; il doit lui décrire

110. Rapport n° 25, rec. 2*a*).

111. *Id.*, rec. 2*b*).

112. *Id.*, rec. 2*c*).

113. *Id.*, rec. 2*d*).

114. *Id.*, p. 39.

la technique d'investigation, lui en expliquer la nature et l'informer des raisons pour lesquelles on veut y recourir. En plus, la personne chargée de l'application de la technique est tenue, en vertu de l'alinéa *b*), d'aviser l'intéressé des risques pour sa santé ou sa sécurité, tandis que l'alinéa *c*) oblige l'agent de la paix à l'informer qu'il a le droit de consulter un avocat avant de décider s'il donne son consentement. Il s'agit ici de veiller au caractère volontaire et éclairé du consentement donné à l'égard de techniques aussi attentatoires. Et comme l'utilisation de ces techniques a lieu lorsque le processus pénal est déjà en branle, il est absolument essentiel de donner des renseignements clairs sur le droit à l'avocat. Lorsque la personne visée manifeste le désir de bénéficier de la présence d'un avocat au cours de l'application d'une technique régie par la présente partie, on devrait lui donner satisfaction dans tous les cas où cela est matériellement possible[115].

Le paragraphe (3), qui prévoit que le consentement peut être donné de vive voix ou par écrit, est conforme aux autres dispositions du présent code relatives à cette question.

CHAPITRE IV
EXERCICE DES POUVOIRS RELATIFS AUX TECHNIQUES D'INVESTIGATION

SECTION I
FORMALITÉS DE L'APPLICATION DES TECHNIQUES D'INVESTIGATION

Compétence du technicien

74. (1) L'application de toute technique d'investigation est confiée à une personne qui, de par sa formation ou son expérience, a la compétence requise.

Rapport n° 25, rec. 12

Empreintes dentaires

(2) Les empreintes dentaires sont prélevées par une personne habilitée à ce faire en vertu des lois de la province.

Techniques d'ordre médical

(3) L'application de toute technique d'investigation qui suppose la recherche ou l'extraction d'une chose saisissable se trouvant dans le corps d'une personne est confiée à un médecin.

Rapport n° 25, rec. 4*j*)

Exception

(4) Dans les circonstances prévues à l'article 71 (urgence), l'agent de la paix peut rechercher et extraire une chose saisissable dissimulée dans la bouche de la personne.

115. *Id.*, p. 29.

COMMENTAIRE

On trouve au chapitre IV les formalités générales, les garanties procédurales et les mécanismes de contrôle applicables à toutes les techniques d'investigation visées par cette partie.

L'article 74 vise à ce que le recours aux techniques d'investigation autorisées se fasse de la façon la plus sûre et la plus fiable possible. En effet, certaines méthodes régies par la présente partie peuvent présenter des risques pour la santé ou la sécurité du sujet si leur application n'est pas confiée à des personnes qualifiées. D'autres (comme l'analyse des résidus laissés par un coup de feu) posent moins de risques, mais devraient tout de même être appliquées par des personnes compétentes, par souci de garantir la régularité et la valeur des résultats[116]. Et lorsqu'on demande un mandat, il faut donner «le nom d'une personne qui, de l'avis du demandeur, est compétente, de par sa formation ou son expérience, pour l'application de la technique en cause, ou le nom d'une catégorie de personnes répondant à ce critère[117]». En outre, le juge de paix qui décerne un mandat peut exiger que l'application de la technique d'investigation soit confiée à une personne ainsi qualifiée[118].

Au moment du procès, on pourra vérifier si réellement c'est une personne compétente qui s'est chargée de l'application de la technique, selon les mêmes formalités et les mêmes critères que pour déterminer la qualité d'expert d'un témoin.

Les paragraphes (2) et (3) de l'article 74 précisent quelles catégories de personnes sont qualifiées pour accomplir les actes à caractère médical dont il y est question. Le paragraphe (3), qui concerne la recherche et l'extraction d'objets se trouvant dans le corps d'une personne, n'est pas conçu comme une restriction des pouvoirs concernant le simple examen visuel des orifices corporels ou de la surface du corps d'une personne (voir les alinéas 56*a*), 56*b*) et l'article 72).

Le paragraphe (4), qui répond à un souci de clarté, vise à éviter qu'une chose se trouvant dans la bouche d'une personne soit considérée comme se trouvant «dans le corps» de cette personne. Car si l'on devait retenir cette interprétation, la recherche et l'extraction de la chose en question devraient, aux termes du paragraphe (3), être confiées à un médecin. Grâce au paragraphe 74(4), l'agent de la paix pourra s'en charger, dans les situations d'urgence définies à l'article 71. Actuellement reconnu par la common law, le pouvoir de l'agent de la paix d'empêcher une personne de tenter de cacher un élément de preuve dans sa bouche, ou encore de le détruire en l'avalant, se trouve ainsi préservé[119].

116. Voir le document de travail n° 34, pp. 9-11.

117. Alinéa 59*j*),.

118. Voir l'article 61.

119. C'est en matière de drogues que ce pouvoir est le plus souvent utilisé; voir *R.* c. *Brezack* (1949), 96 C.C.C. 97 (C.A. Ont.); *Scott* c. *La Reine* (1975), 24 C.C.C. (2d) 261 (C.A.F.); *R.* c. *Collins*, précité, note 31.

Renseignements à fournir

75. (1) Nul ne peut être soumis à l'application d'une technique d'investigation sans son consentement, à moins que les conditions suivantes n'aient été préalablement remplies :

***a*) on a donné au sujet une description de la technique d'investigation, on lui en a expliqué la nature et on l'a informé des raisons motivant le recours à cette technique;**

***b*) on a informé le sujet que la loi l'oblige à s'y soumettre et autorise le recours à la force nécessaire et raisonnable dans les circonstances pour l'application de la technique.**

Rapport n° 25, rec. 9

Divulgation préalable

(2) Ces renseignements sont fournis à la personne avant l'application de la technique; en cas d'impossibilité matérielle, ils sont fournis à la première occasion raisonnable.

Renonciation

(3) La personne peut renoncer, de vive voix ou par écrit, aux exigences prévues à l'alinéa (1)*a*).

COMMENTAIRE

Le paragraphe 75(1) énonce clairement les renseignements devant obligatoirement être fournis à la personne que l'on veut soumettre sans son consentement à l'application d'une technique d'investigation. Il s'agit d'indiquer au sujet la nature de celle-ci, les raisons de son utilisation, et de lui dire s'il est légalement tenu de s'y soumettre; d'une part on favorise ainsi l'observation des prescriptions légales, et d'autre part on fait en sorte que la personne visée ne puisse légitimement conclure à une application arbitraire de la loi. Le paragraphe (1) ne précise pas qui doit fournir ces renseignements, mais il s'agit bien sûr d'une personne en mesure de les donner. Dans le cas de l'alinéa *b*), ce sera en général un agent de la paix, tandis que pour l'alinéa *a*), cela dépendra de la technique en cause. Il sera sans doute nécessaire à l'occasion que cette formalité soit accomplie conjointement par l'agent de la paix et le technicien.

Le paragraphe (2), nouveau par rapport à la recommandation initiale de la Commission, permet une certaine souplesse quant au moment où les renseignements doivent être donnés.

Comme nous l'avons indiqué, ces formalités doivent généralement être remplies avant le recours à quelque technique d'investigation. D'autres renseignements doivent être fournis dans le cas des techniques appliquées en vertu d'un mandat (art. 69) et lorsqu'on veut obtenir le consentement du sujet (par. 73(2)).

Le paragraphe (3) fait référence aux exigences qui ne peuvent faire l'objet d'une renonciation que si l'application de la technique n'est pas subordonnée à l'obtention du consentement du sujet. Afin de garantir le caractère libre et volontaire du consentement, la renonciation n'est pas permise lorsque l'on cherche à amener le sujet à consentir à l'application de la technique.

Modalités de l'application des techniques d'investigation

76. (1) Toute technique d'investigation est appliquée d'une manière qui respecte la dignité de la personne visée. Compte tenu de sa nature et des circonstances,

***a*) d'une part, elle est appliquée de façon à incommoder le moins possible la personne;**

***b*) d'autre part, elle respecte le plus possible l'intimité de la personne.**

Rapport n° 25, rec. 11 et 13

Renonciation

(2) La personne peut renoncer, de vive voix ou par écrit, aux exigences prévues aux alinéas (1)*a*) ou *b*).

COMMENTAIRE

L'article 76 est le pendant d'une règle équivalente énoncée à l'article 50 (fouilles, perquisitions et saisies); il vise à encourager la courtoisie dans le traitement réservé aux personnes soumises à l'application des techniques d'investigation relevant du régime établi dans la présente partie. La prise en considération de la nature de la technique et des circonstances, fondée sur les réalités de l'application de la loi, permet une certaine souplesse. Par exemple, si les techniques nécessitant la mise à nu des parties génitales du sujet doivent de préférence être appliquées par des personnes de son sexe, cela pourrait s'avérer matériellement impossible dans des régions éloignées ou lorsque chaque minute compte. L'obligation d'incommoder le moins possible le sujet est pareillement fonction des circonstances, les diverses techniques n'étant pas toutes équivalentes sous ce rapport et d'autres facteurs jouant un rôle, notamment la coopération du sujet.

L'article 76 exprime en outre un principe fondamental, en ce qu'il exige le respect de la dignité de la personne visée — et il s'agit là d'une obligation rigoureuse. En termes concrets, il faudra simplement faire preuve de décence et de courtoisie; seront interdits les actes visant à humilier le sujet.

Le paragraphe (2) de cet article ne nécessite pas de longues explications. Il précise lesquelles, parmi les garanties établies dans notre régime, peuvent dans tous les cas faire l'objet d'une renonciation.

Absence de responsabilité

77. Ne constitue pas un crime, le fait d'omettre ou de refuser de soumettre une autre personne à une technique d'investigation.

COMMENTAIRE

Dans le rapport n° 25 (pp. 30, 46), la Commission se disait d'avis que la loi devrait énoncer clairement que les simples citoyens ne sont aucunement tenus d'appliquer les techniques d'investigation visées ici, ni de prêter leur concours à l'utilisation de ces techniques. En effet, ce serait enfreindre leurs droits individuels que de les «mobiliser» ainsi. Dans le cas des médecins, surtout, cela risquerait d'équivaloir à une immixtion inacceptable dans les rapports particuliers qu'ils ont avec leurs patients.

L'article 77 traduit l'orientation exprimée dans le rapport n° 25; du reste, il est à rapprocher des dispositions qui dégagent de toute responsabilité pénale le médecin ou le technicien qui refuse d'effectuer des prélèvements de sang sur la personne soupçonnée d'avoir conduit un véhicule sous l'empire d'un état alcoolique[120].

SECTION II
POUVOIRS CONNEXES

Prise de photographies

78. Le pouvoir de procéder à l'examen visuel des orifices corporels ou de la surface du corps d'une personne non consentante comporte le pouvoir de photographier tout indice découvert par ce moyen.

COMMENTAIRE

Sous le régime proposé, l'agent de la paix peut se procurer un mandat autorisant l'examen visuel des orifices corporels ou de la surface du corps d'une personne (voir les alinéas *a*) et *b*) de l'article 56). Par ailleurs, cet examen peut être effectué sans mandat ni consentement dans certaines circonstances décrites aux articles 71 et 72 (par exemple, à l'occasion d'une arrestation légitime). L'article 78 permet de réaliser des représentations fidèles des indices découverts pendant l'examen. Il autorise en effet la prise de photographies dans des circonstances bien définies, pour assurer le respect des prescriptions de la loi et faire en sorte que puisse être produite devant le tribunal la preuve la meilleure et la plus fiable possible. Aucune autorisation distincte n'est exigée, dans la mesure où l'on découvre des éléments de preuve sérieux. En revanche, ce pouvoir ne peut être exercé si l'examen ne permet la découverte d'aucun indice.

Examen et analyse

79. (1) L'agent de la paix peut faire procéder à l'examen ou à l'analyse de toute chose prise ou obtenue grâce à l'application d'une technique d'investigation.

Préservation des indices

(2) Si l'examen ou l'analyse permet de découvrir un indice, la chose, ou ce qui en reste alors, est préservée de façon à pouvoir être utilisée dans le cadre de procédures ultérieures.

Inapplicabilité

(3) Le présent article ne s'applique pas aux choses saisies à titre de choses saisissables sous le régime de la présente partie.

120. Voir le *Code criminel*, par. 257(1). Voir aussi l'article 119 du présent code et le commentaire qui l'accompagne.

COMMENTAIRE

Certaines des techniques autorisées sous le régime de la présente partie (par exemple, la prise d'empreintes ou de photographies) permettent l'obtention d'éléments de preuve matériels ou de renseignements même si nul objet n'est physiquement retiré du corps du sujet. D'autres supposent en revanche le prélèvement d'un objet matériel quelconque, que l'on examinera ou analysera pour déterminer sa valeur probante. Suivant le paragraphe 79(1), l'agent de la paix responsable peut dans les deux cas faire procéder immédiatement à cet examen ou à cette analyse, sans avoir à obtenir une autre autorisation. Cette règle, qui ne figure à l'heure actuelle dans aucune disposition législative, n'en est pas moins conforme à ce qui se passe dans la pratique. Il en va de même pour la règle énoncée au paragraphe (2).

Normalement, les formalités prévues à la partie VI (*La disposition des choses saisies*) quant à la garde ou à la restitution ne s'appliqueront pas aux choses saisies ou obtenues par les agents de la paix en vertu de la présente partie, sauf si elles ont été saisies à titre de choses saisissables (par exemple, des objets retirés du corps d'une personne en conformité avec l'alinéa 56*b*)). Une future partie du code, consacrée à la communication de la preuve par la poursuite, fixera les règles applicables à la divulgation des résultats des épreuves ou analyses effectuées sous le régime de la présente partie; une autre, portant sur la conduite du procès, renfermera des dispositions touchant la remise à l'accusé, en vue d'analyses scientifiques, d'échantillons ou de choses devenues pièces à conviction. Soucieux d'élaborer un régime global et cohérent, nous reportons aussi à plus tard le problème de la restitution et de la disposition des choses obtenues en vertu de la présente partie, ainsi que celui de la tenue et de la destruction des dossiers les concernant.

Certaines dispositions de la présente partie autorisent la saisie de «choses saisissables» pendant l'application d'une technique d'investigation (voir l'alinéa 56*b*)); le paragraphe (3) précise que ces choses échappent à l'application du présent article — elles sont en effet régies par les dispositions de la partie VI. Les exigences de l'article 80 s'appliquent toutefois à leur égard. Outre le rapport exigé par celui-ci, donc, il faudra dresser et produire un inventaire et un procès-verbal de saisie conformément aux dispositions de la partie VI.

SECTION III
RAPPORT SUR LES TECHNIQUES APPLIQUÉES

Contenu du rapport et exigences

80. (1) À la suite de l'application d'une technique d'investigation en vertu d'un mandat, de l'article 71 (urgence) ou de l'article 72 (arrestation), ou lorsqu'une chose a été prise ou obtenue grâce à l'application d'une technique d'investigation avec le consentement de l'intéressé, l'agent de la paix, dès que cela est matériellement possible, dresse et signe un rapport qui contient les renseignements suivants :

***a*) le crime faisant l'objet de l'enquête;**

b) **la personne soumise à l'application de la technique;**

c) **la technique utilisée et, le cas échéant, la description des choses prélevées ou obtenues;**

d) **le lieu, la date et l'heure de l'application de la technique;**

e) **le nom de la personne qui a procédé à l'application de la technique;**

f) **le nom de l'agent de la paix.**

Cas d'urgence

(2) Dans le cas où le recours à la technique était fondé sur l'article 71 (urgence), le rapport indique en outre les motifs pour lesquels l'agent de la paix croyait que l'application de la technique fournirait un indice probant relatif à l'implication de la personne dans le crime en question, que le délai nécessaire à l'obtention d'un mandat aurait entraîné la perte ou la destruction de l'indice et qu'il était matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne.

Rapport n° 25, rec. 7(1) et (2)

Arrestation

(3) Dans le cas où le recours à la technique était fondé sur l'article 72 (arrestation), le rapport indique en outre les motifs pour lesquels l'agent de la paix croyait que l'application de la technique permettrait d'obtenir un indice probant concernant l'implication de la personne dans le crime en question et qu'il était matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne.

Techniques non appliquées

(4) Dans le cas où l'application de la technique était fondée sur un mandat autorisant l'application de plusieurs techniques qui n'ont pas toutes été utilisées, le rapport indique en outre les raisons pour lesquelles certaines ne l'ont pas été.

Rapport n° 25, rec. 7

COMMENTAIRE

Le but visé ici consiste d'une part à obliger les agents de la paix à rendre compte de leurs actes, et d'autre part à faciliter le contrôle de la légalité des techniques d'investigation appliquées sous le régime de la présente partie.

Suivant le paragraphe (1), un rapport doit être rempli dès que cela est matériellement possible après qu'une personne a été soumise à l'application d'une technique d'investigation sans son consentement, ou lorsque des choses ont été prises ou obtenues par le recours à une technique réglementée. Les alinéas *a*) à *f*) énumèrent de façon explicite les renseignements à fournir. Quant aux paragraphes (2) et (3), ils concernent les cas où la technique a été appliquée sans mandat; on oblige alors l'agent de la paix à indiquer a posteriori les motifs sur lesquels il s'est appuyé pour appliquer la technique sans avoir obtenu de mandat. L'agent est donc tenu de justifier ses actes, peu importe qu'un

mandat ait été décerné ou non. Et, le cas échéant, il doit aussi expliquer pourquoi il n'a pas cherché à obtenir de mandat.

Les dispositions des paragraphes (2) et (3) ne nécessitent aucune explication. Elles visent à obliger l'agent de la paix à rendre compte de ses actes et garantissent la conservation des pièces en vue d'un contrôle ultérieur.

Les dispositions du paragraphe (4) sont semblables à celles que l'on trouve à l'article 34, à l'égard du mandat de perquisition non exécuté, et reposent sur le même principe. Par ailleurs, les règles applicables lorsque le mandat expire sans qu'aucune technique d'investigation n'ait été appliquée sont énoncées à l'article 67.

Remise et dépôt du rapport

81. L'agent de la paix, dès que cela est matériellement possible :

***a*) remet une copie du rapport à la personne soumise à l'application de la technique;**

***b*) fait déposer le rapport auprès du greffier du district judiciaire où la technique a été utilisée.**

Rapport n^{0} 25, rec. 7(3)

PARTIE IV

LE DÉPISTAGE DE L'ÉTAT ALCOOLIQUE CHEZ LES CONDUCTEURS

Textes à l'origine de la partie IV

PUBLICATIONS DE LA CRD

Les méthodes d'investigation scientifiques : l'alcool, la drogue et la conduite des véhicules, Rapport n° 21 (1983)

Les méthodes d'investigation scientifiques, Document de travail n° 34 (1984)

Pour une nouvelle codification du droit pénal, Rapport n° 31 (1987)

LÉGISLATION

Code criminel, art. 254-258, par. 487.1(11)

OBSERVATIONS PRÉLIMINAIRES

La présente partie régit un volet des techniques d'investigation applicables à la personne, soit le prélèvement et l'analyse d'échantillons d'haleine ou de sang afin de déceler l'état alcoolique chez des conducteurs de véhicules. Nous avons dans une large mesure repris ici les règles actuelles, tout en profitant de l'occasion pour simplifier le droit et donner une forme législative à bon nombre de réformes importantes déjà préconisées par la Commission.

Dans la recommandation 10(5) de notre projet de code pénal (rapport n° 31), nous avons conservé les infractions actuellement prévues aux alinéas 253*a*) et *b*) du *Code criminel*; à savoir, respectivement, le fait de conduire un véhicule à moteur ou d'en avoir la garde ou le contrôle lorsque sa capacité de conduire est affaiblie par l'effet de l'alcool ou d'une drogue, et le fait de conduire un véhicule à moteur ou d'en avoir la garde ou le contrôle lorsque son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang. A également été maintenue l'infraction qui consiste à faire défaut ou à refuser d'obtempérer lorsqu'un agent de la paix ordonne de fournir des échantillons de sang ou d'haleine en vue de la détermination de l'alcoolémie au moyen d'analyses[121]. Nous avons en revanche éliminé les textes incriminant l'omission ou le refus de fournir un échantillon d'haleine en vue d'une analyse préliminaire au moyen d'un «appareil de détection approuvé» et l'omission de suivre l'agent de la paix en vue du prélèvement de l'échantillon (paragraphe 254(5) du *Code criminel*)[122].

Les règles qui régissent le dépistage et la preuve des infractions liées à la conduite avec facultés affaiblies sont inutilement complexes. Elles sont le résultat de réponses fragmentaires, d'une part aux progrès scientifiques dans le domaine, et d'autre part aux exigences sans cesse croissantes de la population quant à l'efficacité de la recherche et de la poursuite des délinquants. De ce fait, certaines dispositions sont à notre sens devenues carrément illisibles. À titre d'exemple, mentionnons l'article 258 du *Code criminel*, qui est venu ajouter des conditions compliquées relatives aux présomptions en matière d'analyse d'haleine et à l'admission en preuve de certificats ayant trait aux analyses de sang. Des cas comme celui-là ont amené la Commission à conclure que, même pour les règles dont il y a lieu de conserver les objectifs essentiels, une nouvelle rédaction était indispensable, ne fût-ce que par souci de clarté.

Les changements d'attitude du public à l'égard des infractions de conduite avec facultés affaiblies ont trouvé un écho dans les décisions des juridictions supérieures. Ainsi, la Cour suprême du Canada décidait récemment que les contrôles au hasard autorisés par une loi, bien que constituant une «détention arbitraire» au sens de l'article 9 de la Charte, étaient justifiés en tant que «limite raisonnable» suivant le critère posé à l'article premier. Selon la Cour, l'objectif législatif poursuivi (soit la répression de la conduite avec facultés affaiblies par la drogue ou l'alcool) constituait une «préoccupation urgente et réelle[123]», au point qu'il était légitime en l'occurrence de limiter la

121. Rapport n° 31, rec. 10(6), p. 79.

122. *Id.*, commentaire aux pp. 79-80.

123. *R.* c. *Hufsky*, [1988] 1 R.C.S. 621, pp. 634-637.

protection du droit constitutionnel en cause. Elle a jugé que la nature et le degré de l'atteinte découlant de ces contrôles étaient proportionnés à cet objectif.

Le bien-fondé des objectifs législatifs relevés par la Cour suprême avait été reconnu par la Commission dans un rapport publié en 1983, intitulé *Les méthodes d'investigation scientifiques : l'alcool, la drogue et la conduite des véhicules*. Les propositions faites à cette occasion, sur lesquelles repose la présente partie, visaient à supprimer certaines dispositions qui selon nous entravaient la poursuite des infractions de conduite avec facultés affaiblies par l'alcool[124]. Elles traduisaient aussi le souci de veiller au caractère raisonnable de toute atteinte aux droits garantis par la Constitution[125], et de faire en sorte que toute modification législative entraînant des atteintes plus graves à la vie privée ou à l'intégrité physique soit compensée par l'adoption de dispositions ayant pour objet de garantir le plus possible l'exactitude de la preuve recueillie ainsi que la santé et la sécurité des citoyens[126].

Sauf les exceptions dont il sera fait mention ci-après, les dispositions de la présente partie reprennent l'essentiel du droit actuellement en vigueur. Voici, en résumé, le contenu de celles qui confèrent aux agents de la paix des pouvoirs en vue de l'obtention d'échantillons d'haleine ou de sang — elles forment la clé de voûte de cette partie :

(1) L'agent de la paix peut demander à la personne qui conduit un véhicule, ou en a la garde ou le contrôle, de fournir des échantillons d'haleine en vue d'une analyse au moyen d'un alcootest. Il suffit qu'il ait de bonnes raisons de soupçonner la présence d'alcool dans le sang de cette personne. L'alcootest ne permet pas de mesurer la quantité d'alcool présente dans le sang : il indique, le cas échéant, la présence d'une quantité paraissant supérieure à la limite permise et, partant, la nécessité de procéder à une analyse plus poussée. Ne constituera plus un crime, le fait de ne pas obtempérer à cette demande ou de ne pas suivre l'agent pour le prélèvement de l'échantillon[127]. Mais si la personne refuse ou omet d'obtempérer, l'agent peut l'arrêter et l'emmener là où un analyseur d'haleine est disponible. (À l'heure actuelle, cet appareil est désigné dans le *Code criminel* par le terme «alcootest approuvé»; or, le mot alcootest vise normalement l'appareil de dépistage préliminaire.) Le fait de refuser ou d'omettre de fournir les échantillons nécessaires à l'utilisation de cet appareil constituera un crime en vertu de l'article 59 du projet de code criminel de la Commission. Il faut à chaque étape avertir la personne des conséquences d'un refus; cela, pour encourager le respect de ces dispositions et faire en sorte que les citoyens connaissent leurs droits.

124. Rapport n° 21, p. 1. On faisait état, notamment, des dispositions du paragraphe 237(2) du *Code criminel* de l'époque, suivant lesquelles nul n'était tenu de se soumettre à l'analyse d'échantillons de sang.

125. *R.* c. *Oakes*, [1986] 1 R.C.S. 103; *R.* c. *Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, le juge en chef Dickson, pp. 768-769. Les «limites» sont «raisonnables» si elles présentent un lien rationnel avec les objectifs poursuivis, sont de nature à porter atteinte le moins possible aux droits garantis et l'atteinte ainsi portée n'est pas disproportionnée avec les objectifs législatifs.

126. Rapport n° 21, p. 17.

127. Les infractions actuelles sont énoncées au paragraphe 254(5) du *Code criminel*. Le refus de suivre l'agent est une façon de commettre l'infraction consistant dans le refus d'obtempérer à une demande faite en vertu de l'article 254. Voir *R.* c. *MacNeil* (1978), 41 C.C.C. (2d) 46 (C.A. Ont.).

(2) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne, au cours des deux heures précédentes, a commis le crime de conduite sous l'empire d'un état alcoolique prévu à l'article 58 du projet de code criminel de la CRD[128], peut se dispenser du dépistage préliminaire. Il peut en effet demander sur-le-champ à la personne de le suivre là où l'on pourra procéder à des prélèvements d'haleine en vue d'une analyse au moyen d'un «analyseur d'haleine». Et si l'agent estime que le prélèvement serait matériellement impossible à cause de l'état physique du suspect, il peut lui demander de le suivre jusqu'à un endroit où l'on pourra effectuer des prélèvements de sang. À ce stade, l'agent est tenu d'avertir la personne qu'en cas de refus ou d'omission de fournir les échantillons (de sang ou d'haleine, selon le cas), il peut l'arrêter et la conduire à un endroit où seront effectués les prélèvements. Une fois que la personne s'y trouve, l'agent peut lui demander de fournir les échantillons de sang ou d'haleine, et doit l'avertir que suivant l'article 59 du projet de code criminel de la CRD, le fait de refuser ou d'omettre d'obtempérer constitue un crime. Encore une fois, lorsque le policier fait une demande de cette nature, il doit aussi informer clairement l'intéressé des conséquences d'une omission ou d'un refus.

(3) L'agent de la paix peut demander à un juge de paix (en personne ou, si cela lui est matériellement impossible, par téléphone ou à l'aide d'un autre moyen de télécommunication) de décerner un mandat autorisant le prélèvement d'échantillons de sang sur un suspect. Les motifs justifiant la délivrance du mandat correspondent pour l'essentiel à ceux qui sont énoncés à l'article 256 du *Code criminel* actuel. Le juge de paix peut décerner le mandat s'il est convaincu qu'il existe des motifs raisonnables de croire : (1) que cette personne, au cours des deux heures précédentes, a commis le crime de conduite sous l'empire d'un état alcoolique prévu à l'article 58 du projet de code criminel de la CRD et a été impliquée dans un accident ayant coûté la vie ou des lésions corporelles à quelque personne; (2) qu'un médecin est d'avis à la fois que cette personne se trouve, à cause de l'absorption d'alcool ou de l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement d'échantillons de son sang, et que le prélèvement ne risque pas de mettre en danger la vie ou la santé de cette personne.

Le prélèvement d'échantillons de sang porte plus gravement atteinte à l'intégrité corporelle que le prélèvement d'échantillons d'haleine; il peut aussi présenter certains risques pour la santé, voire pour la vie. Aussi les dispositions de la présente partie qui le régissent renferment-elles un certain nombre de garanties spéciales. On ne peut prélever plus de deux échantillons de sang. Le prélèvement doit avoir lieu sous la direction d'un médecin, qui doit être convaincu que l'intervention ne présente aucun risque pour la vie ou la santé de la personne visée. Aucune responsabilité pénale ne peut être imputée au médecin — ni au technicien agissant sous sa direction — qui omettrait ou refuserait de faire le prélèvement. En outre, comme la demande d'échantillons (de sang

128. Il s'agit essentiellement du crime constitué par le fait de conduire un véhicule, ou d'en avoir la garde ou le contrôle, lorsque ses facultés sont affaiblies ou que son alcoolémie dépasse 80 milligrammes par 100 millilitres de sang.

ou d'haleine) est en soi susceptible de nuire au traitement de la personne si elle est blessée, nous avons ajouté une disposition donnant au médecin, en certaines circonstances, un droit de regard à ce sujet.

On trouve aussi des dispositions qui établissent les formalités applicables à la demande et à la délivrance de mandats autorisant le prélèvement d'échantillons de sang (semblables à celles qui ont trait aux mandats de perquisition et aux mandats relatifs à la recherche d'indices sur les personnes). D'autres permettent à la personne détenue de demander le prélèvement d'échantillons de son sang lorsque les résultats de l'analyse d'haleine lui sont défavorables. Certaines dispositions décrivent la procédure régissant la remise au suspect d'échantillons de sang en vue d'une analyse effectuée pour son compte. D'autres enfin permettent l'analyse d'échantillons de sang pour déceler la présence de drogues.

La législation proposée reprend en gros les dispositions du Code actuel régissant l'admissibilité des résultats d'analyses d'haleine ou de sang, les présomptions applicables à leur égard et l'utilisation des certificats préparés par les analystes, les techniciens ou les médecins. Signalons toutefois une modification importante, touchant le nombre d'échantillons de sang qui doivent être prélevés et analysés pour que s'applique la présomption actuellement prévue au paragraphe 258(1)*d*) du *Code criminel*. Pour donner à l'accusé la possibilité de présenter «une pleine réponse et défense[129]», nous avons fait passer ce nombre de un à deux.

Soulignons aussi l'absence, dans la partie IV, de disposition analogue au paragraphe 258(3) du *Code criminel*. À l'heure actuelle, on peut produire au cours de certaines poursuites «la preuve que l'accusé, sans excuse raisonnable, a fait défaut ou refusé» de fournir des échantillons de sang ou d'haleine, et le tribunal peut en tirer une conclusion défavorable à l'accusé. Or, à notre sens, la recevabilité et les conséquences de cette preuve devraient relever des règles de preuve ordinaires. Si, dans les circonstances, l'omission ou le refus peuvent contribuer à l'établissement de la «culpabilité consciente», ils devraient être reçus en preuve, avec les conséquences que cela entraîne; dans le cas contraire, il n'existe aucune raison, sur le plan des principes ou de la logique, de continuer à tenir arbitrairement ce fait pour recevable, tout en énonçant qu'une conclusion de culpabilité ne doit pas nécessairement en être tirée[130].

CHAPITRE PREMIER
DÉFINITIONS

Définitions

82. Les définitions qui suivent s'appliquent à la présente partie.

129. *Code criminel*, par. 650(3) en ce qui concerne les actes criminels. Au paragraphe 802(1), relativement aux infractions punissables sur déclaration de culpabilité par procédure sommaire, on utilise l'expression «une réponse et défense complète».

130. Voir *R.* c. *Mackenzie* (1984), 6 C.C.C. (3d) 86 (B.R. Alb.); *R.* c. *Van Den Elzen* (1984), 10 C.C.C. (3d) 532 (C.A. C.-B.).

«alcootest» (*preliminary breath testing device*)

«alcootest» Appareil destiné à déceler la présence d'alcool dans le sang d'une personne, qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada.

«analyseur d'haleine» (*breath analysis instrument*)

«analyseur d'haleine» Appareil destiné au prélèvement et à l'analyse de l'air expiré, qui permet de déterminer l'alcoolémie d'une personne et qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada.

«analyste» (*analyst*)

«analyste» Personne désignée comme analyste par le procureur général pour l'application de la présente partie.

«conduire» (*operate*)

«conduire» Dans le cas d'un navire ou d'un aéronef, le piloter.

«contenant» (*container*)

«contenant» Selon le cas :

a) contenant destiné à recueillir, en vue d'une analyse, un échantillon de l'air expiré par une personne, qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada;

b) contenant destiné à recueillir, en vue d'une analyse, un échantillon du sang d'une personne, qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada.

«technicien» (*technician*)

«technicien» Selon le cas :

a) toute personne reconnue qualifiée par le procureur général pour faire fonctionner un analyseur d'haleine;

b) toute personne reconnue qualifiée par le procureur général pour prélever un échantillon du sang d'une personne pour l'application de la présente partie, ou faisant partie d'une catégorie de personnes reconnues qualifiées à cette fin par le procureur général.

«véhicule» (*vehicle*)

«véhicule» Tout véhicule à moteur, et tout navire, train ou aéronef; la présente définition ne vise toutefois pas les véhicules tirés, mûs ou poussés par la force musculaire.

Code criminel, art. 2, 214, par. 254(1)

COMMENTAIRE

Nous avons adapté à notre régime certaines des définitions existantes. On trouve à l'article 82 celles des mots «conduire» et «véhicule», inspirées de l'article 56 de notre projet de code criminel[131], ainsi que quelques autres tirées de l'article 2 et du paragraphe 254(1) du *Code criminel* en vigueur.

131. Rapport n° 31, annexe B, p. 209. Des modifications récentes ont été apportées à la définition des termes «conduire» et «véhicule à moteur»; *Loi sur la sécurité ferroviaire*, L.C. 1988, ch. 40, par. 55(1) et art. 56. Elles seront éventuellement intégrées au présent code après étude de la question.

Dans la plupart des cas, la signification des termes demeure pour l'essentiel la même. Il en va ainsi de la définition du mot «analyste». Nous avons par contre substitué au terme «appareil de détection approuvé» le terme «alcootest», mais sans modifier le fond de la définition. Quant au terme «analyseur d'haleine», sa définition correspond dans une large mesure à celle du terme «alcootest approuvé» du Code actuel, mais l'expression retenue décrit mieux l'appareil en question. Le verbe «conduire» se voit donner une définition correspondant à celle du mot «conducteur» à l'article 56 de notre projet de code criminel; nous nous sommes inspirés ici de l'alinéa *c*) de la définition se trouvant à l'article 214 du *Code criminel*. Le mot «contenant» est substitué à celui de «contenant approuvé», sans que la définition soit fondamentalement différente. C'est aussi le cas pour le mot «technicien», qui remplace «technicien qualifié». Quant à la définition du mot «véhicule» (substitué à «véhicule à moteur»), elle est fondée sur celle que l'on trouve à l'article 56 de notre projet de code criminel. La Commission avait en effet annoncé, dans la recommandation 10(5) du rapport n° 31, son intention de rendre les textes d'incrimination relatifs à la conduite avec facultés affaiblies, etc., applicables à la conduite de tout «moyen de transport (mû par une force autre que la force musculaire [par exemple une bicyclette])».

CHAPITRE II
DÉPISTAGE PRÉLIMINAIRE

Demande d'échantillon

83. (1) L'agent de la paix qui a de bonnes raisons de soupçonner un état alcoolique chez la personne qui conduit un véhicule, ou en a la garde ou le contrôle, peut lui demander :

***a*) de fournir, dès que cela est matériellement possible, l'échantillon d'haleine qu'il estime nécessaire à une analyse au moyen d'un alcootest;**

***b*) de le suivre, si besoin est, pour que le prélèvement de cet échantillon puisse être effectué.**

Mise en garde

(2) Lorsqu'il fait cette demande, l'agent de la paix avertit la personne qu'en cas d'omission ou de refus, il peut l'arrêter et l'emmener à un endroit où un analyseur d'haleine est disponible.

Code criminel, par. 254(2) et (5)

COMMENTAIRE

Cet article reprend dans une large mesure les dispositions du paragraphe 254(2) du *Code criminel* actuel. Le verbe «demander» remplace «ordonner», moins approprié à la façon dont les agents de la paix devraient à notre avis chercher au départ à obtenir la coopération des automobilistes. Mais la demande dont il question dans la présente partie n'en conserve pas moins un caractère impératif : le paragraphe (2) fait allusion aux conséquences d'un refus d'obtempérer, qui sont précisées dans les dispositions ultérieures.

Pour que l'agent de la paix soit admis à demander un échantillon d'haleine en vue d'un dépistage préliminaire au moyen de l'alcootest, il doit comme à l'heure actuelle être fondé à soupçonner un état alcoolique chez la personne qui conduit un véhicule, ou en a la garde ou le contrôle. Alors que suivant le *Code criminel*, la personne doit obtempérer «immédiatement», elle serait ici tenue de le faire «dès que cela est matériellement possible»; suivant certaines décisions, en effet, c'est le sens qu'il y a lieu de donner au mot «immédiatement[132]».

Suivant notre régime, la personne qui omet ou refuse de fournir l'échantillon demandé en vue de l'épreuve de l'alcootest ne se rend pas coupable d'un crime, comme c'est actuellement le cas en vertu du paragraphe 254(5) du *Code criminel*. Mais comme on le verra clairement lorsque la Commission fera connaître ses propositions définitives en matière d'arrestation, ce refus ou cette omission constitue un motif suffisant pour que l'agent arrête la personne et la conduise à un endroit où un analyseur d'haleine est disponible. Du reste, le paragraphe (2) oblige l'agent à expliquer au suspect cette nouvelle conséquence, lorsqu'il lui demande l'échantillon.

Les nouvelles règles établies ici (et dans nos futures dispositions sur l'arrestation) à l'égard des personnes qui refusent de fournir des échantillons d'haleine en vue du dépistage préliminaire, doivent être lues à la lumière du commentaire qui accompagne notre recommandation 10(6) dans le rapport n° 31[133]. Les règles en vigueur ont placé les tribunaux devant cette alternative : soit reconnaître l'application en l'occurrence des droits garantis par la Charte (ce qui est susceptible d'empêcher tout dépistage efficace), soit en exclure l'application (et alors, on peut être déclaré coupable d'une infraction criminelle tout en s'étant vu refuser le droit d'avoir recours à l'assistance d'un avocat pendant qu'on est détenu)[134]. La Cour suprême du Canada a retenu la deuxième solution. Dans un arrêt récent, elle concluait que la restriction du droit à l'avocat dans le contexte du dépistage préliminaire était raisonnable au regard de la Charte[135]. Mais, a-t-elle souligné du même coup, les moyens mis en œuvre pour la poursuite d'un objectif législatif suffisamment important pour justifier la limitation d'un droit constitutionnel doivent être proportionnés avec cet objectif[136]. Or, selon nous, il est tout à fait possible de porter moins radicalement atteinte aux droits individuels qu'en ce moment sans nuire à l'efficacité du dépistage et de la dissuasion en matière de conduite avec facultés affaiblies. Suivant les articles 83 et 84 de la présente partie, les autorités demeurent investies de tous les pouvoirs nécessaires pour interpeller les conducteurs soupçonnés d'imprégnation alcoolique et les soumettre à des analyses. Cependant, nous avons renoncé à la méthode par laquelle les conducteurs sont à l'heure actuelle forcés de subir l'épreuve de l'alcootest — relativement peu concluante —, et sont ainsi exposés à la rigueur de la loi pénale sans avoir la possibilité de recourir à l'assistance d'un avocat, même s'ils sont détenus[137].

132. Voir *R.* c. *Seo* (1986), 25 C.C.C. (3d) 385, p. 409 (C.A. Ont.), ainsi que les observations du juge Le Dain dans l'arrêt *R.* c. *Thomsen*, [1988] 1 R.C.S. 640.

133. Aux pages 79-80. Voir *R.* c. *Thomsen*, précité, note 132.

134. Voir S.A. COHEN, «Roadside Detentions» (1986), 51 *C.R.* (3d) 34, p. 41.

135. *R.* c. *Thomsen*, précité, note 132.

136. *Id.*, pp. 653-654.

137. Voir *R.* c. *Therens*, [1985] 1 R.C.S. 613.

CHAPITRE III
DEMANDE D'ÉCHANTILLONS POUR LA DÉTERMINATION DE L'ALCOOLÉMIE

SECTION I
REFUS DE FOURNIR UN ÉCHANTILLON POUR LE DÉPISTAGE PRÉLIMINAIRE

Demande d'échantillons d'haleine

84. Lorsqu'une personne a été arrêtée pour omission ou refus de fournir un échantillon d'haleine en vue de l'épreuve de l'alcootest, ou pour omission ou refus de suivre l'agent de la paix pour le prélèvement de cet échantillon, l'agent de la paix peut lui demander de fournir, dès que cela est matériellement possible, les échantillons d'haleine nécessaires, de l'avis d'un technicien, à une analyse au moyen d'un analyseur d'haleine.

COMMENTAIRE

En ce moment, le fait d'omettre ou de refuser sans excuse raisonnable de fournir un échantillon en vue de l'épreuve de l'«appareil de détection approuvé» constitue un crime. Les peines minimales prévues sont établies au paragraphe 255(1) du *Code criminel*. Elles correspondent grosso modo à celles qui sont applicables en cas de condamnation pour les infractions de conduite avec facultés affaiblies ou lorsque l'alcoolémie dépasse le niveau de 0,08.

En étudiant l'évolution de ces textes au fil des ans, on constate que le législateur, soucieux de faire preuve de sévérité, a progressivement étendu le champ de la responsabilité pénale. Il y a eu en premier lieu le crime de conduite avec capacité affaiblie; en deuxième lieu, le crime de conduite lorsque l'alcoolémie est supérieure à 0,08 (présomption de capacité affaiblie); enfin, le crime consistant dans le refus de fournir des échantillons d'haleine ou de sang. En ce qui a trait aux échantillons d'haleine, la loi réprime le refus de fournir un échantillon, non seulement en vue de l'utilisation de l'analyseur d'haleine, mais aussi pour l'épreuve du dépistage préliminaire.

Ces dispositions, maintenant familières aux agents de police, aux avocats et aux juges, n'en présentent pas moins à notre sens de graves défauts, susceptibles toutefois d'être aisément corrigés sans que la vigueur de la politique d'application en souffre.

L'analyseur d'haleine permet de mesurer avec précision l'alcoolémie d'une personne, ce qui n'est pas le cas de l'«appareil de détection approuvé». Celui-ci est utilisé pour un dépistage purement préliminaire, qui aide le policier à déterminer s'il doit demander à la personne de fournir la preuve non équivoque de sa culpabilité en se soumettant à l'épreuve de l'analyseur d'haleine. En punissant le refus de fournir un échantillon en vue du simple dépistage, on se trouve donc en quelque sorte à étendre sur le plan temporel le champ de la responsabilité pénale, en ne tenant pas suffisamment compte du principe fondamental de la modération dans le recours à la rigueur du

droit pénal. Selon la Commission, il y aurait lieu de recourir à un autre moyen pour aider les policiers à accomplir leur mission sans donner une portée abusive à la loi pénale.

Cet autre moyen, on le trouve exposé au présent article. Lorsqu'une personne refuse de fournir un échantillon d'haleine en vue de l'épreuve de l'alcootest (dépistage préliminaire), l'agent de police est habilité à lui demander de fournir des échantillons destinés à l'utilisation d'un analyseur d'haleine. C'est uniquement à ce moment-là que le refus ou l'omission engage la responsabilité pénale.

SECTION II
COMMISSION DU CRIME DE CONDUITE SOUS L'EMPIRE D'UN ÉTAT ALCOOLIQUE

Demande d'échantillons d'haleine

85. (1) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne, au cours des deux heures précédentes, a commis le crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD peut, dès que cela est matériellement possible, demander à cette personne :

***a*) de fournir, dès que cela est matériellement possible, les échantillons d'haleine nécessaires, de l'avis d'un technicien, à une analyse au moyen d'un analyseur d'haleine;**

***b*) de le suivre, si besoin est, pour le prélèvement des échantillons d'haleine.**

Mise en garde

(2) S'il lui demande de le suivre, il l'avertit qu'en cas d'omission ou de refus, il peut l'arrêter et la conduire à un endroit où un analyseur d'haleine est disponible.

Rapport n° 21, rec. 1 et 8
Code criminel, al. 254(3)*a*)

COMMENTAIRE

Le paragraphe (1) de cet article est le pendant de l'actuel paragraphe 254(3) du *Code criminel*. Il décrit le second cas où l'agent de la paix est fondé à demander des échantillons d'haleine en vue de l'épreuve de l'analyseur d'haleine. Lorsque la condition prévue au paragraphe (1) est remplie, l'agent peut faire cette demande sans être astreint aux formalités relatives au dépistage préliminaire.

La personne, qui à ce moment sera détenue[138], a le droit de consulter un avocat et d'être informée de ce droit avant d'obtempérer à la demande. Rien ne s'oppose donc à ce que le législateur réprime pénalement le refus ou l'omission de fournir les échantillons demandés.

138. *Ibid.*

Demande d'échantillons de sang

86. (1) L'agent de la paix qui a des motifs raisonnables de croire que, à cause de l'état physique de cette personne, le prélèvement d'échantillons d'haleine serait matériellement impossible ou elle serait incapable de fournir des échantillons d'haleine, peut, dès que cela est matériellement possible, lui demander :

***a*) de se soumettre, dès que cela est matériellement possible, au prélèvement d'échantillons de son sang pour la détermination de son alcoolémie;**

***b*) de le suivre, si besoin est, pour le prélèvement des échantillons.**

Mise en garde

(2) S'il lui demande de le suivre, il l'avertit qu'en cas d'omission ou de refus, il peut l'arrêter et la conduire à un endroit où pourront être effectués les prélèvements de sang.

Rapport n° 21, rec. 3 et 8
Code criminel, par. 254(3)*b*)

COMMENTAIRE

Les règles établies au paragraphe (1) correspondent pour l'essentiel aux dispositions de l'alinéa 254(3)*b*) du *Code criminel*. Elles doivent être lues à la lumière du paragraphe 103(1) de la présente partie, qui (contrairement au Code actuel) limite à deux le nombre d'échantillons de sang susceptibles d'être prélevés.

Le paragraphe (2) l'oblige à une mise en garde semblable à celle qui est exigée au paragraphe 85(2), à l'égard des échantillons d'haleine.

SECTION III
MISE EN GARDE SUR LES CONSÉQUENCES D'UN REFUS

Mise en garde

87. L'agent de la paix qui demande à une personne de fournir des échantillons d'haleine ou de sang l'avertit que, suivant l'article 59 (omission ou refus de fournir un échantillon d'haleine ou de sang) du projet de code criminel de la CRD, le fait de refuser ou d'omettre d'obtempérer sans excuse raisonnable constitue un crime.

Rapport n° 21, rec. 8

COMMENTAIRE

Il s'agit ici de faire en sorte que la personne à qui une demande est faite en vertu des articles 84, 85 ou 86 (et donc, qui a été arrêtée et emmenée à un endroit où des échantillons peuvent être prélevés) soit informée de son obligation légale d'obtempérer.

Du reste, la plupart des corps policiers du Canada font déjà cette mise en garde dans de telles circonstances.

SECTION IV
RESTRICTIONS QUANT À LA DEMANDE D'ÉCHANTILLONS

Traitement médical

88. Lorsque la personne a été admise à l'hôpital ou est traitée d'urgence par un médecin, l'agent de la paix ne peut lui demander de fournir des échantillons d'haleine ou de subir des prélèvements de sang que si le médecin traitant estime que la formulation de cette demande et le prélèvement des échantillons ne risquent pas de nuire au traitement de cette personne ni aux soins qui lui sont donnés.

Rapport n° 21, rec. 5

COMMENTAIRE

Cet article établit clairement que, lorsqu'une personne a été admise à l'hôpital ou est traitée d urgence par un médecin, la protection de sa santé et sa sécurité doivent l'emporter sur les pouvoirs de l'agent de la paix quant à la demande d'échantillons d'haleine ou de sang. Certes, les paragraphes 254(4) et 256(4) ainsi que le sous-alinéa 256(1)*b*)(ii) du *Code criminel* offrent en ce moment une certaine protection au patient à l'égard des prélèvements de sang, mais elle est à notre sens insuffisante. Les dispositions actuelles s'appliquent en effet au *prélèvement* d'échantillons de sang, sans qu'aucun mécanisme ne soit prévu pour le filtrage des *demandes*. Or, comme celles-ci (qu'elles aient trait à des échantillons d'haleine ou de sang) sont en soi susceptibles de gêner le traitement du patient et de nuire à son bien-être, le présent article limite le pouvoir des autorités de lui demander des échantillons.

SECTION V
DEMANDE D'ÉCHANTILLONS DE SANG APRÈS COMMUNICATION DES RÉSULTATS DES ANALYSES

Communication des résultats

89. (1) Une fois connus les résultats des analyses d'haleine, l'agent de la paix les communique à la personne visée dès que cela est matériellement possible.

Demande d'échantillons de sang

(2) Une fois informée des résultats des analyses d'haleine, la personne détenue peut demander que des échantillons de sang soient prélevés sur elle; l'agent de la paix prend alors les dispositions nécessaires à cet effet.

Rapport n° 21, rec. 9 et 10

COMMENTAIRE

On s'accorde à dire que, pour la détermination de l'alcoolémie, l'analyse du sang est plus précise que celle de l'air expiré[139]. De droit nouveau, les dispositions de l'article 89 visent donc à permettre aux personnes détenues d'avoir recours à la méthode la plus rigoureuse. Il est essentiel pour cela que toute personne qui fournit des échantillons en vue de l'épreuve de l'analyseur d'haleine soit promptement avisée des résultats. Cette obligation, imposée de façon claire par le paragraphe (1), n'entraînera aucune difficulté administrative, les résultats étant connus sitôt le prélèvement effectué. Ainsi, la personne qui est remise en liberté après avoir appris que l'analyse d'haleine lui est défavorable sera en mesure de prendre des dispositions pour faire procéder à des analyses de sang, ce que pourra d'ailleurs lui avoir conseillé son avocat, si elle en a consulté un. Le paragraphe (2) vise simplement à donner aussi à la personne détenue la possibilité d'avoir recours à l'analyse de sang, si tel est son souhait.

La majorité des commissaires estiment que les règles applicables aux échantillons de sang fournis sur la demande d'un agent de la paix devraient également régir les échantillons prélevés à la suite d'une demande faite en vertu du présent article. Il n'existerait alors aucun privilège relativement à ces échantillons ni aux résultats de l'analyse. Les échantillons demeureraient sous la garde des autorités, qui devraient les préserver comme tout autre échantillon de sang prélevé en vertu de la présente partie. Les dispositions contenues au chapitre V traduisent le point de vue des commissaires majoritaires, et sont, à l'article 101, expressément déclarées applicables aux échantillons prélevés en vertu du paragraphe 89(2).

Certains commissaires ne partagent cependant pas ce point de vue. Comme l'objet de cet article est de mettre la personne détenue sur le même pied que celle qui a été relâchée, ils pensent que les résultats de l'analyse d'échantillons de sang prélevés à la suite d'une demande faite en vertu du présent article, une fois communiqués à l'intéressé, devraient être considérés comme sa propriété et faire l'objet d'un privilège. Par conséquent, les autorités ne devraient pas avoir la possibilité d'avoir accès aux résultats de l'analyse de «leur moitié» de l'échantillon, à moins que la personne n'ait annoncé son intention de les produire au procès. Nous avons ajouté au chapitre V une série de contre-dispositions traduisant ce point de vue.

L'accusé qui souhaite produire au procès les résultats d'une analyse effectuée par un «analyste» (suivant la définition donnée à l'article 82) peut le faire au moyen d'un certificat, conformément aux dispositions de l'article 123.

139. Voir P. HARDING et P.H. FIELD, «Breathalyser Accuracy in Actual Law Enforcement Practice: A Comparison of Blood-and-Breath-Alcohol Results in Wisconsin Drivers» (1987), 32 *Journal of Forensic Sciences* 1235.

CHAPITRE IV
MANDAT AUTORISANT DES PRÉLÈVEMENTS DE SANG

SECTION I
DEMANDE DE MANDAT

Demandeur

90. L'agent de la paix peut demander un mandat autorisant le prélèvement d'échantillons de sang sur une personne.

Rapport n° 21, rec. 4
Code criminel, par. 256(1)

COMMENTAIRE

L'article 90 indique qui peut demander un mandat autorisant le prélèvement d'échantillons de sang. Le *Code criminel* n'exclut pas la présentation d'une demande par un simple citoyen, mais seul l'agent de la paix peut obtenir un télémandat à cet égard. Vu les conditions fixées à l'article 94 pour la délivrance du mandat, il semble opportun d'autoriser seulement l'agent de la paix à présenter la demande visée au présent article.

Demande en personne ou par téléphone

91. (1) La demande est présentée en personne. Toutefois, elle peut aussi l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, s'il est matériellement impossible au demandeur de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement et sous serment, de vive voix ou par écrit.

Forme de la demande écrite

(3) La demande présentée par écrit doit l'être selon la formule prescrite.

Code criminel, par. 256(1) et (3)

COMMENTAIRE

L'article 91 énonce les modalités applicables à la demande de mandat autorisant le prélèvement d'échantillons de sang. La procédure est semblable à celle qui régit la demande de mandat de perquisition.

Le paragraphe (1) reprend les deux méthodes actuellement prévues au paragraphe 256(1) du *Code criminel.*

Quant au paragraphe (2), il dispose que la demande doit être présentée unilatéralement (à savoir, «sans avis et sans qu'il soit nécessaire de la notifier à quelque autre partie»). Contrairement à ce que prévoient généralement les règles régissant la présentation des demandes de mandat prévues dans notre code de procédure pénale, il n'est pas nécessaire que la demande dont il est question ici soit présentée à huis clos. La

raison en est que la personne sur qui les échantillons doivent être prélevés sera normalement inconsciente, d'où l'absence de risque de perte ou de destruction des indices recherchés, à supposer que la personne puisse être mise au courant de la présentation de la demande. Le paragraphe (2), s'écarte aussi du droit actuel en permettant de présenter de vive voix aussi bien que par écrit la demande de mandat relative au prélèvement d'échantillons de sang. Nous avons expliqué les motifs de ce changement dans le commentaire relatif au paragraphe 22(2).

Aux termes du *Code criminel* actuel, la demande de mandat présentée par écrit, en matière de prélèvements de sang, doit l'être au moyen d'«une dénonciation faite sous serment selon la formule 1». Or, il s'agit en fait de la formule conçue pour la demande de mandat de perquisition et qui, outre ses défauts inhérents[140], s'avère parfaitement inadéquate pour la demande d'une toute autre nature visée dans la présente partie. C'est pourquoi l'on prévoit au paragraphe (3) l'utilisation d'une formule spéciale, où pourront aisément être insérés les renseignements exigés à l'article 93.

Compétence, demande en personne

92. (1) La demande présentée en personne est adressée à un juge de paix du district judiciaire où est censé avoir été commis le crime ou de celui où le mandat doit être exécuté.

Compétence, demande par téléphone

(2) La demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication est présentée à un juge de paix désigné par le juge en chef de la Cour criminelle pour exercer cette fonction.

Code criminel, par. 256(1)

COMMENTAIRE

Le *Code criminel* ne précise pas où la demande doit être présentée. Comme elle est normalement faite dans des situations d'urgence, le paragraphe (1) donne au demandeur une latitude considérable sous ce rapport. Cela sera particulièrement utile lorsque la demande a trait à un accident qui s'est produit dans une région éloignée.

Le paragraphe (2) ne nécessite aucune explication. Il est inspiré des dispositions actuelles du *Code criminel*, mais nous avons tenu compte dans sa rédaction des propositions qu'a formulées la Commission en vue de l'unification de la juridiction pénale (document de travail n° 59).

Contenu de la demande

93. La demande contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le lieu et la date où elle est présentée;**

***c*) le crime faisant l'objet de l'enquête;**

140. Voir le commentaire accompagnant l'article 24.

d) **la personne sur laquelle les échantillons de sang doivent être prélevés;**

e) **les motifs pour lesquels le demandeur croit que cette personne, au cours des deux heures précédentes, a commis le crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD et a été impliquée dans un accident ayant coûté la vie ou des lésions corporelles à quelque personne;**

f) **les motifs pour lesquels le demandeur croit qu'un médecin est d'avis à la fois :**

(i) **que cette personne se trouve, à cause de l'absorption d'alcool, de l'accident ou de tout autre événement lié à l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement d'échantillons de son sang,**

(ii) **que le prélèvement des échantillons ne risque pas de mettre en danger la vie ou la santé de cette personne;**

g) **la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;**

h) **dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.**

COMMENTAIRE

La procédure régissant la demande de mandat. en matière de prélèvements de sang, doit répondre aux mêmes grands objectifs que pour les fouilles et perquisitions : caractère judiciaire, précision, régularité de l'opération, réglementation rigoureuse des atteintes aux droits individuels découlant de l'exercice de pouvoirs discrétionnaires. Il est essentiel à la réalisation de ces objectifs que les motifs sur lesquels repose l'autorisation judiciaire soient clairement énoncés.

Le *Code criminel* actuel prescrit pour la demande l'utilisation de la formule 1. Or, comme celle-ci est conçue pour la demande de mandat de perquisition, les prélèvements de sang risquent d'être autorisés suivant des critères vagues ou déficients. L'article 93 énumère donc d'une manière spécifique les renseignements devant figurer dans la demande, et fait une distinction entre les éléments touchant le fond et les éléments touchant la preuve. La seule distinction de ce type se trouve à l'heure actuelle à l'article 487.1 du *Code criminel*, qui précise le contenu obligatoire de la demande de télémandat. Dans notre code, nous avons donné une portée générale à cette règle.

SECTION II
DÉLIVRANCE DU MANDAT

Motifs justifiant la délivrance du mandat

94. (1) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant le prélèvement d'échantillons du sang d'une personne s'il est convaincu qu'il existe des motifs raisonnables de croire :

***a*) d'une part, que cette personne, au cours des deux heures précédentes, a commis le crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD et a été impliquée dans un accident ayant coûté la vie ou des lésions corporelles à quelque personne;**

***b*) d'autre part, qu'un médecin est d'avis à la fois :**

(i) que cette personne se trouve, à cause de l'absorption d'alcool, de l'accident ou de tout autre événement lié à l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement de son sang,

(ii) que le prélèvement des échantillons ne risque pas de mettre en danger la vie ou la santé de cette personne.

Motifs supplémentaires, demande par téléphone

(2) Dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix refuse la délivrance du mandat s'il n'est pas en outre convaincu de l'existence de motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

Rapport n° 21, rec. 4
Code criminel, par. 256(1)

COMMENTAIRE

Nous avons repris ici, d'une manière générale, les conditions posées au paragraphe 256(1) du *Code criminel* pour la délivrance du mandat autorisant les prélèvements de sang.

À la suite des consultations, nous avons perfectionné nos recommandations antérieures sous deux rapports. En premier lieu, nous avons décidé de limiter la possibilité de recourir aux prélèvements de sang aux situations où un accident a coûté la vie ou des lésions corporelles à une personne (voir l'alinéa 94(1)*a*)), au nom du principe de la modération. En second lieu, la délivrance du mandat n'est plus subordonnée à l'état d'inconscience de la personne visée; il peut en effet arriver que l'on se trouve incapable de donner son consentement tout en étant conscient (en cas d'ivresse ou de blessures, par exemple).

Pour statuer sur la demande, le juge de paix se voit conférer le même pouvoir discrétionnaire qu'en matière de mandats de perquisition[141]. Il doit être convaincu que les conditions énoncées aux alinéas (1)*a*) et *b*) sont réunies. Une précision : s'il est nécessaire aux termes de l'alinéa *b*) que le juge de paix soit «convaincu qu'il existe des motifs raisonnables de croire» que l'opinion d'un médecin répond aux exigences des sous-alinéas (i) et (ii), il n'a pas à apprécier personnellement l'autorité ni la valeur de cette opinion.

Le paragraphe (2) de l'article 94 répond à l'alinéa 93*h*). La condition supplémentaire régissant la délivrance du mandat à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication est identique à celle qui est énoncée à l'article 26, dans le domaine des fouilles et des perquisitions. Ce mandat confère exactement les mêmes pouvoirs que s'il était délivré à la suite d'une demande faite en personne; seule diffère la façon dont il est obtenu. Comme c'est le cas en matière de perquisitions, il doit être rempli par le juge de paix, qui en transmet deux exemplaires au demandeur ou lui en fait remplir deux exemplaires (voir l'article 12).

Conditions d'exécution

95. Le juge de paix qui décerne un mandat peut y fixer toutes conditions qu'il juge opportunes quant à son exécution.

COMMENTAIRE

Cet article confère au juge de paix saisi de la demande un pouvoir identique à celui qui lui est donné en matière de fouilles et de perquisitions par l'article 27. L'attribution de ce pouvoir est liée au fait que le juge de paix peut poser toutes les questions qu'il veut avant de délivrer le mandat. Car s'il comprend mieux la situation dans son ensemble, il sera davantage en mesure d'établir des conditions pour que l'objectif poursuivi soit atteint de la manière la plus sûre, la plus efficace et la moins attentatoire possible aux droits de la personne visée. On constate, à la lecture de l'article 100, que les présentes dispositions donnent au juge de paix la possibilité d'exiger, à titre de condition spéciale, qu'une copie ou un fac-similé du mandat soit remis à une personne désignée autre que celle devant être soumise au prélèvement. Cela pourra fréquemment s'avérer utile lorsque le sujet est inconscient. (Voir à ce sujet le commentaire qui accompagne l'article 100.)

Forme du mandat

96. Le mandat est rédigé selon la formule prescrite et porte la signature du juge de paix qui le délivre.

Code criminel, par. 256(2)

COMMENTAIRE

Le paragraphe 256(2) du *Code criminel* prévoit à l'heure actuelle que le mandat relatif au prélèvement d'échantillons de sang «peut être rédigé suivant les formules 5 ou 5.1 en les adaptant aux circonstances». Or, en fait, ces deux formules sont conçues

141. Voir le commentaire qui accompagne l'article 25.

pour le mandat de perquisition. Leurs défauts ont été traités dans les commentaires qui accompagnent les articles 29 et 32. Et les critiques formulées dans le cadre des fouilles et des perquisitions ont encore plus de force lorsque ces modèles sont utilisés pour les prélèvements de sang. En exigeant que le mandat soit rédigé selon une formule expressément destinée à cet usage, nous entendions insister sur le caractère tout à fait particulier du mandat autorisant ce type de prélèvements.

Contenu du mandat

97. Le mandat contient les renseignements suivants :

a) le nom du demandeur;

b) le crime faisant l'objet de l'enquête;

c) la personne sur laquelle les échantillons de sang doivent être prélevés;

d) le jour et l'heure où la demande a été présentée;

e) les conditions fixées, le cas échéant, pour l'exécution du mandat;

f) le jour et l'heure où le mandat expire s'il n'est pas exécuté;

g) le jour, l'heure et l'endroit où le mandat est délivré;

h) le nom du juge de paix et son ressort.

COMMENTAIRE

Cet article énumère les renseignements qui doivent figurer dans le mandat. Nous avons ici repris dans leurs grandes lignes les dispositions de l'article 30, consacrées aux fouilles et aux perquisitions.

SECTION III
EXPIRATION DU MANDAT

Délai de six heures

98. Le mandat autorisant le prélèvement d'échantillons de sang expire six heures après sa délivrance ou au moment de son exécution, si elle a lieu avant cette échéance.

COMMENTAIRE

Nous avons déjà expliqué les principales raisons pour lesquelles il est opportun d'indiquer dans le mandat le moment où il expire[142]. L'article 98, sans équivalent dans le *Code criminel* actuel, fixe le délai d'exécution du mandat autorisant le prélèvement d'échantillons de sang. L'utilité de ces prélèvements diminue au bout d'un certain temps; nous avons donc voulu, en limitant à six heures la durée de validité du mandat,

142. Voir les commentaires relatifs aux articles 31 à 33.

empêcher des atteintes à l'intégrité corporelle qui seraient abusives, parce que sans objet, vu le temps écoulé depuis l'infraction reprochée. (La présente partie comporte également d'autres dispositions touchant les délais.) Malgré son caractère quelque peu arbitraire, ce délai d'exécution de six heures est sans aucun doute raisonnable.

Dépôt du mandat expiré

99. Lorsque le mandat expire sans avoir été exécuté, les raisons pour lesquelles il ne l'a pas été sont notées sur une copie du mandat. Celle-ci est déposée dès que cela est matériellement possible auprès du greffier du district judiciaire où le mandat a été délivré.

COMMENTAIRE

Ces dispositions, semblables à celles de l'article 34 (fouilles, perquisitions et saisies), répondent aux mêmes objectifs.

SECTION IV
REMISE D'UNE COPIE DU MANDAT

Personne à qui la copie est remise

100. Dès que cela est matériellement possible après l'exécution du mandat, l'agent de la paix remet une copie du mandat à la personne sur qui les échantillons de sang ont été prélevés, à moins que le juge de paix qui a décerné le mandat n'ait prescrit, à titre de condition régissant son exécution, que cette copie soit remise à une autre personne désignée.

COMMENTAIRE

Comme dans le cas du mandat de perquisition[143], la Commission estime qu'en règle générale, on devrait remettre à la personne visée (sans qu'elle ait à le demander expressément) une copie du mandat autorisant des prélèvements de sang sur elle. L'article 100 prévoit en outre la remise d'une copie à toute autre personne désignée par le juge de paix, le cas échéant : il peut en effet arriver que le suspect soit inconscient, ou que d'autres personnes (des membres de sa famille, par exemple) veuillent s'assurer qu'aucun prélèvement ne sera effectué sans nécessité médicale ou sans autorisation donnée en bonne et due forme.

143. Voir le commentaire qui accompagne l'article 40.

CHAPITRE V
PRÉLÈVEMENT, ANALYSE ET REMISE DES ÉCHANTILLONS DE SANG

SECTION I
CHAMP D'APPLICATION

Application du chapitre

101. Le présent chapitre s'applique aux échantillons de sang prélevés en vertu d'un mandat, d'une demande faite suivant l'alinéa 86(1)*a*) (agent de la paix) ou d'une demande faite dans les circonstances décrites au paragraphe 89(2) (personne détenue).

SECTION II
PRÉLÈVEMENT ET ANALYSE DES ÉCHANTILLONS

Conditions du prélèvement

102. (1) Le prélèvement d'échantillons de sang doit satisfaire aux conditions suivantes :

a) il est effectué dès que cela est matériellement possible après la formulation de la demande ou la délivrance du mandat;

b) il est effectué par un médecin ou par un technicien agissant sous la direction d'un médecin;

c) il est effectué de manière telle que la personne soit incommodée le moins possible.

Avis du médecin

(2) Le prélèvement d'échantillons de sang est interdit à moins que le médecin ne soit d'avis, avant le prélèvement de chaque échantillon,

a) que, d'une part, le prélèvement de l'échantillon ne risque pas de mettre en danger la vie ou la santé de la personne;

b) que, d'autre part, dans le cas où l'échantillon est prélevé en vertu d'un mandat, la personne se trouve, à cause de l'absorption d'alcool, de l'accident ou de tout autre événement lié à l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement de son sang.

Rapport n° 21, rec. 13 et 14
Code criminel, par. 254(3), 254(4) et 256(4)

COMMENTAIRE

Le paragraphe 102(1) renferme un certain nombre de dispositions visant à protéger les droits des personnes soumises à des prélèvements de sang. À l'alinéa (1)*a*), on exige que ceux-ci soient effectués le plus tôt possible (ce que font bien sûr la plupart des policiers, tout retard ayant pour effet d'affaiblir la valeur accordée aux résultats des analyses). On entend ainsi veiller à ce que les échantillons soient prélevés pendant qu'ils présentent encore une utilité scientifique, pour éviter que des personnes subissent une telle atteinte à leur intégrité corporelle sans justification. L'alinéa(1)*b*) reprend les dispositions du paragraphe 254(4) du *Code criminel* actuel qui visent à ce que le prélèvement des échantillons soit effectué selon les règles de l'art par une personne compétente. L'alinéa(1)*c*) se passe d'explications; il a pour but d'atténuer le plus possible les désagréments causés par le prélèvement d'échantillons de sang.

Le paragraphe (2) reprend aussi certaines dispositions de l'alinéa 254(3)*b*) et du paragraphe 254(4) du Code actuel. Il est l'écho des exigences posées à l'alinéa 94(1)*b*) de notre code pour l'obtention du mandat, et donne sans équivoque un droit de regard au médecin quant à l'opportunité du prélèvement et quant au moment où il est effectué, la protection de la vie et de la santé de la personne étant primordiales.

Nombre d'échantillons

103. (1) Le prélèvement sur une même personne est limité à deux échantillons de sang distincts.

Quantité prélevée

(2) La quantité de sang prélevée pour chaque échantillon est limitée à celle qui, de l'avis du médecin, permet de diviser l'échantillon en deux parties destinées à des analyses distinctes, pour la détermination de l'alcoolémie de la personne.

Rapport n° 21, rec. 3 et 4
Code criminel, par. 254(3) et 256(1)

COMMENTAIRE

Les articles 103 à 105 énoncent certaines règles applicables au prélèvement d'échantillons de sang. Quelque peu différentes, les règles actuellement prévues au *Code criminel* sont aussi plus confuses, et ne sont pleinement compréhensibles qu'à la lumière des dispositions de l'article 258 relatives à la preuve.

Si l'article 258 établit une présomption réfragable quant aux résultats de l'analyse d'un échantillon de sang, on ne trouve dans le *Code criminel* aucune limite expresse touchant le nombre d'échantillons susceptibles d'être prélevés. Par exemple, il est uniquement question au paragraphe 254(3) des «échantillons de sang [. . .] qui, de l'avis d'un technicien ou d'un médecin qualifiés sont nécessaires à l'analyse convenable pour permettre de déterminer [l']alcoolémie [de la personne].» Même formulation au paragraphe 256(1) : «les échantillons de sang nécessaires, selon la personne qui les prélève, à une analyse convenable permettant de déterminer l'alcoolémie de cette personne.» Le paragraphe 103(1) prévoit clairement le prélèvement d'un maximum de deux échantillons de sang, ce qui limite les atteintes à l'intégrité corporelle de la part de l'État.

Les dispositions du paragraphe (2) sont explicites : c'est le médecin qui détermine la quantité de sang prélevée pour chaque échantillon.

Division des échantillons

104. (1) Chacun des échantillons de sang est divisé en deux parties, qui sont placées dans des contenants scellés distincts.

Conservation des échantillons

(2) L'agent de la paix chargé de l'enquête sur le crime relativement auquel le prélèvement a été effectué a la garde des échantillons; il prend les mesures propres à assurer leur protection et leur conservation.

Code criminel, sous-al. 258(1)*d*)(i) et (iv)

COMMENTAIRE

Comme à l'heure actuelle, les échantillons doivent suivant le paragraphe (1) être placés dans des contenants scellés. Quant au paragraphe (2), nouveau, il répond à un souci de précision. Il s'agit de confier clairement la garde et la conservation des échantillons à la personne qui logiquement est le plus en mesure de s'acquitter de cette responsabilité.

Analyse pour le compte de l'agent de la paix

105. (1) L'agent de la paix peut confier à un analyste une partie de chacun des échantillons de sang pour la détermination de l'alcoolémie.

Échantillon de contrôle

(2) Il garde l'autre partie de chacun des échantillons, afin qu'une analyse puisse être effectuée pour le compte de la personne sur qui les échantillons ont été prélevés.

Rapport n° 21, rec. 11
Code criminel, sous-al. 258(1)*d*)(i) et (v)

COMMENTAIRE

Le paragraphe (1) de cet article vise à donner expressément à la police le pouvoir de faire procéder à l'analyse d'une partie de chaque échantillon de sang. Le paragraphe (2), pour sa part, a pour objet de faciliter l'exercice par l'accusé du droit qui lui est donné à l'article 107, à savoir, obtenir la remise d'échantillons en vue de faire exécuter une analyse pour son propre compte. À l'heure actuelle, le sous-alinéa 258(1)*d*)(i) du *Code criminel* exige (pour l'application de la présomption réfragable établie à cet article) le prélèvement de deux échantillons, l'un devant être gardé «pour en permettre l'analyse à la demande de l'accusé». Notre disposition énonce en termes plus directs l'obligation de conserver une partie de l'échantillon.

Le droit ne prévoit pas, à l'heure actuelle, la conservation des échantillons d'haleine ni leur remise en vue d'une analyse pour le compte de l'accusé. L'obligation de remettre à celui-ci des échantillons supplémentaires à cette fin a été édictée à maintes

reprises dans le *Code criminel* au fil des ans[144], mais la disposition en cause n'a pas encore été proclamée en vigueur. Il a été jugé que le refus de remettre à l'accusé des échantillons d'haleine pour qu'il puisse faire procéder à une analyse ne contrevenait ni à la *Déclaration canadienne des droits*[145] ni à la Charte[146]. Il semble que l'absence de proclamation tienne aux difficultés techniques que pose la conservation d'échantillons d'haleine. (La conservation des échantillons de sang ne présente aucun problème à cet égard.) Aussi la Commission s'abstient-elle de proposer, pour le moment, que cette règle s'applique au prélèvement d'échantillons d'haleine.

Présence de drogues

106. Tout échantillon de sang peut faire l'objet d'une analyse visant à déceler la présence de drogues.

Rapport n° 21, rec. 2
Code criminel, par. 258(5)

COMMENTAIRE

L'article 106 a pour origine le paragraphe 258(5) du *Code criminel* actuel. Les échantillons obtenus à la suite d'une demande ou en vertu d'un mandat seront analysés en vue de la détermination de l'alcoolémie. Si les analyses s'avèrent négatives ou que l'alcoolémie est très faible, on pourra en certains cas soupçonner que c'est à cause de la consommation de drogues que la personne conduisait d'une manière inhabituelle ou avait un comportement anormal. L'article 106 permet de vérifier le bien-fondé de ces soupçons.

SECTION III
DEMANDE DE REMISE D'ÉCHANTILLONS

Demandeur et préavis

107. La personne sur laquelle des échantillons de sang ont été prélevés peut, moyennant un préavis raisonnable au poursuivant, demander la remise d'une partie de chaque échantillon en vue d'une analyse.

Code criminel, par. 258(4)

Délai et modalités de la demande

108. La demande est présentée par écrit à un juge de paix dans les trois mois qui suivent le jour du prélèvement des échantillons.

Code criminel, par. 258(4)

144. S.C. 1968-1969, ch. 38, art. 16; S.C. 1974-1975-1976, ch. 93, par. 18(1) et (2); S.C. 1985, ch. 19, art. 36; le sous-alinéa 258(1)*d*(i) entrera en vigueur à la date fixée par proclamation.

145. L.R.C. (1985), App. III.

146. Voir *Duke* c. *La Reine*, [1972] R.C.S. 917; *R.* c. *Potma* (1983), 31 C.R. (3d) 231 (C.A. Ont.). Voir aussi, toutefois, la décision *R.* c. *Bourget* (1987), 56 C.R. (3d) 97 (C.A. Sask.), suivant laquelle le fait de ne pas communiquer des pièces pertinentes contreviendrait aux dispositions de l'article 7 de la Charte.

Contenu de la demande

109. (1) La demande contient les renseignements suivants :

a) **le nom du demandeur;**

b) **le lieu et la date où elle est présentée;**

c) **le crime reproché ou faisant l'objet de l'enquête;**

d) **la date du prélèvement des échantillons de sang;**

e) **la nature de l'ordonnance demandée.**

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Signification du préavis

110. Un préavis indiquant le lieu, la date et l'heure de l'audition est signifié, avec la demande et l'affidavit, au poursuivant.

Preuve à l'audience

111. Le juge saisi de la demande peut recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit.

Signification de l'affidavit

112. (1) Lorsqu'un affidavit doit être produit en preuve, il est signifié, dans un délai raisonnable avant l'audience, au poursuivant.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit reçu en preuve peut être interrogé sur le contenu de cet affidavit.

Serment

113. Le serment est obligatoire pour tout témoin.

Enregistrement

114. (1) Les témoignages entendus par le juge de paix sont intégralement enregistrés par écrit ou sur support électronique.

Désignation de l'enregistrement

(2) L'enregistrement indique l'heure, le jour et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

Ordonnance de remise

115. Le juge de paix saisi d'une demande à cet effet ordonne la remise d'une partie de chaque échantillon, sous réserve des conditions qu'il estime nécessaires pour en assurer la

conservation en vue de son utilisation dans le cadre de quelque procédure.

Rapport n° 21, rec. 11
Code criminel, par. 258(4)

Forme de l'ordonnance

116. L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge de paix qui la rend.

Contenu de l'ordonnance

117. L'ordonnance contient les renseignements suivants :

a) le nom du demandeur;

b) le crime reproché ou faisant l'objet de l'enquête;

c) la date du prélèvement des échantillons de sang;

d) les conditions imposées par le juge;

e) le lieu et la date où elle est rendue;

f) le nom et le ressort du juge de paix qui la rend.

Dépôt de documents

118. Dès que cela est matériellement possible après l'audition, le juge de paix fait déposer les documents suivants auprès du greffier du district judiciaire où la demande a été présentée :

a) le préavis relatif à la demande;

b) la demande;

c) l'enregistrement des témoignages qu'il a entendus, ou la transcription de cet enregistrement;

d) les autres éléments de preuve qu'il a reçus;

e) l'original de l'ordonnance.

COMMENTAIRE

Les dispositions de la Section III (art. 107 à 118) reprennent en gros les dispositions du paragraphe 258(4) du *Code criminel* actuel. Fondées sur le droit de présenter une défense pleine et entière[147], elles établissent un mécanisme permettant à l'accusé de demander la remise d'une partie de chaque échantillon prélevé, en vue de contester les résultats des analyses. Le juge de paix devra ordonner la remise, pour peu que la demande ait été présentée, par la personne sur qui les échantillons ont été prélevés ou en son nom, dans le délai prescrit à l'article 108. Ces dispositions remplacent la procédure fumeuse de «demande sommaire» actuellement prévue au paragraphe 258(4) du *Code criminel*[148].

147. Voir le *Code criminel*, par. 650(3), 802(1).

148. Pour une analyse critique de la procédure de demande sommaire, voir le commentaire accompagnant l'article 214 (disposition des choses saisies).

Pour des raisons de commodité, les règles régissant ce mécanisme ont été regroupées dans la présente section et aucun autre commentaire n'accompagne les articles qui la composent. Une fois que notre code de procédure pénale aura été complété et uniformisé, ces règles seront intégrées à une partie générale établissant les règles communes à toutes les demandes d'ordonnance.

SECTION IV
ABSENCE DE RESPONSABILITÉ PÉNALE

Refus de procéder au prélèvement

119. Ne constitue pas un crime, le fait pour un médecin ou un technicien d'omettre ou de refuser de prélever un échantillon de sang sur une personne, ni le fait, pour un médecin, d'omettre ou de refuser de faire effectuer un tel prélèvement par un technicien placé sous sa direction.

Rapport n° 21, rec. 16
Code criminel, par. 257(1)

COMMENTAIRE

Les dispositions de l'article 119 sont semblables à celles du paragraphe 257(1) du *Code criminel* actuel. La Commission estime que forcer médecins et techniciens à participer aux enquêtes criminelles et à l'application de la loi porterait abusivement atteinte à leurs droits fondamentaux. Dans certains cas, cela constituerait aussi une immixtion inacceptable dans les rapports entre le patient et le médecin ou l'infirmière. Nous établissons donc clairement ici que le fait d'omettre ou de refuser de prélever ou de faire prélever un échantillon de sang n'est un manquement à aucune obligation légale[149] et que ni le médecin ni le technicien ne se rend ainsi coupable du crime d'entrave à la justice.

Nous n'avons pas intégré au paragraphe 119 les dispositions du paragraphe 257(2) du *Code criminel* actuel, dont l'objet est de soustraire à toute responsabilité civile ou pénale les médecins, de même que les techniciens agissant sous leur direction, pourvu que les prélèvements soient effectués «avec des soins et une habileté raisonnables». Il est en effet permis de se demander si, du point de vue constitutionnel[150], l'insertion de dispositions sur la responsabilité civile dans une loi pénale est opportune. De plus, le paragraphe du *Code criminel* exprime simplement une règle fondamentale du droit de la responsabilité civile, dont la mise en œuvre revient de toute façon aux juridictions civiles[151]. D'autre part, la mention de la responsabilité pénale n'est pas utile non plus puisque, aux termes de l'article 102, les prélèvements autorisés par la présente partie doivent être effectués par un médecin ou un technicien placé sous sa direction, et que,

149. Voir le rapport n° 31, rec. 25(1) et commentaire y afférent, p. 132.

150. Voir P.W. HOGG, *Constitutional Law of Canada*, 2e éd., Toronto, Carswell, 1985, pp. 412-413; *R.* c. *Zelensky*, [1978] 2 R.C.S. 940, le juge en chef Laskin, p. 963.

151. Voir A.M. LINDEN, *La responsabilité civile délictuelle*, 4e éd., Cowansville (Qc), Éditions Yvon Blais, 1988, le chapitre V en général et en particulier les pp. 173-192.

suivant l'article 23 du projet de code criminel de la Commission[152], échapperait à la responsabilité pénale la personne qui ferait preuve de soins et d'une habileté raisonnables en procédant à des prélèvements en application de l'article 102.

[Position minoritaire — Certains commissaires ont proposé une version différente du chapitre V.

*Comme dans la version majoritaire, les paragraphes 102(1) à 104(1) s'appliqueraient aux échantillons de sang prélevés en vertu d'un mandat ou à la suite de la demande présentée soit par l'agent de la paix en application de l'alinéa 86(1)*a), *soit par la personne détenue dans les circonstances décrites au paragraphe 89(2). L'article 119 aurait aussi une portée générale.*

Les dispositions du paragraphe 104(2) à l'article 118 ne seraient en revanche applicables qu'aux échantillons prélevés en vertu d'un mandat ou à la demande de l'agent de la paix. Les échantillons prélevés à la demande de la personne détenue dans les circonstances décrites au paragraphe 89(2) seraient alors assujettis aux dispositions dont le texte suit.

Remise d'un échantillon

119.1 (1) Une partie de chacun des échantillons de sang est remise à la personne sur laquelle ceux-ci ont été prélevés.

Résultats confidentiels

(2) Les résultats de toute analyse ou épreuve effectuée sur cette partie de l'échantillon sont confidentiels et privilégiés, en ce qui concerne la personne sur qui les échantillons ont été prélevés.

Avis de production

(3) Si cette personne entend produire les résultats en preuve dans quelque procédure, elle donne au poursuivant un préavis raisonnable de son intention.

Conservation des échantillons

119.2 (1) L'agent de la paix chargé de l'enquête sur le crime relativement auquel les échantillons de sang ont été prélevés a la garde de l'autre partie de chaque échantillon; il prend les mesures propres à assurer sa protection et sa conservation.

Analyse pour le compte de l'agent de la paix

(2) L'agent de la paix peut confier à un analyste cette partie de chaque échantillon pour faire déterminer l'alcoolémie et faire constater l'éventuelle présence de drogues.

Communication des résultats

(3) L'analyste ou la personne qui a effectué l'analyse ne peut divulguer les résultats de celle-ci à moins que la personne sur laquelle les échantillons ont été prélevés n'ait donné l'avis prévu au paragraphe 119.1(3).

152. L'article 23 dispose ce qui suit : «N'est pas coupable d'un crime la personne qui, accomplissant un fait prescrit ou autorisé par une loi fédérale [. . .], fait usage à cette fin d'une force raisonnable et nécessaire dans les circonstances».

Irrecevabilité de la preuve

119.3 À moins que la personne sur laquelle les échantillons de sang ont été prélevés n'ait donné l'avis prévu au paragraphe 119.1(3), ni le prélèvement d'échantillons ni les résultats de quelque analyse de ceux-ci n'est recevable en preuve dans quelque procédure, et nul ne peut commenter, dans quelque procédure, le prélèvement d'échantillons.]

CHAPITRE VI
RÈGLES DE PREUVE

SECTION I
ABSENCE DE L'ORIGINAL DU MANDAT OBTENU PAR TÉLÉPHONE

Absence de l'original du mandat

120. Dans toute procédure où il importe au tribunal d'être convaincu que le prélèvement d'un échantillon de sang a été autorisé par un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que le prélèvement n'a pas été autorisé par mandat.

Rapport n° 19, partie II, rec. 2(12)
Code criminel, par. 487.1(11)

COMMENTAIRE

Cette disposition, identique à l'article 41 (perquisitions et saisies), repose sur le raisonnement exposé dans le commentaire qui accompagne celui-ci.

SECTION II
RÉSULTAT DES ANALYSES

Présomptions concernant les analyses d'haleine

121. (1) Dans toute poursuite où une personne est accusée du crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD, les présomptions suivantes s'appliquent lorsque des échantillons de l'air expiré par cette personne ont été prélevés et analysés en conformité avec les conditions énumérées au paragraphe (2) :

***a*) si les résultats des analyses concordent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au taux déterminé par les analyses;**

b) si les résultats des analyses divergent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au plus faible des taux déterminés par les analyses.

Conditions régissant les présomptions

(2) Ces présomptions ne s'appliquent que si les conditions suivantes sont réunies :

a) au moins deux échantillons de l'air expiré par la personne ont été prélevés;

b) les échantillons ont été prélevés à la suite d'une demande présentée par l'agent de la paix en vertu de l'article 84 ou de l'alinéa 85(1)*a*);

c) les échantillons ont été prélevés dès qu'il a été matériellement possible de le faire après le moment où le crime est censé avoir été commis;

d) le premier échantillon a été prélevé dans les deux heures qui ont suivi le moment où le crime est censé avoir été commis;

e) les échantillons ont été prélevés à des intervalles d'au moins quinze minutes;

f) chaque échantillon a été reçu de la personne directement dans un contenant ou un analyseur d'haleine manipulé par un technicien;

g) chaque échantillon a été analysé au moyen d'un analyseur d'haleine manipulé par un technicien.

Inapplicabilité

(3) Le paragraphe (1) ne s'applique pas si l'agent de la paix a omis de communiquer les résultats des analyses à la personne, ou a omis de prendre les dispositions nécessaires pour le prélèvement d'échantillons de sang, en contravention aux dispositions des paragraphes 89(1) et 89(2), respectivement.

Code criminel, al. 258(1)*c*)

COMMENTAIRE

Nous avons ici voulu (entre autres choses) réorganiser et simplifier les dispositions de l'alinéa 258(1)*c*) du *Code criminel* actuel, consacrées aux conclusions susceptibles d'être tirées de l'analyse des échantillons d'haleine. Nous n'avons pas repris la disposition du sous-alinéa 258(1)*c*)(i), jamais proclamée en vigueur à cause de difficultés matérielles, qui exigerait la remise à l'accusé d'échantillons de son haleine «dans un contenant approuvé» (voir le commentaire qui accompagne l'article 105).

Le paragraphe (1) établit des présomptions réfragables. Les résultats de l'analyse ne sont pas nécessairement inadmissibles si les conditions prévues au paragraphe (2) ne sont pas remplies; mais vu l'inapplicabilité des présomptions dans ce cas, il faudra alors citer un expert qui les interprétera. Le paragraphe (3), sans équivalent à

l'alinéa 258(1)*c*) du Code actuel, rend les présomptions inapplicables lorsque les conditions prévues à l'article 89 n'ont pas été remplies.

Présomptions concernant les analyses de sang

122. (1) Dans toute poursuite où une personne est accusée du crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD, les présomptions suivantes s'appliquent lorsque des échantillons du sang de cette personne ont été prélevés et analysés en conformité avec les conditions énumérées au paragraphe (2) :

***a*) si les résultats des analyses concordent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au taux déterminé par les analyses;**

***b*) si les résultats des analyses divergent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au plus faible des taux déterminés par les analyses.**

Conditions régissant les présomptions

(2) Ces présomptions ne s'appliquent que si les conditions suivantes sont réunies :

***a*) les échantillons de sang ont été prélevés en vertu d'un mandat ou à la suite d'une demande présentée par l'agent de la paix en vertu de l'alinéa 86(1)*a*);**

***b*) deux échantillons du sang de la personne ont été prélevés;**

***c*) les échantillons ont été prélevés dès qu'il a été matériellement possible de le faire après le moment où le crime est censé avoir été commis;**

***d*) le premier échantillon a été prélevé dans les deux heures qui ont suivi le moment où le crime est censé avoir été commis;**

***e*) les échantillons ont été prélevés à des intervalles d'au moins quinze minutes;**

***f*) chaque échantillon a été prélevé par un médecin ou par un technicien agissant sous la direction d'un médecin;**

***g*) au moment du prélèvement de chaque échantillon, la personne qui l'a effectué a divisé l'échantillon en deux parties;**

***h*) les deux parties de chaque échantillon ont été reçues de la personne directement, ou ont été placées directement, dans des contenants scellés;**

***i*) une partie de chaque échantillon a été conservée, afin qu'une analyse puisse être faite par la personne ou pour son compte;**

j) **un analyste a procédé à l'analyse d'une partie de chaque échantillon placée dans un contenant scellé;**

k) **le cas échéant, la remise d'une partie de chaque échantillon ordonnée par le juge en vertu de l'article 115 a été dûment effectuée.**

Code criminel, al. 258(1)*d*)

COMMENTAIRE

Cet article, semblable au précédent, vise en partie à simplifier les règles énoncées à l'alinéa 258(1)*d*) du Code actuel. Le paragraphe (1) établit des présomptions, semblables à celles du paragraphe 121(1), mais applicables aux résultats des analyses de sang; les conditions sont énoncées au paragraphe (2). Bien que l'analyse du sang soit considérée comme plus exacte que l'analyse d'haleine, nous avons modifié la règle (al. 258(1)*d*)) voulant que le prélèvement d'un seul échantillon de sang soit suffisant pour que les présomptions entrent en jeu : il faudra désormais prélever deux échantillons, comme pour l'analyse d'haleine[153]. Nous avons maintenu l'obligation de diviser les échantillons de sang, dont une partie sera conservée en vue d'éventuelles analyses pour le compte de l'accusé.

À l'alinéa (2)*k*), nous avons donné une nouvelle rédaction à la règle énoncée au sous-alinéa 258(1)*d*)(i) du *Code criminel*, afin d'éliminer les difficultés que soulève l'interprétation des dispositions actuelles. C'est que l'alinéa 258(1)*d*) semble prévoir l'inapplicabilité de la présomption si l'accusé ne demande pas dans les trois mois la remise d'un échantillon.

SECTION III
FORCE PROBANTE DES CERTIFICATS

Contenu du certificat

123. Dans toute poursuite où une personne est accusée du crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD, chacun des certificats suivants fait foi des faits qui y sont déclarés sans qu'il soit nécessaire de prouver la signature ni la qualité officielle de la personne qui paraît l'avoir signé :

a) **le certificat d'un analyste déclarant qu'il a effectué l'analyse d'un échantillon témoin d'un alcool type identifié dans le certificat et destiné à l'utilisation d'un analyseur d'haleine, et que l'échantillon témoin analysé se prêtait bien à l'utilisation d'un analyseur d'haleine;**

Code criminel, al. 258(1)*f*)

153. Voir R.E. ERWIN, *Defense of Drunk Driving Cases: Criminal/Civil*, 3e éd., New York, M. Bender, 1971, vol. 2, pp. 16-4 à 16-6; l'auteur démontre que la valeur probante des analyses augmente si l'on prélève deux échantillons.

b) lorsqu'une personne a fourni des échantillons d'haleine à la suite d'une demande présentée par l'agent de la paix en vertu de l'article 84 ou de l'alinéa 85(1)*a*), le certificat d'un technicien contenant à la fois :

(i) la mention que l'analyse de chacun des échantillons a été faite au moyen d'un analyseur d'haleine manipulé par lui et dont il s'est assuré du bon fonctionnement au moyen d'un alcool type identifié dans le certificat comme se prêtant bien à l'utilisation d'un analyseur d'haleine,

(ii) la mention des résultats des analyses ainsi faites,

(iii) la mention, dans le cas où il a lui-même prélevé les échantillons :

(A) du lieu, de la date et de l'heure où chaque échantillon a été prélevé,

(B) que chaque échantillon a été reçu directement de la personne dans un contenant ou dans un analyseur d'haleine manipulé par lui;

Code criminel, al. 258(1)*g*)

c) le certificat d'un analyste déclarant qu'il a fait l'analyse d'une partie de chaque échantillon du sang d'une personne, cette partie ayant été placée dans un contenant scellé et désigné dans le certificat, et indiquant le lieu, la date et l'heure de l'analyse et le résultat de celle-ci;

Code criminel, al. 258(1)*i*)

d) lorsque des échantillons du sang d'une personne ont été prélevés en vertu d'un mandat ou à la suite d'une demande présentée soit par l'agent de la paix en vertu de l'alinéa 86(1)*a*), soit par la personne visée au paragraphe 89(2), le certificat d'un médecin ou d'un technicien contenant à la fois :

(i) la mention qu'il a lui-même prélevé les échantillons,

(ii) la mention du lieu, de la date et de l'heure où chacun des échantillons a été prélevé,

(iii) la mention qu'au moment de chaque prélèvement, il a divisé chaque échantillon en deux parties,

(iv) la mention que les deux parties de chaque échantillon ont été reçues directement de la personne, ou ont été placées directement, dans des contenants scellés et désignés dans le certificat;

Code criminel, al. 258(1)*h*)

e) lorsque des échantillons du sang d'une personne ont été prélevés par un technicien en vertu d'un mandat ou à la suite d'une demande présentée soit par l'agent de la paix en vertu de l'alinéa 86(1)*a*), soit par la personne visée au

paragraphe 89(2), le certificat du médecin attestant que le technicien a agi sous sa direction;

Code criminel, al. 258(1)*h*)

***f*) lorsque des échantillons du sang d'une personne ont été prélevés en vertu d'un mandat ou à la suite d'une demande présentée soit par l'agent de la paix en vertu de l'alinéa 86(1)*a*), soit par la personne visée au paragraphe 89(2), le certificat du médecin déclarant qu'avant le prélèvement de chaque échantillon, il était d'avis que ce prélèvement ne risquait pas de mettre en danger la vie ou la santé de cette personne;**

Code criminel, al. 258(1)*h*)

***g*) lorsque des échantillons du sang d'une personne ont été prélevés en vertu d'un mandat, le certificat du médecin déclarant qu'avant le prélèvement de chaque échantillon, il était d'avis que la personne était incapable de consentir au prélèvement de son sang à cause de son état physique ou psychologique résultant de l'absorption d'alcool, de l'accident en rapport avec lequel le mandat a été décerné, ou de tout événement résultant de l'accident ou lié à celui-ci.**

Code criminel, al. 258(1)*h*)

COMMENTAIRE

À l'article 123, nous avons réorganisé et simplifié les alinéas *e*) à *i*) du paragraphe 258(1) du *Code criminel*. Les certificats dont il y est question font foi de leur contenu sans qu'il soit nécessaire de faire témoigner l'analyste, le médecin ou le technicien, selon le cas. En effet, d'une part il serait pratiquement inutile, sur le plan de la valeur probante des certificats, d'exiger systématiquement la présence de ces personnes devant le tribunal, et d'autre part cela créerait des embarras et d'épineux problèmes administratifs, tout en compliquant sans raison les procès. Aussi l'article 123 maintient-il en vigueur le recours aux certificats, pourvu que les conditions y établies soient rigoureusement remplies (et que la poursuite concerne le «crime prévu à l'article 58 du projet de code criminel de la CRD»). Il demeure possible, comme le prévoit en ce moment le paragraphe 258(6) du *Code criminel*, d'exiger la présence de l'analyste, du technicien ou du médecin en vue d'un contre-interrogatoire (voir le paragraphe 124(2)).

Avis de production du certificat

124. (1) Aucun certificat ne peut être reçu en preuve dans une procédure à moins que la partie qui a l'intention de le produire n'ait, au préalable, donné à l'autre partie un préavis raisonnable de son intention, accompagné d'une copie du certificat.

Contre-interrogatoire sur le certificat

(2) La partie contre qui est produit un certificat peut, avec l'autorisation du tribunal, exiger la présence du médecin, de

l'analyste ou du technicien, selon le cas, afin de le contre-interroger.

Code criminel, par. 258(6) et (7).

COMMENTAIRE

L'article 124, qui répond à un souci d'équité, reprend l'essentiel des dispositions actuellement contenues aux paragraphes 256(6) et (7) du *Code criminel*. Comme, normalement, l'accusé peut présumer qu'il aura le droit de contre-interroger les témoins à charge, il convient en toute justice de lui donner un préavis raisonnable lorsqu'on veut passer outre à cette règle. Après réception de ce préavis (accompagné d'une copie du certificat), l'accusé qui souhaite contester la validité du document pourra avec l'autorisation du tribunal exiger la présence du témoin pour le contre-interroger.

PARTIE V

LA SURVEILLANCE ÉLECTRONIQUE

Textes à l'origine de la partie V

PUBLICATIONS DE LA CRD

Le mandat de main-forte et le télémandat, Rapport n° 19 (1983)

La surveillance électronique, Document de travail n° 47 (1986)

La classification des infractions, Document de travail n° 54 (1986)

L'accès du public et des médias au processus pénal, Document de travail n° 56 (1987)

Pour une nouvelle codification du droit pénal, Rapport n° 31 (1987)

Pour une cour criminelle unifiée, Document de travail n° 59 (1989)

LÉGISLATION

Code criminel, art. 183-196

OBSERVATIONS PRÉLIMINAIRES

La partie VI du *Code criminel* actuel, intitulée *Atteintes à la vie privée*, précise les modalités selon lesquelles des communications privées peuvent être légalement interceptées. Le titre est un peu trompeur, car cette partie porte sur un seul aspect de la vie privée.

Selon la *Commission on Freedom of Information and Individual Privacy* de l'Ontario[154], le droit à la vie privée comporte trois volets. D'abord, il y a le droit à la protection contre les intrusions injustifiées chez soi; c'est l'aspect «territorial» de la vie privée. Ensuite, le droit à la protection de la dignité de sa personne, notamment celui de ne pas subir d'agressions physiques. Vient enfin le droit à la protection contre la divulgation de renseignements personnels.

Certains aspects de la vie privée sont protégés depuis des siècles par le droit pénal qui, par exemple, restreint les pouvoirs de la police au chapitre des perquisitions à domicile, interdit le meurtre, les voies de fait. Mais jusqu'à récemment, le *Code criminel* n'accordait aucune protection à l'égard des communications orales; ce qui du reste n'avait rien de très anormal. Car ce n'est que depuis le début du siècle qu'existent des techniques permettant d'intercepter sans grandes difficultés des communications privées[155]. L'apparition des dispositifs d'interception a peu à peu sensibilisé le public à la nécessité de mieux protéger l'intimité de la vie privée. C'est ainsi qu'en 1974, le législateur adoptait l'actuelle partie VI du *Code criminel*, qui en gros interdit l'interception des communications privées (orales, généralement) au moyen de dispositifs de surveillance, sous réserve de quelques exceptions. Des progrès ont par ailleurs été accomplis dans d'autres domaines du droit quant à la protection de la vie privée[156].

On trouve dans la partie VI du Code des textes d'incrimination aussi bien que des règles de procédure. Les crimes actuellement prévus sont les suivants : interception illégale d'une communication privée (art. 184); divulgation illégale d'une communication privée interceptée (art. 193); possession, achat et vente illégaux d'un dispositif, sachant que sa conception le rend principalement utile à l'interception clandestine de communications privées (art. 191).

Certains textes de nature procédurale donnent au juge le pouvoir d'autoriser l'interception d'une communication privée. Ils indiquent qui peut faire la demande, les motifs pour lesquels l'autorisation peut être délivrée, le contenu de celle-ci, la durée de sa validité, les modalités de son renouvellement.

D'autres règles de procédure concernent :

a) la mise dans un paquet scellé des documents présentés à l'appui de la demande d'autorisation;

154. Rapport de la COMMISSION ON FREEDOM OF INFORMATION AND INDIVIDUAL PRIVACY, *Public Government for Private People*, vol. 3: *Protection of Privacy*, Toronto, La Commission, 1980, pp. 498-500.

155. A.F. WESTIN, *Privacy and Freedom*, New York, Atheneum, 1970, pp. 330-349.

156. Voir, par exemple, la *Charte des droits et libertés de la personne* adoptée au Québec, L.R.Q., ch. C-12, art. 5; la *Loi sur la protection des renseignements personnels*, S.C. 1980-81-82-83, ch. 111, ann. II; la *Loi sur l'accès à l'information*, S.C. 1980-81-82-83, ch. 111, ann. I.

b) l'octroi, en cas d'urgence, d'autorisations d'une durée maximale de trente-six heures;
c) l'admissibilité en preuve des communications privées ayant fait l'objet d'une interception;
d) le pouvoir conféré au juge qui préside le procès d'ordonner que des détails complémentaires soient fournis au sujet d'une communication privée;
e) la confiscation des dispositifs de surveillance en cas de condamnation pour possession illégale, ou pour interception illégale d'une communication privée;
f) la possibilité de condamner à des dommages-intérêts la personne déclarée coupable d'interception ou de divulgation illégale d'une communication privée;
g) l'établissement, par les ministres responsables, de rapports annuels faisant état du nombre d'écoutes électroniques autorisées;
h) la remise d'un avis aux personnes dont les communications privées ont été interceptées en vertu d'une écoute électronique autorisée.

La Commission a déjà examiné les règles actuelles sur l'écoute électronique dans trois autres publications. Dans le rapport n° 31 (pp. 82-85), elle a proposé, en matière d'interception illégale de communications privées, l'établissement de crimes fondés dans une large mesure — mais pas exclusivement — sur les textes actuels[157]. Ensuite, elle a préconisé de nombreuses réformes au sujet des règles de procédure actuellement contenues au *Code criminel*, dans les documents de travail n° 47, *La surveillance électronique,* et n° 56, *L'accès du public et des médias au processus pénal*[158]. Ces propositions visaient toutes à une meilleure protection de l'intimité de la vie privée, tenue pour un droit fondamental; bon nombre d'entre elles ont été intégrées au projet de texte législatif présenté ici.

Nous avons également tenu compte des décisions où la Cour suprême du Canada a examiné la législation actuelle à l'aune de la *Charte canadienne des droits et libertés.* Les plus importantes à cet égard sont les récents arrêts *R.* c. *Duarte*[159] et *R.* c. *Wiggins*[160], où la Cour a conclu que l'interception de communications privées, même avec

157. Voici les crimes dont la Commission proposait l'instauration :
   a) interception d'une communication privée sans le consentement d'un des interlocuteurs ni autorisation judiciaire préalable;
   b) entrée dans un lieu privé pour installer, réparer ou enlever un dispositif de surveillance ou un dispositif optique sans le consentement du propriétaire ou de l'occupant, ni autorisation judiciaire préalable;
   c) perquisition dans un lieu privé à l'occasion de l'installation, de la réparation ou de l'enlèvement du dispositif;
   d) recours à la force contre une personne pour entrer dans le lieu privé ou en sortir (toujours en matière d'installation, etc., de dispositifs);
   e) possession d'un dispositif susceptible d'être utilisé pour l'interception d'une communication privée.

158. Parmi les autres ouvrages où l'on étudie le droit actuel de la surveillance électronique et présente des propositions de réforme, citons : S.A. COHEN, *Invasion of Privacy: Police and Electronic Surveillance in Canada*, Toronto, Carswell, 1983; D. WATT, *Law of Electronic Surveillance in Canada*, Toronto, Carswell, 1979; D.A. BELLEMARE, *L'écoute électronique au Canada*, Montréal, Éditions Yvon Blais, 1981.

159. [1990] 1 R.C.S. 30

160. [1990] 1 R.C.S. 62

le consentement préalable d'un des interlocuteurs qui est un agent de la paix ou un indicateur agissant pour le compte de la police, ne peut être tenue pour conforme à la Charte à moins d'avoir au préalable fait l'objet d'une autorisation judiciaire.

Les dispositions sont organisées d'une manière semblable à celles d'autres parties du présent code, notamment la partie II, consacrée aux fouilles, aux perquisitions et aux saisies. Par souci de clarté, nous avons tenté d'utiliser une langue simple et d'éviter les renvois d'un article à l'autre.

Quatre questions importantes ont été laissées de côté. Premièrement, la présente partie ne réglemente aucunement l'installation de dispositifs optiques. Il est en effet indispensable d'étudier d'une manière plus approfondie l'opportunité d'interdire ou de restreindre, au moyen du droit pénal, l'utilisation de ces appareils. Deuxièmement, on n'y trouvera pas non plus de règles sur la recevabilité de la preuve : cette question fera l'objet d'une étude distincte touchant le code dans son ensemble. Nous verrons alors dans quelle mesure il y aurait lieu d'établir des règles particulières en matière de surveillance électronique. Troisièmement, la confiscation de dispositifs de surveillance et le paiement de dommages-intérêts en cas de condamnation pour certains des crimes prévus ici ne sont pas traités. Nous nous attaquerons à ces questions dans les parties du code qui porteront sur les voies de recours. Quatrièmement, le régime proposé ici, à l'instar des règles actuellement en vigueur, n'est pas applicable à l'interception de communications privées au cours d'une enquête relative à une menace pour la sécurité nationale[161].

CHAPITRE PREMIER
DÉFINITIONS

Définitions

125. Les définitions qui suivent s'appliquent à la présente partie.

«avocat» (*solicitor*)

«avocat» Dans la province de Québec, le notaire est assimilé à l'avocat.

Code criminel, art. 183

«clause d'interception d'application générale» (*general interception clause*)

«clause d'interception d'application générale» Clause d'un mandat qui autorise l'interception des communications privées de personnes qui ne sont pas identifiées individuellement ou l'interception de communications privées dans des lieux indéterminés.

«communication privée» (*private communication*)

«communication privée» Toute communication orale ou télécommunication faite dans des circonstances telles que l'un ou l'autre des interlocuteurs peut raisonnablement présumer

161. Ces interceptions continuent d'être régies par la *Loi sur le Service canadien du renseignement de sécurité*, L.R.C. (1985), ch. C-23, art. 21-28.

qu'elle ne sera pas interceptée par une personne qui n'est pas partie à la communication, même si l'un ou l'autre soupçonne qu'elle est interceptée.

Document de travail n° 47, rec. 4 et 5
Code criminel, art. 183

«désigné par les autorités fédérales» (*federally designated*)

«désigné par les autorités fédérales» Désigné par le solliciteur général du Canada pour la présentation des demandes de mandat visées par la présente partie ou pour l'interception de communications privées en vertu d'un mandat.

Code criminel, al. 185(1)*a)*, 188(1)*a)*, par. 186(5) et (6)

«désigné par les autorités provinciales» (*provincially designated*)

«désigné par les autorités provinciales» Désigné par le ministre provincial pour la présentation des demandes de mandat visées par la présente partie ou pour l'interception des communications privées en vertu d'un mandat.

Code criminel, al. 185(1)*b)*, 188(1)*b)*, par. 186(5) et (6)

«dispositif de surveillance» (*surveillance device*)

«dispositif de surveillance» Tout dispositif ou appareil susceptible d'être utilisé pour intercepter une communication privée.

Rapport n° 31, art. 65
Document de travail n° 47, rec. 7
Code criminel, art. 183

«intercepter» et «interception» (*intercept*)

«intercepter» et «interception» Relativement à une communication privée, le fait, notamment, d'écouter ou d'enregistrer le contenu, la substance ou le sens de la communication, ou d'en prendre volontairement connaissance.

Code criminel, art. 183

«ministre provincial» (*provincial minister*)

«ministre provincial» Dans la province de Québec, le ministre de la Sécurité publique et, dans toute autre province, le solliciteur général ou, à défaut, le procureur général de la province.

COMMENTAIRE

L'article 183 du *Code criminel* actuel renferme de nombreux termes dont il est indispensable de saisir la signification précise si l'on veut être en mesure de savoir dans quelles circonstances des communications privées peuvent être légitimement interceptées. La plupart de ces termes ont été repris ici à l'article 125.

Tout au long de la présente partie, le terme «mandat», que nous employons systématiquement dans notre code de procédure pénale, remplace celui d'«autorisation», utilisé à l'heure actuelle dans le *Code criminel*[162]. Par «mandat», on évoque ici le pouvoir, conféré aux policiers par les juges ou les juges de paix dans le cadre des enquêtes criminelles, de porter atteinte à l'intimité de la vie privée. Étant donné que le «mandat» et l'«autorisation» ne présentent aucune différence quant à la forme et au but visé, nous utiliserons parfois ici le terme «mandat» au lieu d'«autorisation», afin d'éviter la

162. Signalons que dans la *Loi sur le Service canadien du renseignement de sécurité*, précitée, note 161, le législateur a aussi préféré le terme «mandat» au terme «autorisation».

répétition inutile de ces deux mots. D'autre part, il ne servirait à rien de définir spécifiquement le terme «mandat» dans le contexte de l'interception des communications privées, puisque sa signification devrait ressortir clairement des dispositions de la présente partie.

La définition du mot «avocat», dans la version française, diffère légèrement de celle qui figure au Code actuel.

L'expression «clause d'interception d'application générale» est nouvelle (nous avons renoncé dans le version anglaise à utiliser le terme «basket clause», d'utilisation courante, vu son caractère familier et péjoratif). En règle générale, il faut désigner dans l'autorisation les personnes dont on doit intercepter les communications privées, ou les endroits précis où l'interception doit avoir lieu. Mais suivant les dispositions actuelles — et c'est aussi le cas dans le présent régime —, l'autorisation peut, à certaines conditions, comporter une clause d'application générale qui permet, soit l'interception des communications de personnes «inconnues», soit l'interception de communications privées à tout endroit non désigné où une personne dont on connaît l'identité séjourne ou qu'elle utilise.

Nous avons sensiblement modifié la définition de l'expression «communication privée» figurant au *Code criminel*. La définition actuelle est axée sur l'idée que l'auteur d'une communication privée est en droit de s'attendre à ce que cette communication ne soit écoutée par nulle autre personne que celle à qui il la destine[163]. Cette définition a suscité certains problèmes, parce qu'elle a pour effet de scinder la conversation entre deux personnes en une série de communications individuelles. La définition proposée ici permet d'éviter cette distinction quelque peu artificielle. Au lieu de parler de l'«auteur» de la communication et de la confidentialité à laquelle il peut s'attendre, elle précise que la communication est privée si elle a lieu dans des circonstances telles que l'un ou l'autre des «interlocuteurs» peut raisonnablement présumer qu'elle ne sera pas interceptée par une personne qui n'y est pas partie. La définition établit ainsi clairement que la communication privée ne consiste pas dans les propos individuels dont elle est constituée, mais dans l'intégralité de la conversation.

Cette définition, en outre, pose un critère plus nettement objectif pour la détermination du caractère privé de la communication. Car, si l'on trouve dans la définition actuelle les termes «peut raisonnablement s'attendre à ce qu'elle [la communication] ne soit pas interceptée», les tribunaux s'intéressent pourtant d'abord aux attentes subjectives de l'interlocuteur quant à l'intimité de la communication. Il faut avant tout pouvoir conclure que la personne s'attendait subjectivement à l'absence d'interception, avant de chercher à savoir si cette attente était objectivement raisonnable[164]. D'où la question suivante : lorsque l'un des interlocuteurs soupçonne que la communication risque de faire l'objet d'une interception, faut-il en conclure nécessairement qu'il ne pouvait de manière raisonnable s'attendre à ce qu'elle ne soit pas interceptée ? Le danger, lorsqu'on exige au départ une attente subjective, c'est que les craintes subjectives d'une

163. Voir *Goldman* c. *La Reine*, [1980] 1 R.C.S. 976.

164. *R.* c. *Sanelli* (1987), 38 C.C.C. (3d) 1 (C.A. Ont.), pourvoi rejeté pour d'autres motifs par la Cour suprême du Canada dans *R.* c. *Duarte*, précité, note 159.

personne peuvent exclure toute possibilité d'attentes raisonnables quant à l'intimité de ses communications. Supposons par exemple que l'État annonce tout à coup que, à titre de mesure de répression du crime, il entend procéder à l'écoute électronique de toutes les communications privées de la population; on pourrait alors soutenir que nul ne peut d'une manière raisonnable croire au caractère privé des communications téléphoniques. C'est pour éviter cette conséquence que la définition proposée ici énonce clairement qu'une attente relative à l'intimité n'est pas nécessairement déraisonnable «si l'un ou l'autre [des interlocuteurs] soupçonne qu'elle [la communication] est interceptée».

L'expression «désigné par les autorités fédérales» est également nouvelle. Nous avons cherché à décrire de façon plus simple le pouvoir dont le solliciteur général fédéral est investi, en vertu de l'alinéa 185(1)*a*) et du paragraphe 186(5) du *Code criminel*, respectivement, pour désigner *a*) les personnes qui peuvent demander une autorisation (un mandat) concernant l'interception de communications privées et *b*) les personnes qui peuvent intercepter des communications privées en vertu d'une autorisation (un mandat).

Le terme «désigné par les autorités provinciales» est à rapprocher du terme «ministre provincial».

Quant au terme «dispositif de surveillance», il remplace le terme «dispositif électromagnétique, acoustique, mécanique ou autre» actuellement défini au *Code criminel*. Nous avons conservé de nombreux éléments de la définition actuelle, mais élargi la portée de celle-ci. Ainsi, les appareils de correction auditive ne sont plus exclus. Leur utilisation normale ne constitue pas un crime, mais la personne qui utiliserait un tel appareil dans le dessein d'intercepter clandestinement une communication privée commettrait le crime prévu à l'article 66 du projet de code criminel de la Commission.

La définition du mot «intercepter» est semblable à celle qui figure au Code actuel.

L'expression «ministre provincial», nouvelle, vise le ministre qui dans chaque province est responsable de la direction des forces policières. Nous avons simplement voulu clarifier le droit actuel. Le *Code criminel*, à l'alinéa 185(1)*b*) et au paragraphe 186(5), donne aux procureurs généraux des provinces le pouvoir de désigner personnellement des «mandataires» autorisés à demander l'autorisation d'intercepter des communications privées et à effectuer de telles interceptions en vertu d'un mandat. Or, selon l'article 2 du *Code criminel* actuel, l'expression «procureur général» vise aussi le solliciteur général de la province. Il y a là une certaine ambiguïté pour les provinces, tel l'Ontario, où les deux charges coexistent[165]. À l'étape de la demande concernant l'interception d'une communication privée, l'objectif consiste à enquêter sur un crime en cours ou imminent. Le ministre responsable de la désignation de ces agents devrait, partant, être celui dont relèvent les enquêtes criminelles, et non celui qui s'occupe de la poursuite des crimes.

Le terme «vendre», défini au Code actuel, ne l'est pas ici. La définition vise à faciliter l'interprétation du texte d'incrimination relatif à la possession, la vente ou

165. Au Québec, le solliciteur général s'appelle depuis peu le ministre de la Sécurité publique, en vertu du *Décret concernant le ministre et le ministère de la Sécurité publique* (1988), 120 *G.O.* II, 4704.

l'achat de dispositifs de surveillance (art. 191). (La vente de tels appareils constituerait une instigation ou une tentative d'instigation relativement au crime de possession d'un dispositif destiné à l'interception des communications privées, prévu à l'alinéa 84*b*) du projet de code criminel de la Commission.)

CHAPITRE II
INTERCEPTION SANS MANDAT

Consentement de toutes les parties

126. Tout agent de la paix ou toute personne agissant pour le compte d'un agent de la paix peut, au moyen d'un dispositif de surveillance, intercepter sans mandat toute communication privée si toutes les parties à la communication y consentent.

COMMENTAIRE

Tant le Code actuel (art. 184) que le code criminel proposé par la Commission (par. 66(1)) érigent en crime l'interception de communications privées au moyen d'un dispositif de surveillance. Cependant, cette règle comporte une exception vaste et importante pour le cas où l'une des parties à la communication privée consent à l'interception de celle-ci.

Indépendamment du problème de la responsabilité pénale, toutefois, se pose la question de l'admission en preuve de communications privées obtenues au moyen d'une interception effectuée avec le consentement implicite de l'une des parties. Il convient à ce propos de signaler un élément important du régime proposé par la Commission. Notre but n'est pas la réglementation des interceptions faites par une partie qui est un particulier agissant pour son propre compte, sans aucune intervention de la police. Les dispositions contenues dans la présente partie visent uniquement les actes des représentants de l'État désireux de recourir à des techniques de surveillance électronique dans le cadre d'enquêtes criminelles.

Vu le libellé des dispositions prévues au *Code criminel,* il n'était jusqu'à récemment pas nécessaire de demander une autorisation judiciaire pour qu'une communication privée puisse être interceptée par une partie à cette communication sur l'ordre de la police. La police jouissait par le fait même d'un pouvoir dans une large mesure discrétionnaire pour déterminer quand et comment procéder à l'interception de communications privées. Les choses en sont restées là pendant de nombreuses années, malgré les critiques formulées par certains juristes :

> [TRADUCTION]
>
> Le contrôle judiciaire à l'égard du recours, par les autorités, aux techniques de surveillance électronique, est l'un des éléments centraux de la législation. Or, vu l'organisation des dispositions actuelles, le consentement est un mécanisme qui permet d'échapper à ce droit de regard et qui, de ce fait, suscite depuis le début des risques d'exploitation et d'abus. D'aucuns ont exprimé l'avis que ces dispositions législatives «encouragent la police à recourir aux services d'agents provocateurs contre l'octroi tacite d'une immunité de poursuites». Les dispositions touchant le

consentement, parce qu'elles permettent la validation a posteriori d'actes d'écoute électronique non autorisés, sont incompatibles avec l'esprit de la législation[166].

La Cour suprême a donné raison à ces critiques dans les arrêts *R.* c. *Duarte*[167] et R. c. *Wiggins*[168]. Suivant cette jurisprudence, le consentement d'une des parties à la communication ne saurait à lui seul permettre aux autorités de se soustraire à l'obligation d'obtenir une autorisation judiciaire avant de procéder à l'interception. Le fait d'agir sans autorisation contrevient selon la Cour aux dispositions de l'article 8 de la Charte, relatives aux fouilles, perquisitions et saisies abusives.

Les dispositions proposées ici, conformes au principe exprimé dans les arrêts *Duarte* et *Wiggins*, traitent en plus de divers problèmes de fond soulevés dans ces deux affaires. Ainsi, à la question «Dans quels cas l'agent de la paix ou son représentant peut-il intercepter une communication privée au moyen d'un dispositif de surveillance sans être tenu d'obtenir un mandat ? », l'article 126 donne cette réponse : il peut le faire si *toutes* les parties à la communication privée consentent à cette interception. Lorsque l'on veut intercepter des communications à l'aide d'un dispositif de surveillance avec le consentement d'une partie seulement, il faut d'abord obtenir un mandat, sous réserve de l'exception limitée établie à l'article 127. Les exigences relatives à l'obtention des mandats sont énoncées au chapitre III.

Protection de la vie ou de la sécurité

127. Tout agent de la paix peut, sans mandat, utiliser un dispositif de surveillance pour écouter, mais non pour enregistrer, une communication privée à laquelle est partie un agent de la paix ou une personne agissant pour le compte de celui-ci, s'il est raisonnable de croire que la vie ou la sécurité de cet agent ou de cette personne peut être en danger.

COMMENTAIRE

La Cour suprême du Canada a conclu, dans les affaires *Duarte* et *Wiggins*, que les dispositions de la Charte s'opposent à l'interception de communications privées sans l'obtention préalable d'un mandat judiciaire : l'enregistrement par les autorités des communications privées d'une personne à son insu constitue selon la Cour une atteinte injustifiable à l'intimité de la vie privée. Dans les deux cas, le but avoué des interceptions clandestines consistait dans l'obtention d'éléments de preuve crédibles relatifs à la commission d'un crime.

Dans certains cas, il peut toutefois s'avérer indispensable d'écouter des communications privées, non pas pour recueillir des indices, mais plutôt pour protéger la vie ou la sécurité d'un indicateur ou d'un agent de la paix qui dissimule sa qualité; or, la Cour suprême n'a pas tenu compte de cette possibilité dans les affaires qui lui avaient été

166. COHEN, *op. cit.*, note 158, pp. 176-177. Voir aussi G. KILLEEN, «Recent Developments in the Law of Evidence» (1975), 18 *C.L.Q.* 103, p. 108.

167. Précité, note 159.

168. Précité, note 160.

soumises. Prenons un exemple. Un agent de la paix fait enquête, incognito, sur les activités de trafiquants de stupéfiants; un rendez-vous est fixé à l'improviste entre lui et les trafiquants. Il s'agit là d'une situation qui présente des risques énormes, et il sera peut-être impossible d'obtenir à temps un mandat judiciaire. À notre sens, le souci de protéger la sécurité de l'agent de la paix dans de telles circonstances devrait l'emporter sur l'obligation d'obtenir un mandat, et la police devrait avoir la possibilité d'écouter, exclusivement pour des raisons de sécurité, les conversations entre l'agent et les trafiquants. Nous avons toutefois soigneusement tenu compte, en rédigeant cette disposition, de la portée donnée au principe du respect de l'intimité de la vie privée par la Cour suprême. Le pouvoir d'interception ne vise que l'*écoute* de communications privées. L'*enregistrement* demeure rigoureusement prohibé; pour y procéder, l'obtention d'un mandat est obligatoire, puisque l'enregistrement répond au souci d'obtenir des éléments de preuve et non à la nécessité de protéger la sécurité des policiers. (Comme nous l'avons déjà souligné, les règles régissant l'admission des éléments de preuve — et l'établissement d'une telle règle s'imposera ici — seront examinées d'une manière distincte dans un autre volume du présent code.)

CHAPITRE III
MANDAT AUTORISANT L'INTERCEPTION DE COMMUNICATIONS PRIVÉES

SECTION I
RÈGLES GÉNÉRALES SUR LES MANDATS

1. Demande de mandat

Demandeur fédéral

128. (1) Tout agent désigné personnellement et par écrit par les autorités fédérales peut demander un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance, si le crime faisant l'objet de l'enquête peut donner lieu à des poursuites engagées à la demande des autorités fédérales et conduites par le procureur général du Canada ou en son nom.

Code criminel, al. 185(1)*a*)

Demandeur provincial

(2) Tout agent désigné personnellement et par écrit par les autorités provinciales peut demander, dans la province où il a été désigné, un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance, si l'interception doit avoir lieu dans la province en question et que le crime faisant l'objet de l'enquête puisse donner lieu à des poursuites engagées à la demande des autorités provinciales et conduites par le procureur général de la province ou en son nom.

Document de travail n° 47, rec. 20
Code criminel, al. 185(1)*b*)

COMMENTAIRE

Cet article indique d'une manière générale qui peut demander un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance. Il s'inspire fortement des règles établies aux alinéas 185(1)*a*) et *b*) du *Code criminel*, auxquelles les changements nécessaires ont été apportés.

Le paragraphe (1) est consacré à l'«agent désigné par les autorités fédérales», c'est-à-dire désigné personnellement et par écrit par le solliciteur général du Canada. Cet agent peut demander un mandat pourvu que le crime faisant l'objet de l'enquête puisse donner lieu à des poursuites engagées par le procureur général du Canada.

Au paragraphe (2), il est question de l'«agent désigné par les autorités provinciales», soit la personne désignée personnellement et par écrit, au Québec par le ministre de la Sécurité publique, dans les autres provinces par le solliciteur général ou le procureur général, selon le cas. Nous avons voulu ici remédier à une grande lacune du droit actuel. En effet — nous l'avions déjà souligné dans notre document de travail n° 47 —, la formulation des alinéas 185(1)*a*) et *b*) du *Code criminel* ne permet aux autorités provinciales de demander une autorisation que dans les seuls cas où un crime a été commis ou est en cours de perpétration dans leur province. Elles n'ont aucunement le pouvoir de le faire lorsque le crime est en cours de perpétration ailleurs, même si les suspects se trouvent dans le territoire relevant de leur compétence[169]. Le paragraphe (2) découle d'une recommandation faite dans le document de travail n° 47 (p. 38) pour remédier à cet état de choses.

Les dispositions de l'article 128 diffèrent aussi d'une autre façon des règles actuelles. Comme il est peu vraisemblable que le ministre présente personnellement la demande de mandat (possibilité néanmoins prévue en ce moment par le *Code criminel*), on y précise que seuls sont habilités à demander un mandat les agents qu'il désigne à cette fin.

Mode de présentation

129. (1) La demande est présentée unilatéralement, en personne et à huis clos, de vive voix ou par écrit.

Forme de la demande écrite

(2) La demande présentée par écrit doit l'être selon la formule prescrite.

Document de travail n° 47, rec. 18
Code criminel, par. 185(1)

COMMENTAIRE

Pour bien comprendre la procédure applicable à la demande de mandat en matière d'écoute électronique, il faut tenir compte, en lisant ces dispositions, des formalités générales régissant tous les mandats et établies aux articles 10 à 12 du présent code. Elles concernent l'audition de témoignages et la réception d'éléments de preuve au moment de la présentation de la demande, l'enregistrement des témoignages, ainsi que

169. Document de travail n° 47, p. 38.

la procédure de délivrance du mandat à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication.

L'article 129 modifie quelque peu les règles actuellement prévues au *Code criminel* quant aux formalités de la demande d'autorisation ordinaire, présentée sous le régime de la partie VI. En ce moment, la demande doit être faite par écrit. Or, suivant les dispositions proposées ici, la demande de mandat en matière d'écoute électronique peut aussi l'être de vive voix — conformément du reste aux dispositions des parties II (*Les fouilles, les perquisitions et les saisies*), III (*La recherche d'indices sur les personnes*) et IV (*Le dépistage de l'état alcoolique chez les conducteurs*). Comme la présentation de la demande sera enregistrée dans tous les cas[170], il n'est pas nécessaire d'exiger que celle-ci soit présentée par écrit. Mais si elle l'est, il faudra employer la formule prescrite.

D'une manière générale, les demandes de mandat autorisant l'écoute électronique seraient présentées en personne. En vertu des règles exposées ici, en effet, il n'est normalement pas possible de présenter une demande par téléphone ou à l'aide d'un autre moyen de télécommunication. (La seule exception concerne les cas où l'affaire est urgente; elle est traitée à l'article 150.)

Compétence

130. La demande est présentée à un juge de la province où la communication privée doit être interceptée.

Code criminel, par. 185(1)

COMMENTAIRE

Deux choses ressortent de cet article. Tout d'abord, la demande doit être présentée à un juge, et non à un juge de paix. Il s'agit en l'occurrence d'un juge qui siégerait à la cour criminelle unifiée dont la Commission propose l'instauration[171]. Ensuite, elle peut être présentée n'importe où dans la province où la communication privée doit être interceptée.

Présentation de la demande

131. (1) La demande est présentée par le demandeur; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu

(2) Elle contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le lieu et la date où elle est présentée;**

***c*) le crime faisant l'objet de l'enquête, avec les faits et les circonstances, ainsi que leur gravité;**

***d*) le genre de communication privée que l'on se propose d'intercepter;**

170. Voir l'article 11.

171. Voir le document de travail n° 59.

e) une description générale des moyens devant être utilisés pour l'interception;

f) le nom de toutes les personnes dont on veut intercepter les communications privées ou, s'il est impossible de connaître leur nom, la description d'autres caractéristiques permettant de les identifier individuellement; si cela est également impossible, la catégorie dont font partie ces personnes non identifiées;

g) les lieux, s'ils sont déterminés, où serait effectuée l'interception;

h) le cas échéant, le fait que des communications privilégiées sont susceptibles d'être interceptées;

i) les motifs donnant lieu de croire que l'interception pourrait faire avancer l'enquête sur le crime;

j) la période pour laquelle le mandat est demandé;

k) les autres méthodes d'investigation qui ont été essayées et ont échoué; si aucune autre méthode n'a été essayée, les raisons pour lesquelles aucune autre méthode ne paraît avoir de chances de succès, ou pour lesquelles, étant donné l'urgence de l'affaire, il est matériellement impossible d'avoir recours à une autre méthode;

l) la liste de toutes les demandes de mandat déjà présentées relativement au même crime et aux mêmes personnes ou à la même catégorie de personnes, avec la date de chacune d'entre elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

m) dans le cas où l'autorisation d'effectuer une entrée clandestine est demandée en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance :

(i) les raisons pour lesquelles, d'une part, cette entrée est nécessaire et, d'autre part, les méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offrent peu de chances de succès,

(ii) le lieu où serait effectuée cette entrée;

n) lorsque le demandeur souhaite obtenir une ordonnance d'aide en vertu de l'article 139, la nature de l'aide requise.

Document de travail n° 47, rec. 24, 33 et 40
Code criminel, par. 185(1)

COMMENTAIRE

Suivant le paragraphe 185(1) du *Code criminel* actuel, la demande présentée par un «mandataire» désigné est distincte de l'affidavit signé par un agent de la paix ou un fonctionnaire public qui doit l'accompagner. Selon le régime proposé ici, en revanche,

c'est principalement dans la demande elle-même, et non dans l'affidavit, que l'on trouvera la preuve justifiant la délivrance du mandat. Le paragraphe (1) prévoit que le contenu de la demande est attesté par l'affidavit d'un agent de la paix; et seuls les agents désignés selon la loi peuvent effectivement la présenter. Nous proposons par surcroît que l'affidavit ne puisse être signé que par un «agent de la paix» (terme dont le sens est plus étroit que celui de «fonctionnaire public»)[172].

On précise au paragraphe (2) les renseignements que doit contenir la demande. Les alinéas *a*) et *b*) ne posent aucun problème. L'alinéa *c*) remplace l'alinéa 185(1)*c*) du *Code criminel* actuel. Aux termes de celui-ci, il faut que la demande indique «les faits sur lesquels le déclarant se fonde pour justifier qu'à son avis il y a lieu d'accorder une autorisation, ainsi que les détails relatifs à l'infraction». Cela n'est pas suffisamment clair. En effet, il s'agit de savoir, non pas si l'agent de la paix croit que la délivrance d'un mandat s'impose, mais plutôt si les renseignements fournis par lui sont suffisants pour convaincre le juge qu'il y a lieu de délivrer le mandat. Or, il est essentiel pour cela de connaître les faits et circonstances du crime faisant l'objet de l'enquête ainsi que leur gravité.

Les renseignements exigés par les autres alinéas du paragraphe (2) doivent également aider le juge à décider de l'opportunité de délivrer le mandat.

Nous avons légèrement modifié, par souci de clarté, la règle de l'alinéa 185(1)*e*) du *Code criminel* actuel; cette disposition a notamment pour objet d'obliger la police à donner les noms («s'ils sont connus») de toutes les personnes dont elle veut intercepter les communications privées. À l'alinéa (2)*f*) de nos dispositions, il est question de personnes susceptibles d'être identifiées par une caractéristique quelconque, que ce soit le nom ou autre chose, et non de personnes «connues». C'est que la jurisprudence relative aux dispositions du Code actuel est inévitablement source de confusion lorsqu'il y est question de personnes inconnues mais «connues»[173]. Par ailleurs, l'alinéa *f*) prévoit la mention de la catégorie dont font partie des personnes non identifiées, pour les clauses d'interception d'application générale.

Les alinéas *d*), *e*), *g*) et *i*) reprennent les règles actuellement énoncées aux alinéas 185(1)*d*) et *e*) du *Code criminel*. Signalons que l'alinéa *e*) prend un sens particulier lorsqu'un mandat est demandé dans un cas où une personne a consenti à l'interception des communications privées. Nous estimons qu'alors, la «description générale des moyens devant être utilisés pour l'interception» devrait énoncer, non seulement le type de dispositif devant être utilisé, mais aussi le fait qu'une partie aux communications a consenti à l'interception.

L'alinéa *h*), pour sa part, est nouveau. Le droit actuel, aux paragraphes 186(2) et (3) du *Code criminel*, prévoit un mécanisme ayant pour but la protection des

172. Aux termes du paragraphe 10(1) du présent code, l'agent de la paix peut attester par affidavit, sur la base de sa conviction ou des renseignements dont il dispose, le contenu de la demande.

173. Voir S.D. FRANKEL, «The Relationship of «Known» and «Unknown» Persons to the Admissibility of Intercepted Private Communications» (1978-79), 21 *C.L.Q.* 465; M. ROSENBERG, «Chesson: Implications for Privacy in the Supreme Court's Latest Plunge into the Unknown of Wiretap Law» (1988), 65 *C.R.* (3d) 211.

communications privilégiées entre l'avocat et son client. Un problème se pose toutefois à cet égard, qui relève de la politique pénale. Y aurait-il lieu de prévoir également la protection d'autres communications privilégiées, lorsque le juge saisi de la demande est convaincu de l'existence d'un motif valable donnant lieu à un privilège ? Nous avons conclu que tel est le cas. C'est pourquoi la demande devrait, si les circonstances le justifient, indiquer que des communications privilégiées seront vraisemblablement interceptées, afin que le juge soit sensibilisé à cet aspect de la situation. D'autres articles portent sur les mesures que le juge peut prendre pour empêcher l'interception de déclarations privilégiées.

L'alinéa *j*) maintient la règle actuellement établie à l'alinéa 185(1)*g*) du *Code criminel*, tandis que l'alinéa *k*) reprend, dans une formulation légèrement modifiée, les dispositions de l'alinéa 185(1)*h*).

À l'alinéa *l*), nous avons repris les dispositions de l'alinéa 185(1)*f*) du Code, mais en y apportant un changement important. La formulation proposée ici oblige clairement le demandeur à préciser, quant à chacune des demandes antérieures, si elle a été retirée, accueillie, ou rejetée. Le juge de paix devrait ainsi être encore mieux en mesure de rendre une décision éclairée.

Dans l'ensemble, les dispositions de l'alinéa *m*) sont nouvelles[174]. Elles sont liées au pouvoir du juge d'autoriser expressément les policiers, dans un mandat relatif à l'interception de communications, à entrer clandestinement dans un lieu en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance. L'article 138 décrit ce pouvoir et les conditions qui le régissent. Pour la Commission, il est souhaitable de poser en cette matière des restrictions semblables à celles qui s'appliquent à l'interception de communications privées. Le demandeur devra donc, s'il veut obtenir l'autorisation d'entrer dans un lieu en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, fournir au juge, au moment de la demande, tous les renseignements pertinents.

L'alinéa *n*) est également nouveau. Dans le document de travail n° 47[175], la Commission avait recommandé que l'on permette au juge d'ordonner à toute personne de fournir l'aide raisonnablement nécessaire à la réalisation de l'interception prévue par le mandat. L'article 139 de la présente partie découle directement de cette recommandation. Le demandeur devra, au moment de la présentation de la demande, préciser la nature de l'aide requise, afin que le juge ait les renseignements nécessaires pour rendre l'ordonnance en question.

Règles de procédure

132. Les articles 10 et 11 s'appliquent à la demande de mandat visée par la présente section.

Code criminel, par. 185(1)

174. Voir à ce sujet le document de travail n° 47, rec. 31, p. 55.

175. Recommandation 75, p. 107.

2. Délivrance du mandat

Motifs justifiant la délivrance du mandat

133. (1) Le juge saisi d'une demande à cet effet peut décerner un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance, s'il est convaincu, à la fois :

a) qu'il existe des motifs raisonnables de croire :

(i) d'une part, qu'on a commis un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou une entente, tentative, instigation ou tentative d'instigation relativement à un tel crime,

(ii) d'autre part, que l'interception fera avancer l'enquête sur le crime en question;

b) que d'autres méthodes d'investigation ont été essayées et ont échoué, qu'aucune autre méthode n'a de chances de succès ou que l'urgence est telle qu'il est matériellement impossible de recourir à quelque autre méthode;

c) que l'octroi de cette autorisation servirait au mieux l'administration de la justice, compte tenu de la gravité des faits et des circonstances du crime faisant l'objet de l'enquête.

Enquête secrète

(2) Le juge ne doit pas refuser la délivrance du mandat pour le seul motif qu'un agent de la paix ou une personne agissant pour le compte d'un agent de la paix sera partie à la communication.

Document de travail n° 47, rec. 19 et 21
Code criminel, par. 186(1)

COMMENTAIRE

Pour délivrer le mandat demandé, le juge doit être convaincu que certaines conditions sont réalisées. Ces conditions sont énumérées au paragraphe 133(1). Comme nous l'avons vu, l'obligation d'obtenir un mandat s'applique désormais d'une manière générale aux interceptions clandestines, même réalisées avec le consentement d'une partie aux communications privées si cette partie est un agent de la paix ou une personne agissant pour le compte d'un agent de la paix.

L'alinéa *a*) modifie le droit actuel sous deux rapports importants. Le premier changement ressort du sous-alinéa *a*)(i). Celui-ci remplace la définition du mot «infraction» qui figure à l'article 183 du *Code criminel*. L'une des plus grandes difficultés, quand on cherche à comprendre la législation actuelle, consiste à saisir le principe directeur

qui pourrait justifier la longue liste d'infractions relativement auxquelles une autorisation peut être donnée en matière d'écoute électronique[176].

Si, dans le document de travail n° 47, la Commission avait pour l'essentiel accepté le contenu de cette énumération, elle avait en revanche critiqué la définition de la criminalité organisée («infraction reliée à un type d'activité criminelle. . .») et instamment recommandé son élimination, jugeant qu'elle n'ajoutait pas grand-chose à la définition traditionnelle du complot. Nous avions également recommandé d'une part l'exclusion de certains crimes figurant dans la liste (par exemple, l'encouragement au génocide), et d'autre part l'adjonction de nouveaux (telle la perception d'intérêts à un taux criminel)[177].

Le fondement du sous-alinéa *a*)(i), tout aussi valable mais plus simple, rend inutile l'élaboration d'une longue liste de crimes. Le critère applicable aux crimes pour lesquels un mandat peut être obtenu découle dans une large mesure de la classification des infractions préconisée par la Commission[178].

Le second changement figure au sous-alinéa *a*)(ii). Celui-ci précise que l'interception ne peut être effectuée que s'il existe, de l'avis du juge, des motifs raisonnables de croire qu'elle fera avancer l'enquête. Il s'agit là d'un changement par rapport au droit actuel de même qu'aux recommandations faites dans le document de travail n° 47.

Le droit actuel a été précisé à l'occasion d'un important arrêt rendu dans l'affaire *R.* c. *Finlay and Grellette*[179]. Le juge Martin a, le premier, formulé le critère du progrès de l'enquête, dans le cadre d'une contestation de l'ancienne partie IV.1 du Code (l'actuelle partie VI) fondée sur une prétendue violation de l'article 8 de la Charte (garantie contre les fouilles, les perquisitions et les saisies abusives). Dans l'arrêt *Finlay*, la Cour a conclu à la validité de la disposition du Code en cause (laquelle permet la délivrance d'une autorisation si, entre autres choses, le juge saisi de la demande est «convaincu que [. . .] l'octroi de [l']autorisation servirait au mieux l'administration de la justice»). Au nom de la Cour d'appel, le juge Martin a exprimé l'avis que cette disposition a une portée [TRADUCTION] «au moins aussi grande» que le critère américain (Title III) des [TRADUCTION] «motifs raisonnables [motifs probables] de croire que l'interception

176. Le terme «infraction», à l'article 183 du *Code criminel*, vise à l'heure actuelle de nombreux crimes prévus au Code, de la haute trahison à la vente de mise collective, de même que certains crimes prévus dans d'autres lois, comme le trafic de stupéfiants (*Loi sur les stupéfiants*, précitée, note 21) et l'espionnage (*Loi sur les secrets officiels*, L.R.C. (1985), ch. O-5). Il s'applique également à toute infraction énoncée au *Code criminel* et dont l'auteur est passible d'un emprisonnement de cinq ans ou plus, et à toute infraction prévue à l'article 20 de la *Loi sur les petits prêts*, S.R.C. 1970, ch. S-11, «dont il existe des motifs raisonnables de croire qu'elle est reliée à un type d'activité criminelle fomentée et organisée par deux ou plusieurs personnes agissant de concert». Sont aussi visés, enfin, à l'égard de tous ces crimes, le complot, la tentative, la complicité après le fait ou le fait de conseiller à une autre personne la perpétration.

177. Document de travail n° 47, rec. 1, 2 et 3, pp. 18-19.

178. *Op. cit.*, note 108. En cas de tentative, de complot ou de tentative d'instigation, la peine d'emprisonnement peut être inférieure à deux ans. Suivant les propositions contenues aux pp. 51-52 du rapport n° 31, la peine maximale à cet égard correspondrait à la moitié de la peine applicable au crime consommé.

179. (1985) 48 C.R. (3d) 341 (C.A. Ont.).

envisagée permettra d'obtenir des communications portant sur l'infraction en cause[180]», critère qui semble d'après lui équivaloir au critère du progrès de l'enquête[181].

La formulation retenue au sous-alinéa *a*)(ii) («l'interception fera avancer l'enquête sur le crime en question») correspond ainsi au critère maintenant établi en common law.

Elle vise en outre à clarifier l'ambiguïté entourant les «clauses omnibus» (appelées ici «clauses d'interception d'application générale») par suite de la décision récente de la Cour suprême dans l'affaire *R.* c. *Chesson*[182]. Pour expliquer la portée de la réforme proposée, il est indispensable de dire quelques mots au sujet de ces clauses ainsi que de l'interception des communications de personnes inconnues. Dans l'arrêt *Chesson*, la Cour avait établi que les communications privées d'une accusée, interceptées en vertu d'une clause d'application générale autorisant l'interception des communications de «personnes inconnues[183]», ne pouvaient être produites en preuve contre elle parce que son nom ne figurait pas dans l'autorisation. Selon la Cour, il aurait fallu nommer la personne, parce que la police connaissait son identité et savait, en demandant l'autorisation, que l'interception de ses communications privées, dans les circonstances, *pourrait faire* (et non *ferait*) avancer l'enquête.

À première vue, l'arrêt *Chesson* semble protéger les droits individuels, la requérante ayant réussi à faire empêcher l'admission en preuve des conversations interceptées. Mais pour certains auteurs, le critère qui aurait été établi dans cette décision n'est pas suffisamment rigoureux[184]. La Cour semble avoir conclu dans l'affaire *Chesson* que l'interception de communications privées peut être autorisée lorsqu'elle est *susceptible* de fournir des éléments de preuve.

Il n'est pas certain que ces critiques soient fondées sur une interprétation correcte de l'arrêt *Chesson*. En évoquant le critère «pourront être utiles», la Cour a peut-être simplement fait allusion aux renseignements que le demandeur doit donner lorsqu'il sollicite une autorisation, et non au critère devant être appliqué par le juge appelé à

180. *Id.*, p. 366.

181. *Ibid.* Ces observations ont été récemment approuvées par la Cour suprême du Canada dans l'arrêt récent *R.* c. *Duarte*, précité, note 159, p. 45. Le juge La Forest, au nom de la majorité, a résumé le critère énoncé dans l'affaire *Finlay* en disant que le juge donnant l'autorisation doit être «convaincu de l'existence de motifs raisonnables et probables de croire qu'une infraction a été commise ou est en voie de l'être et que l'autorisation sollicitée permettra d'obtenir une preuve de sa perpétration.»

182. [1988] 2 R.C.S. 148.

183. Pour que le mandat puisse autoriser légalement l'interception des communications privées d'une personne «inconnue», il doit renfermer une clause spécifique à cet effet. Par exemple, on peut y autoriser expressément l'interception des communications privées de «toute autre personne» résidant à l'une des adresses spécifiquement mentionnées. Nous utilisons ici l'expression «clause d'interception d'application générale» pour désigner ce que l'on appelle parfois «clause omnibus». Les tribunaux se sont vus forcés de déterminer les conditions de validité de ce type de clause. L'un des principaux problèmes consistait à savoir si l'utilisation de celles-ci est limitée à l'interception des communications privées de personnes dont on est certain de l'existence sans toutefois connaître leur identité. Dans l'arrêt *R.* c. *Samson* (1983), 36 C.R. (3d) 126, la Cour d'appel de l'Ontario a conclu à l'inopportunité de restreindre ainsi l'application de ces clauses; celles-ci pourraient donc autoriser l'interception des communications privées de personnes dont l'existence ne s'est révélée à la police qu'après l'obtention de l'autorisation.

184. Voir ROSENBERG, *loc. cit.*, note 173.

statuer sur la demande. De toute façon, l'incertitude justifie à notre sens une entreprise de clarification et de réforme. Le critère selon lequel le juge doit rendre sa décision suivant le sous-alinéa *a*)(ii) est plus rigoureux que celui qui, au dire de certains auteurs, aurait été formulé par la Cour suprême dans l'affaire *Chesson*[185]. Comme dans d'autres domaines, la reconnaissance judiciaire de pouvoirs à la police devrait être fondée sur une probabilité raisonnable d'activité criminelle, non sur de simples soupçons ou possibilités. C'est pourquoi l'on exige au sous-alinéa 133*a*)(ii) que le juge soit convaincu qu'il existe des motifs raisonnables de croire que l'interception de la communication privée *fera* avancer l'enquête.

Le sous-alinéa 133*a*)(ii) restreint la portée des clauses d'interception d'application générale. En effet, l'obtention d'un mandat visant des personnes «inconnues» (que, par souci de clarté, nous préférons qualifier de «non identifiées») est subordonnée à la même condition que celle d'un mandat visant des personnes «connues» (désormais qualifiées de «identifiées») : l'interception des communications privées doit faire avancer l'enquête. Il faut que la police connaisse au moment de la demande l'existence de la personne non identifiée, et non qu'elle l'apprenne plus tard. Nous avons en fait retenu le raisonnement du juge de première instance Borins dans l'affaire *R.* c. *Samson (No. 4)*[186], plutôt que le point de vue exprimé par la Cour d'appel de l'Ontario[187], qui a infirmé sa décision.

L'alinéa *b*) reprend la règle actuellement établie à l'alinéa 186(1)*b*) du *Code criminel*.

L'alinéa *c*) s'inspire de l'alinéa 186(1)*a*) du *Code criminel*, suivant lequel le juge peut autoriser l'interception s'il est convaincu que «l'octroi de cette autorisation

185. Il est à souligner que cette condition est moins rigoureuse que celle proposée dans le document de travail n° 47. Suivant les recommandations faites à l'époque (rec. 26 et 27, p. 47), le juge ne devrait autoriser l'interception de communications privées que s'il existe des motifs raisonnables de croire que l'interception pourrait faire avancer l'enquête sur l'infraction en cause, en raison de la *participation* de la personne à cette infraction. (La Commission avait alors soutenu vigoureusement que l'établissement d'un critère moins rigoureux irait sans doute à l'encontre des obligations du Canada en vertu du *Pacte international relatif aux droits civils et politiques*, et même à l'encontre de certaines dispositions de la *Charte canadienne des droits et libertés*. — Voir le document de travail n° 47, pp. 39-40 —. Toutefois, ces arguments avaient été présentés dans un passage consacré à la restriction des interceptions. Nous avons tenu compte de ces observations dans la rédaction de l'article 140 des présentes dispositions, où est proposée une liste de conditions que le juge peut imposer afin que seules les communications privées utiles à l'enquête soient interceptées). Toutefois, l'emploi du mot «participation» soulevait une difficulté. Certaines des personnes consultées ont souligné que ce critère était trop restrictif, puisqu'il peut être nécessaire d'intercepter les communications d'une personne aucunement mêlée à la perpétration d'une infraction; par exemple, un intermédiaire innocent qui transmet ou reçoit des renseignements de la part d'une personne qui, elle, participe à la perpétration du crime.

186. (1982) 37 O.R. (2d) 26 (Cour de comté).

187. Précité, note 183.

servirait au mieux l'administration de la justice[188]». Dans le document de travail n° 47[189], nous avions souligné que, vu la gamme très étendue de crimes à l'égard desquels l'autorisation peut être obtenue, l'interception de communications ne devrait pas être possible à l'égard de faits sans gravité. Cela explique la teneur de l'alinéa *c*). Pour décider si la délivrance du mandat servirait au mieux l'administration de la justice, le juge serait obligé en vertu de cette disposition de tenir compte de la gravité des faits et des circonstances du crime faisant l'objet de l'enquête. On exige en fait qu'il s'assure dans chaque cas que la nécessité de protéger la société contre des actes criminels nuisibles l'emporte en l'occurrence sur le droit de la personne en cause à l'intimité de sa vie privée.

Le paragraphe 133(2) vise à régler une difficulté d'interprétation susceptible de se présenter lorsque les autorités demandent un mandat et qu'une personne qui sera partie à des communications privées est disposée à consentir à l'interception de celles-ci. C'est que d'aucuns pourraient conclure du libellé du paragraphe 133(1) que les motifs y énoncés excluent en fait la délivrance d'un mandat dans de telles circonstances. Lorsque la police a obtenu le consentement d'un des interlocuteurs, il lui serait, d'après cette argumentation, impossible d'obtenir une autorisation judiciaire en vertu du présent régime, parce que, aucune autre méthode d'investigation (recours à des indicateurs sans écoute électronique ni enregistrement, par exemple) n'ayant été essayée, le juge n'est pas fondé à décerner un mandat. Or, à notre avis, le fait qu'un agent de la paix ou son représentant est partie aux communications privées ne devrait pas avoir pour effet d'exclure la délivrance d'un mandat. D'où le paragraphe 133(2), qui supprime toute incertitude à cet égard.

Bureau d'un avocat

134. Dans le cas où le mandat demandé concerne l'interception de communications privées au bureau d'un avocat, ou à tout endroit qui sert ordinairement à l'avocat pour la tenue de consultations avec des clients, le juge en refuse la délivrance s'il n'est pas en outre convaincu qu'il existe des motifs raisonnables de croire que l'avocat, l'un de ses associés, une personne ayant des liens avec lui ou l'un de ses employés :

***a*) soit participe à la perpétration du crime faisant l'objet de l'enquête ou est sur le point d'y participer;**

188. Dans l'arrêt *R.* c. *Finlay and Grellette*, précité, note 179, p. 366, le juge d'appel Martin fait au sujet de ce critère les observations suivantes, également applicables à la même expression utilisée dans les dispositions ici proposées :

> [TRADUCTION]
> Le juge doit [. . .] être convaincu que la délivrance de l'autorisation «servirait au mieux l'administration de la justice». Les termes utilisés par le législateur, comme nous l'avons indiqué, obligent le juge à mettre en balance d'un côté la nécessité d'une application efficace de la loi, de l'autre le respect de l'intimité de la vie privée. À mon sens, le juge doit à tout le moins être convaincu qu'il existe des motifs raisonnables de croire que l'interception projetée permettra d'obtenir des communications touchant l'infraction en cause (y compris bien sûr le complot, la tentative ou l'incitation en vue de la commission de cette infraction).

189. Recommandation 19, pp. 36-38.

***b*) soit est la victime du crime faisant l'objet de l'enquête et a lui-même demandé l'interception.**

Code criminel, par. 186(2)

COMMENTAIRE

Voir le commentaire qui accompagne l'article 135.

Domicile d'un avocat

135. Dans le cas où le mandat demandé concerne l'interception de communications privées au domicile d'un avocat, le juge en refuse la délivrance s'il n'est pas en outre convaincu qu'il existe des motifs raisonnables de croire que l'avocat ou une personne qui habite à son domicile :

***a*) soit participe à la perpétration du crime faisant l'objet de l'enquête ou est sur le point d'y participer;**

***b*) soit est la victime du crime faisant l'objet de l'enquête et a lui-même demandé l'interception.**

Code criminel, par. 186(2)

COMMENTAIRE

L'interception de communications privées est fortement susceptible de battre en brèche la protection juridique accordée à l'égard du secret professionnel de l'avocat, qui constitue un élément important de notre droit.

Le paragraphe 186(2) du *Code criminel* comporte des dispositions particulières sur la protection du privilège des communications entre l'avocat et son client. Par souci de clarté, nous l'avons scindé en deux dispositions distinctes (les al. 134*a*) et 135*a*)). L'alinéa 134*a*) traite de l'interception de communications privées au bureau de l'avocat ou à tout endroit utilisé habituellement par celui-ci pour la tenue de consultations avec des clients, tandis que l'alinéa 135*a*) est consacré aux interceptions effectuées à son domicile. Dans les deux cas, la protection ne s'étend pas à l'avocat qui est mêlé au crime faisant l'objet de l'enquête.

Quant aux alinéas 134*b*) et 135*b*), ils établissent une règle nouvelle. Leur insertion tient à la nécessité d'obtenir un mandat même lorsqu'une personne qui est partie aux communications privées consent à l'interception de celles-ci. Sans ces dispositions, nul avocat ne pourrait obtenir l'aide de la police pour enregistrer les appels téléphoniques ou les autres communications d'un extorqueur, ou pour en déterminer l'origine. Les alinéas 134*b*) et 135*b*), rédigés avec toute la circonspection souhaitable, permettent donc à la police, à la demande d'un avocat qui est la personne visée par un crime, d'obtenir un mandat en vue de procéder à l'interception des communications privées au bureau ou au domicile de cet avocat.

Soulignons que l'article 140 permet au juge d'imposer des conditions destinées à atténuer le caractère attentatoire de l'interception. Dans le cas de l'écoute électronique effectuée au domicile ou au bureau d'un avocat, nous pensons que le juge imposera normalement des conditions propres à garantir que, dans la mesure du possible,

l'interception se limite aux communications pertinentes. Par exemple, il pourrait exiger la surveillance humaine, au sujet de laquelle on trouvera des explications dans le commentaire qui accompagne l'article 140.

Lieux indéterminés

136. Dans le cas où le mandat demandé concerne l'interception de communications privées dans des lieux indéterminés, le juge en refuse la délivrance à moins que la personne dont les communications privées doivent être interceptées ne soit identifiée dans le mandat.

Document de travail n° 47, rec. 29

COMMENTAIRE

Les tribunaux, faute de balises législatives, ont dû s'efforcer d'établir les limites des clauses autorisant l'interception de communications privées dans des lieux non désignés spécifiquement au mandat, soit dans tout lieu où une personne dont les communications privées peuvent être interceptées en vertu du mandat séjourne, ou qu'elle utilise. Ils ont jugé que ces clauses ne sont valides qu'à l'égard de personnes identifiées. Sinon, les pouvoirs d'écoute électronique conférés à la police seraient à toutes fins utiles illimités.

Cette disposition, conforme aux recommandations faites dans le document de travail n° 47[190], ne permet le recours aux clauses d'interception d'application générale (c'est l'expression employée dans le régime proposé ici) qu'à l'égard de personnes identifiées dans le mandat.

Personnes non identifiées

137. Dans le cas où le mandat demandé concerne l'interception de communications privées de personnes qui ne peuvent être individuellement identifiées, le juge en refuse la délivrance à moins que les lieux où les communications doivent être interceptées ne soient déterminés dans le mandat.

Document de travail n° 47, rec. 28

COMMENTAIRE

Cette disposition règle sans équivoque la question de savoir si une clause d'interception d'application générale peut permettre l'interception des communications privées de personnes non identifiées. Elle reprend la règle actuelle, suivant laquelle il est illégal d'autoriser l'interception des communications privées de personnes inconnues à des endroits indéterminés[191]. Mais, afin d'assouplir les modalités d'exécution, l'article 157 permet la modification du mandat au cours de l'enquête, pour désigner précisément des endroits qui ne l'étaient pas à l'origine.

190. Recommandation 29, pp. 47-48.

191. Voir *R.* c. *McLeod* (1988), 63 C.R. (3d) 104 (C.A. T.N.-O.).

Entrée clandestine

138. Sur requête du demandeur, le juge peut, dans le mandat, autoriser l'entrée clandestine dans un lieu quelconque, en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, s'il est convaincu qu'il existe des motifs raisonnables de croire que le recours à des méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offre peu de chances de succès.

Document de travail n° 47, rec. 31 et 32

COMMENTAIRE

Le *Code criminel*, nous l'avons vu, n'autorise expressément que l'interception des communications privées. Il ne permet pas en toutes lettres aux policiers d'entrer dans un lieu en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance. Mais la Cour suprême du Canada, dans les arrêts *Lyons* c. *La Reine*[192] et *Renvoi sur l'écoute électronique*[193], a décidé que le pouvoir d'intercepter des communications privées emporte celui d'entrer clandestinement dans un lieu pour y installer un dispositif de surveillance. Ces décisions font encore autorité même depuis l'entrée en vigueur de la Charte[194].

Qu'il soit nécessaire et légitime de permettre l'entrée clandestine en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, nous le reconnaissons volontiers. Mais comme ce pouvoir n'existe présentement que dans la mesure où il a été inféré de décisions judiciaires, sa réglementation s'avère inadéquate. Or, le fait d'entrer chez une personne sans son consentement porte sérieusement atteinte à son intimité; partant, cette démarche devrait être subordonnée à l'obtention au préalable d'une autorisation judiciaire expresse; c'est l'objet de l'article 138. Pour autoriser l'entrée clandestine dans des lieux privés (la résidence ou la voiture d'une personne, par exemple), le juge doit être convaincu qu'il existe des motifs raisonnables de croire que le recours à des méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offre peu de chances de succès. Cela permet à notre avis de réaliser un juste équilibre entre la prévention du crime et la protection de l'intimité de la vie privée, et ce, d'une manière conforme aux exigences de la primauté du droit.

Ordonnance d'aide

139. (1) Le juge qui décerne un mandat peut, sur requête du demandeur, ordonner à toute personne qui fournit un service de communication ou de télécommunication, au propriétaire du lieu où un dispositif de surveillance doit être installé, ou à toute personne qui administre ce lieu ou s'en occupe,

192. [1984] 2 R.C.S. 631.

193. [1984] 2 R.C.S. 697.

194. Voir *R.* c. *Chesson*, précité, note 182.

d'apporter son aide; il précise la nature de celle-ci dans l'ordonnance.

Indemnisation

(2) L'ordonnance peut prévoir l'indemnisation raisonnable de la personne dont l'aide est ainsi requise.

Document de travail n° 47, rec. 75

Forme de l'ordonnance

(3) L'ordonnance est rédigée selon la formule prescrite et porte la signature du juge qui l'a rendue.

Contenu

(4) Elle est adressée à une personne ou à un organisme nommément désigné et contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) la nature de l'aide requise;**

***c*) le lieu et la date où l'ordonnance est rendue;**

***d*) le nom et le ressort du juge.**

Mise en garde

(5) L'ordonnance met en garde la personne ou l'organisme que le fait de ne pas s'y conformer constitue un crime visé à l'alinéa 121*b*) (transgression d'une ordonnance judiciaire) du projet de code criminel de la CRD.

COMMENTAIRE

Dans le document de travail n° 47 (pp. 106-107), nous signalions des cas où la police, malgré l'obtention d'une autorisation, n'avait pu effectuer l'interception d'une communication privée, faute d'avoir pu obtenir l'aide requise de l'entreprise de télécommunications concernée. L'article 139 remédie à ce problème. Le paragraphe (1) donne au juge le pouvoir d'ordonner expressément aux personnes compétentes d'aider la police à installer le dispositif de surveillance.

Le paragraphe (2) ne nécessite pas d'explications.

Les paragraphes (3) et (4) établissent la forme et le contenu de l'ordonnance d'aide; leurs dispositions sont explicites.

La personne qui refuserait de se conformer à l'ordonnance se rendrait coupable du crime prévu à l'alinéa 121*b*) du projet de code criminel de la Commission. Dans ces conditions, il nous semble opportun que l'ordonnance contienne une mise en garde à cet effet; c'est ce que prévoit le paragraphe (5).

Atténuation du caractère attentatoire

140. Le juge qui décerne un mandat peut y insérer l'une ou plusieurs des clauses suivantes :

***a*) l'interception doit en tout temps faire l'objet d'une surveillance humaine;**

***b*) autant qu'il est raisonnablement possible, seules les communications des personnes individuellement identifiées**

dans le mandat ou visées par une clause d'interception d'application générale seront interceptées;

c) **dans le cas où des communications privées doivent être interceptées à un téléphone que le public peut utiliser, l'interception fera l'objet d'une surveillance humaine en tout temps et, sauf impossibilité matérielle, l'appareil fera l'objet d'une surveillance visuelle en tout temps;**

d) **des mesures raisonnables seront prises pour éviter l'interception de communications entre des personnes dont les communications sont confidentielles ou privilégiées, selon les précisions données par le juge à cet égard, le cas échéant;**

e) **l'interception prendra fin lorsqu'aura été atteint le but de l'enquête énoncé dans la demande de mandat;**

f) **dans le cas où des communications privées sur une ligne à plusieurs abonnés doivent être interceptées, l'interception fera en tout temps l'objet d'une surveillance humaine;**

g) **le cas échéant, l'entrée clandestine autorisée dans un lieu devra ou ne devra pas être faite par certains moyens;**

h) **le juge devra être périodiquement informé de l'identité de toute personne dont les communications privées sont interceptées sans qu'elle soit individuellement identifiée dans le mandat;**

i) **le juge devra être périodiquement informé des lieux qui ne sont pas déterminés dans le mandat mais où des communications privées sont interceptées;**

j) **toute demande visant le renouvellement ou la modification du mandat, ou la délivrance d'un mandat distinct ayant trait à la même enquête, devra être présentée au juge qui a décerné le mandat initial;**

k) **toute autre clause que le juge estime opportune en vue de limiter le plus possible l'interception de communications privées ne présentant aucun intérêt pour l'avancement de l'enquête.**

Document de travail n° 47, rec. 22, 23, 25, 30 et 36
Code criminel, par. 186(3)

COMMENTAIRE

Cet article porte sur la restriction des interceptions : il importe «de n'intercepter et de n'enregistrer que les communications se rapportant à l'enquête[195]».

195. Document de travail n° 47, p. 38.

À l'heure actuelle, le *Code criminel* n'indique pas expressément au juge suivant quels critères il doit décider s'il y a lieu d'ajouter au mandat certaines clauses afin de restreindre l'interception ou l'enregistrement des communications privées.

Dans le document de travail n° 47 (pp. 39-40), nous avions dénoncé cet état de choses. L'absence de telles dispositions dans le Code actuel, disions-nous, pourrait être interprétée comme un manquement de la part du Canada aux obligations qui lui incombent en matière de protection de l'intimité de la vie privée au regard du droit international et peut-être même de la *Charte canadienne des droits et libertés*. Mais nous avions tenu compte de l'argument suivant lequel la restriction obligatoire des interceptions serait trop coûteuse et risquerait de nuire aux enquêtes criminelles. Un compromis avait par conséquent été préconisé : les juges se verraient conférer le pouvoir discrétionnaire d'imposer certaines conditions restrictives s'ils le jugent nécessaire.

Les conditions énumérées à l'article 140 sont très diversifiées. Celle qui a la portée la plus large figure à l'alinéa *k*). D'autres sont beaucoup plus précises. Ainsi, l'alinéa *c*) porte sur l'interception des communications à une cabine téléphonique.

Ces conditions sont pour la plupart explicites. Précisons simplement que l'alinéa *a*) permet au juge d'exiger que les communications privées fassent l'objet d'une surveillance humaine. Cela signifie qu'une personne doit alors écouter la communication pendant qu'elle a lieu et décider d'une part s'il est justifié de continuer à l'écouter, et d'autre part s'il y a lieu de l'enregistrer. Cette condition, lorsqu'elle est imposée, empêche donc l'écoute prolongée qui serait inutile et l'enregistrement de communications privées sans intérêt pour l'enquête. Quant à l'alinéa *d*), il vise à empêcher l'enregistrement de communications privilégiées ou confidentielles. Le juge estime-t-il que les communications devant être interceptées sont susceptibles d'être confidentielles ou privilégiées, il peut alors ordonner la prise de mesures raisonnables pour que les communications qui le sont ne soient pas interceptées. Cette protection s'applique non seulement à l'égard du secret professionnel de l'avocat, mais aussi à d'autres communications pouvant être protégées, telles les conversations entre mari et femme. On pourra ainsi mieux protéger qu'à l'heure actuelle la totalité des communications privilégiées (même celles qui ne sont pas en ce moment reconnues comme telles en droit, mais pourraient l'être un jour).

Forme du mandat

141. Le mandat est rédigé selon la formule prescrite et porte la signature du juge qui le délivre.

Contenu

142. Le mandat contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le crime faisant l'objet de l'enquête;**

***c*) le genre de communication privée susceptible d'être interceptée;**

***d*) une description générale des moyens qui pourront être utilisés pour réaliser l'interception;**

***e*) la désignation la plus précise possible des personnes ou des catégories de personnes dont les communications privées pourront être interceptées;**

***f*) les lieux, s'ils sont déterminés, où des communications pourront être interceptées;**

***g*) les lieux où l'entrée clandestine est autorisée;**

***h*) les clauses particulières insérées par le juge;**

***i*) la date où le mandat expire;**

***j*) le lieu et la date où le mandat est délivré;**

***k*) le nom du juge et son ressort.**

Document de travail n° 47, rec. 26, 27, 28 et 29
Code criminel, par. 186(4)

COMMENTAIRE

C'est au paragraphe 186(4) du *Code criminel* que l'on trouve les renseignements devant obligatoirement figurer dans l'autorisation : le crime relativement auquel des communications privées pourront être interceptées; le genre de communications privées susceptibles d'être interceptées; l'identité, si elle est connue, des personnes dont les communications privées doivent être interceptées; une description générale, si cela est possible, des lieux où les communications privées pourront être interceptées; une description générale de la façon dont les communications pourront être interceptées; les conditions que le juge estime opportun de fixer dans l'intérêt public; enfin, une période de validité d'une durée maximale de soixante jours.

Malgré quelques modifications répondant à un souci de clarté et d'uniformité, les renseignements devant figurer dans le mandat décerné en vertu de la présente partie correspondent dans une large mesure à ceux qui sont exigés au paragraphe 186(4). Cela dit, des renseignements supplémentaires devront être fournis, afin qu'il soit tenu compte de tous les pouvoirs qu'exerce le juge relativement à la délivrance du mandat. Ainsi, l'emploi du terme «catégorie de personnes» à l'alinéa 142*e*) correspond au pouvoir du juge d'autoriser l'insertion d'une clause d'interception d'application générale visant des personnes. D'autre part, l'alinéa 142*g*) prévoit que si le juge décide d'autoriser une entrée clandestine en vue de l'installation, la réparation ou l'enlèvement d'un dispositif de surveillance, le mandat doit contenir une clause à cet effet. Enfin, le mandat doit indiquer les endroits — si on les connaît — où l'interception de communications privées doit avoir lieu; il est donc logique qu'il précise également les endroits où l'entrée clandestine est autorisée.

Date d'expiration

143. Le juge fixe dans le mandat une date d'expiration qui n'est pas postérieure de plus de soixante jours à la date de délivrance.

Code criminel, al. 186(4)*a*)

COMMENTAIRE

Suivant l'alinéa 186(4)*e*) du Code actuel, la durée maximale de l'autorisation est de soixante jours. Cette règle est conservée à l'article 143.

3. Renouvellement du mandat

OBSERVATIONS PRÉLIMINAIRES

Bien que le mandat autorisant l'interception soit valide jusqu'à la date d'expiration qui y est indiquée (le délai maximum étant de soixante jours), il peut arriver que la prolongation de l'enquête rende ce délai insuffisant. C'est pourquoi les dispositions qui suivent, à l'instar des paragraphes 186(6) et (7) du *Code criminel*, prévoient la possibilité de faire renouveler le mandat autorisant l'interception.

Demandeur

144. Le demandeur initial, de même que tout autre agent désigné par les mêmes autorités, peut demander le renouvellement du mandat.

COMMENTAIRE

L'article 144 indique qui peut présenter la demande de renouvellement. D'abord, l'agent désigné qui a présenté la demande initiale peut demander le renouvellement du mandat. Mais de plus, serait aussi recevable tout autre agent désigné à cette fin par le même ministre fédéral ou provincial qui a désigné le demandeur initial.

Mode de présentation

145. (1) La demande est présentée unilatéralement, en personne et à huis clos, de vive voix ou par écrit.

Forme de la demande écrite

(2) La demande présentée par écrit doit l'être selon la formule prescrite.

Document de travail n° 47, rec. 18
Code criminel, par. 186(6)

COMMENTAIRE

Le paragraphe 186(6) du Code actuel ne donne qu'une description sommaire des formalités à remplir pour obtenir le renouvellement de l'autorisation. La présente disposition indique de façon plus précise la forme de la demande et le mode de présentation.

Délai de présentation

146. La demande de renouvellement du mandat est présentée avant l'expiration de celui-ci, à un juge de la province où il a été décerné.

Code criminel, par. 186(6)

COMMENTAIRE

Cet article précise, en toute logique, que la demande de renouvellement doit être présentée avant l'expiration du mandat. Il indique aussi à qui elle doit l'être.

Présentation de la demande

147. (1) La demande est présentée par le demandeur; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu

(2) Elle contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le lieu et la date où elle est présentée;**

***c*) le crime faisant l'objet de l'enquête;**

***d*) les raisons invoquées à l'appui de la demande;**

***e*) tous les détails, y compris la date et l'heure, des interceptions effectuées ou tentées en vertu du mandat;**

***f*) tout renseignement obtenu grâce à une interception effectuée en vertu du mandat;**

***g*) la liste de toutes les demandes de renouvellement du mandat déjà présentées, avec la date de chacune d'entre elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;**

***h*) le fait que le mandat à renouveler comporte ou non une clause d'interception d'application générale;**

***i*) le cas échéant, la mention qu'une demande de modification est présentée, conjointement avec la demande de renouvellement, afin d'ajouter de nouvelles personnes dont les communications privées pourraient être interceptées, ou de nouveaux lieux où des communications privées pourraient être interceptées;**

***j*) la période pour laquelle le renouvellement est demandé;**

***k*) si le demandeur veut faire renouveler le mandat pour une période de plus de trente jours, les motifs donnant lieu de croire que ce délai s'impose.**

Document de travail n° 47, rec. 18
Code criminel, par. 186(6)

COMMENTAIRE

Suivant le paragraphe (1), le renouvellement du mandat est régi par la même procédure que la demande initiale, notamment quant au mode de présentation de la demande et à l'attestation de son contenu par l'affidavit d'un agent de la paix.

Le paragraphe (2) indique les renseignements dont la présence est obligatoire dans la demande de renouvellement. Les alinéas *d*), *j*), *e*), *f*) et *g*) correspondent aux actuels alinéas 186(6)*a*), *b*) et *c*) du *Code criminel*; mais plutôt que de reprendre la mention vague «autres renseignements que le juge peut exiger» que contient la disposition

actuelle, nous avons préféré fournir des précisions. L'alinéa *h*) oblige l'agent de la paix à indiquer si le mandat à renouveler renfermait une «clause d'interception d'application générale»; le juge doit être informé de ce fait pour déterminer s'il y a lieu de désigner dans le mandat renouvelé des personnes ou des lieux qui auparavant ne l'étaient pas. (L'article 150 exige que ces personnes ou ces lieux soient précisément désignés dans le mandat renouvelé, lorsque c'est possible.) L'alinéa *i*) se rapporte à l'alinéa 157*d*), qui permet de modifier le mandat pour y ajouter de nouvelles personnes ou de nouveaux lieux non visés par le mandat initial. Lorsque l'on veut procéder à une telle modification à l'étape du renouvellement, il faut le préciser dans la demande. L'alinéa *k*) est lui aussi nouveau; il a trait au pouvoir conféré au juge par le paragraphe 151(2), soit celui de renouveler le mandat pour une période plus longue que le délai habituel de trente jours.

Règles de procédure

148. Les articles 10 et 11 s'appliquent à la demande de renouvellement de mandat.

COMMENTAIRE

En vertu de cette disposition, les règles qui régissent l'audition et l'enregistrement des témoignages au moment de la demande de mandat autorisant l'interception de communications privées s'appliquent également à la demande de renouvellement de ce mandat.

Motifs de renouvellement

149. Si le juge saisi de la demande est convaincu que les motifs sur lesquels reposait la délivrance du mandat existent toujours, il peut renouveler le mandat en y apposant un visa à cet effet, revêtu de sa signature, et indiquant le lieu et la date du renouvellement.

Code criminel, par. 186(7)

COMMENTAIRE

De toute évidence, la demande de renouvellement ne devrait être accueillie que si les motifs ayant amené la délivrance du mandat sont toujours valables. Suivant le paragraphe 186(7) du *Code criminel*, le juge saisi d'une demande de renouvellement peut y faire droit s'il est convaincu que l'une ou l'autre des conditions prévues au paragraphe 186(1) pour la délivrance du mandat existe encore. Le principe a été maintenu à l'article 149, mais nous l'avons formulé en termes plus clairs. Vraisemblablement, le juge procédera au renouvellement en indiquant simplement sur le mandat initial la nouvelle date d'expiration et en y apposant sa signature; le lieu et la date du renouvellement doivent aussi être mentionnés.

Clause d'interception d'application générale

150. Le mandat comportant une clause d'interception d'application générale ne peut être renouvelé à moins d'être modifié, suivant les formalités prévues, de façon que soient

désignés précisément les personnes ou les lieux qui étaient visés par la clause d'interception d'application générale et qui sont connus au moment de la demande de renouvellement.

COMMENTAIRE

Lorsque le mandat autorise l'interception des communications privées de personnes non identifiées ou permet l'interception de communications privées en des lieux indéterminés, il y a lieu, d'après la jurisprudence, de désigner précisément ces personnes ou ces lieux au moment où l'on demande le renouvellement du mandat, si cela est possible[196]. Nous donnons une forme législative à ce principe à l'article 150.

Nouvelle date d'expiration

151. (1) Le mandat expire trente jours après la date du renouvellement.

Extension de la période de renouvellement

(2) Le juge peut toutefois renouveler le mandat pour une période de plus de trente jours, mais d'au plus soixante jours à compter de la date du renouvellement, s'il est convaincu qu'il faudra sans doute plus de trente jours pour terminer l'enquête et qu'il serait matériellement impossible au demandeur de chercher à obtenir un autre renouvellement.

Document de travail n° 47, rec. 45
Code criminel, art. 186(7)

COMMENTAIRE

À l'heure actuelle, la durée totale de validité d'une autorisation (soixante jours) renouvelée une seule fois (soixante jours) peut atteindre cent vingt jours. Dans le document de travail n° 47[197], nous avions soutenu que, ces enquêtes policières revêtant un caractère de plus en plus attentatoire à mesure que le temps passe, il y avait lieu de les soumettre à une surveillance judiciaire plus étroite. Nous avions donc recommandé que soit ramené à trente jours la durée maximale de validité du mandat renouvelé; d'où les dispositions du paragraphe 151(1). Toutefois, pour donner une certaine latitude dans les cas où, manifestement, le délai de trente jours s'avère insuffisant, nous avions aussi proposé de conférer au juge le pouvoir d'accorder un délai d'une durée maximale de soixante jours lorsqu'une justification particulière a été démontrée. Le juge devrait alors mentionner sur le document les motifs de cette prolongation[198]; c'est la règle énoncée au paragraphe (2).

196. *R.* c. *Blacquiere* (1980), 57 C.C.C. (2d) 330 (C.S. Î.-P.-É.); *R.* c. *Crease* (1980), 53 C.C.C. (2d) 378 (C.A. Ont.).

197. Recommandation 45, p. 58.

198. *Ibid.*

4. Modification du mandat

OBSERVATIONS PRÉLIMINAIRES

Il est impossible en ce moment de modifier l'autorisation au stade du renouvellement. Une juridiction d'appel a conclu dans l'arrêt *R.* c. *Badovinac*[199] que l'on ne pouvait à cette occasion modifier ni assouplir les conditions fixées dans l'autorisation, à part bien entendu le délai d'expiration. Il faut pour cela obtenir une nouvelle autorisation, même pour des modifications d'importance mineure.

Dans le document de travail n° 47[200], nous avions proposé l'attribution au juge de pouvoirs plus étendus quant à la modification de l'autorisation, notamment pour lui permettre de désigner, avant l'expiration de celle-ci, des personnes ou des lieux qui ne l'étaient pas au moment de la demande initiale. Nous estimions aussi que des modifications mineures devraient pouvoir être apportées au moment du renouvellement : désignation précise de personnes et de lieux visés d'une manière générale dans l'autorisation; adjonction de lieux supplémentaires où les communications privées de personnes visées par le mandat pourraient être interceptées; description différente ou plus précise de personnes ou de lieux; modification des moyens d'interception ou désignation de nouveaux moyens; modification des crimes visés par l'autorisation initiale ou adjonction de crimes ayant un rapport manifeste avec ceux-ci et entrant dans le cadre de la même enquête, etc.[201]. Nous préconisions aussi que le juge soit investi du pouvoir d'insérer, à l'étape du renouvellement, des conditions destinées à restreindre l'interception de communications privées[202].

L'établissement de ce pouvoir de modification du mandat autorisant l'interception de communications privées présenterait deux avantages. D'une part, il aiderait les agents de la paix à mener leurs enquêtes à bien, et d'autre part il faciliterait l'exercice par le tribunal du rôle de surveillance restreint mais néanmoins important qui lui est réservé dans le régime proposé ici. Le renouvellement, il importe toutefois de le souligner, n'est pas le mécanisme approprié lorsqu'on veut modifier le mandat; il existe en effet des dispositions spécifiques pour cela et la modification du mandat devrait normalement être obtenue au moyen d'une demande distincte. Suivant les règles proposées dans la présente partie, donc, le renouvellement continuerait à ne servir qu'à prolonger la durée de validité du mandat.

Demandeur

152. Le demandeur initial, de même que tout autre agent désigné par les mêmes autorités, peut demander la modification du mandat.

199. (1977) 34 C.C.C. (2d) 65 (C.A. Ont.).

200. Voir les pages 47, 48, 58.

201. Document de travail n° 47, rec. 41 à 43, p. 58.

202. *Id.*, rec. 44, p. 58.

COMMENTAIRE

Tout comme la demande de renouvellement, la demande de modification du mandat doit être présentée par l'agent désigné qui a présenté la demande initiale, ou par tout autre agent désigné à cet effet par le même ministre fédéral ou provincial qui a désigné le demandeur initial.

Mode de présentation

153. (1) La demande est présentée unilatéralement, en personne et à huis clos, de vive voix ou par écrit.

Forme de la demande écrite

(2) La demande présentée par écrit doit l'être selon la formule prescrite.

Délai de présentation

154. La demande de modification du mandat est présentée, avant l'expiration de celui-ci, à un juge de la province où il a été décerné.

Présentation de la demande

155. (1) La demande est présentée par le demandeur; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu

(2) Elle contient les renseignements suivants :

***a*) le nom du demandeur;**

***b*) le lieu et la date où elle est présentée;**

***c*) le crime faisant l'objet de l'enquête;**

***d*) les modifications demandées;**

***e*) les motifs invoqués à l'appui de la demande;**

***f*) tous les détails, y compris la date et l'heure, des interceptions effectuées ou tentées en vertu du mandat;**

***g*) tout renseignement obtenu grâce à une interception effectuée en vertu du mandat;**

***h*) la liste de toutes les demandes de modification du mandat déjà présentées, avec la date de chacune d'entre elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas.**

Règles de procédure

156. Les articles 10 et 11 s'appliquent à la demande de modification du mandat.

COMMENTAIRE

En vertu de cet article, les dispositions prévues aux articles 10 et 11 du présent code quant à l'audition des témoignages et à la réception des éléments de preuve ayant

trait à la demande, ainsi qu'à l'enregistrement de celle-ci, s'appliquent à la demande de modification du mandat autorisant l'interception de communications privées.

Motifs justifiant la modification et nature de celle-ci

157. Le juge saisi d'une demande à cet effet peut apporter au mandat les modifications suivantes, s'il est convaincu que la modification demandée est liée à l'enquête sur le crime auquel le mandat a trait :

a) **description plus exacte, lorsque c'est possible, des personnes individuellement identifiées dont les communications privées peuvent être interceptées en vertu du mandat;**

b) **mention de l'identité de personnes antérieurement visées par une clause d'interception d'application générale mais identifiées par la suite, dont les communications privées pourraient être interceptées en vertu du mandat;**

c) **mention de lieux antérieurement visés par une clause d'interception d'application générale mais déterminés par la suite, où des communications privées pourraient être interceptées en vertu du mandat;**

d) **adjonction de nouvelles personnes dont les communications privées pourraient être interceptées ou de nouveaux lieux où des communications privées pourraient être interceptées, à la condition que le juge soit en outre convaincu de l'existence de motifs justifiant la délivrance d'un mandat à l'égard de ces personnes ou de ces lieux;**

e) **radiation de personnes dont les communications privées auraient pu être interceptées, ou de lieux où l'interception était autorisée;**

f) **autorisation d'effectuer une entrée clandestine dans un lieu en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, à la condition que le juge soit en outre convaincu de l'existence de motifs raisonnables de croire que les méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offrent peu de chances de succès;**

g) **modification des moyens pouvant être utilisés pour l'interception;**

h) **modification des clauses particulières ajoutées au mandat;**

i) **adjonction de toute clause susceptible d'être insérée par le juge qui décerne un mandat.**

Document de travail n° 47, rec. 29, 41 à 44

COMMENTAIRE

L'article 157 établit les limites du pouvoir de modification conféré au juge. La modification doit être liée à l'enquête sur le crime relativement auquel le mandat initial a été délivré. Elle ne saurait constituer un prétexte pour intercepter des communications dans le cadre d'une enquête sur un autre crime.

L'article 157 décrit aussi les modifications pouvant être apportées par le juge. Les alinéas *a*) et *b*) concernent les modifications visant à mieux identifier des personnes. Le premier permet de donner une description plus exacte de personnes déjà désignées dans le mandat. Par exemple, il pourra arriver que l'on ait identifié quelqu'un au moyen d'une description, mais sans le nommer. Une fois connue son identité, on pourra par une modification nommer cette personne dans le mandat.

L'alinéa *b*) permet quant à lui de mentionner l'identité de personnes qui n'avaient pas antérieurement été identifiées et dont l'interception des communications avait été autorisée en vertu d'une clause d'application générale. Ce faisant, la police serait en mesure de recourir à une clause d'interception d'application générale pour élargir la portée de l'écoute électronique quant aux lieux surveillés. (Le lecteur est prié de se reporter à ce sujet à l'article 136 et au commentaire qui l'accompagne.)

L'alinéa *c*) est le pendant de l'alinéa *b*) et permet la désignation précise de lieux antérieurement visés par une clause d'interception d'application générale.

L'alinéa *d*) permet, sous réserve de certaines garanties, d'utiliser le mécanisme de la modification pour ajouter des personnes dont les communications ne pouvaient être interceptées ou des lieux où l'on ne pouvait procéder à une interception en vertu du mandat initial. Cette solution nous paraît plus efficace et judicieuse que la nécessité d'obtenir un nouveau mandat pour l'adjonction de nouvelles personnes ou de nouveaux lieux.

L'alinéa *e*) permet la radiation de personnes dont les communications pouvaient être interceptées ou de lieux où l'interception était autorisée, et qui se sont révélés sans intérêt. Quant à l'alinéa *f*), il permet d'autoriser l'entrée clandestine dans un lieu en vue de l'installation, la réparation ou l'enlèvement d'un dispositif de surveillance.

Les alinéas *g*), *h*) et *i*) prévoient des modifications de types divers : modification des moyens pouvant être utilisés pour l'interception, modification des clauses insérées dans le mandat ou adjonction de nouvelles clauses.

Ces dispositions prévoient le recours au mécanisme de la modification pour changer les conditions d'exécution du mandat, mais il existe un autre moyen pour arriver aux mêmes fins. Si le demandeur estime qu'il serait préférable d'obtenir un nouveau mandat, il pourra en effet emprunter cette voie.

Forme de la modification

158. Le juge peut modifier le mandat en y apposant un visa à cet effet, revêtu de sa signature, ou en signant un avenant qu'il joint au mandat, et en indiquant le lieu et la date de la modification.

COMMENTAIRE

L'article 158 décrit la façon dont le juge peut procéder à la modification. Normalement, il devra apposer sur le mandat un visa de modification revêtu de sa signature. Mais si cela s'avère impossible (par exemple, lorsque les nouvelles clauses sont longues ou nombreuses), la modification pourra être énoncée sur un avenant signé par le juge et joint au mandat.

Ordonnance d'aide

159. Le juge saisi d'une demande de modification peut, sur requête du demandeur, rendre une ordonnance d'aide conformément à l'article 139.

SECTION II
DÉLIVRANCE DU MANDAT EN CAS D'URGENCE

OBSERVATIONS PRÉLIMINAIRES

L'actuel article 188 du *Code criminel* permet au juge de délivrer une autorisation spéciale si l'urgence de la situation exige que l'interception de communications privées commence avant qu'il soit possible, avec toute la diligence raisonnable, d'obtenir une autorisation suivant la procédure normale. Cette autorisation ne peut être demandée que par un agent de la paix spécialement désigné à cette fin et sa durée ne peut dépasser trente-six heures. Les articles 160 à 165 de la présente partie régissent la marche à suivre en cas d'urgence. Fortement inspirés des dispositions actuelles, ils s'en écartent dans certains cas, pour des raisons d'efficacité et de rigueur procédurale.

Motifs justifiant la délivrance en cas d'urgence

160. (1) Le juge désigné par le juge en chef de la Cour criminelle pour entendre des demandes de mandat en cas d'urgence dans la province où une communication doit être interceptée, et saisi d'une demande à cet effet, peut délivrer un mandat autorisant l'interception de cette communication privée au moyen d'un dispositif de surveillance, s'il est convaincu, d'une part, que la délivrance du mandat est justifiée et, d'autre part, qu'il existe des motifs raisonnables de croire que le mandat doit être obtenu d'urgence et que cela serait impossible, avec toute la diligence raisonnable, en vertu de la section I.

Motifs supplémentaires, demande par téléphone

(2) Le juge peut également délivrer un mandat demandé par téléphone ou à l'aide d'un autre moyen de télécommunication s'il est en outre convaincu qu'il existe des motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne.

Code criminel, par. 188(1) et (4)

COMMENTAIRE

Le paragraphe (1) indique devant quel juge la demande doit être présentée dans de telles circonstances. Aux termes du paragraphe 188(1) du Code actuel, la demande doit être faite à un «juge d'une cour supérieure de juridiction criminelle ou à un juge au sens de l'article 552». Le paragraphe 160(1) de notre code dispose plutôt que la demande doit être présentée au juge de la Cour criminelle désigné par le juge en chef de celle-ci pour entendre les demandes en cas d'urgence dans la province où la communication doit être interceptée. On aura compris que cette modification découle de l'adhésion de la Commission au principe de la création d'une cour criminelle unifiée (document de travail n° 59).

Le paragraphe (1) énonce en outre les motifs de délivrance du mandat actuellement prévus au paragraphe 188(2) du *Code criminel*. Outre les conditions applicables au mandat ordinaire, le juge doit être convaincu qu'il existe des motifs raisonnables de croire que le mandat doit être obtenu d'urgence et que cela serait impossible selon la procédure habituelle, malgré toute la diligence voulue.

Pour des raisons d'efficacité, nous avons modifié le droit actuel au paragraphe 160(2); celui-ci permet en effet au juge, en cas d'urgence, de recevoir une demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication[203].

Demandeur fédéral

161. (1) La demande peut être présentée par tout agent de la paix désigné par écrit par les autorités fédérales si le crime faisant l'objet de l'enquête peut donner lieu à des poursuites engagées à la demande des autorités fédérales et conduites par le procureur général du Canada ou en son nom.

Demandeur provincial

(2) La demande peut être présentée dans une province par tout agent de la paix désigné par écrit par les autorités de cette province si l'interception de la communication privée doit y avoir lieu et que le crime faisant l'objet de l'enquête puisse donner lieu à des poursuites engagées à la demande des autorités provinciales et conduites par le procureur général de la province ou en son nom.

Document de travail n° 47, rec. 20
Code criminel, par. 188(1)

COMMENTAIRE

L'article 161 donne aux agents de la paix désignés par les autorités fédérales ou provinciales le pouvoir de demander la délivrance d'un mandat de ce type[204]. Ce pouvoir est identique à celui qui leur est conféré pour l'obtention d'un mandat ordinaire.

203. La Commission avait fait une proposition en ce sens dans le document de travail n° 47; voir rec. 53, pp. 74-75.

204. Voir, à l'article 125, la définition des termes «désigné par les autorités fédérales» et «désigné par les autorités provinciales».

La présente disposition reprend aussi la règle actuelle suivant laquelle la désignation de ces agents de la paix se fait par écrit, par le ministre responsable.

Demande en personne ou par téléphone

162. (1) La demande est présentée en personne. Elle peut toutefois l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, s'il est matériellement impossible au demandeur de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement et à huis clos, de vive voix et sous serment.

Document de travail n° 47, rec. 53
Code criminel, par. 188(1)

COMMENTAIRE

Les dispositions du paragraphe (1) sont explicites. Le paragraphe (2) dispose que, contrairement aux autres demandes présentées à huis clos, celle-ci est faite de vive voix. Cela se justifie par l'urgence des situations visées dans la présente section.

Renseignements supplémentaires

163. Outre les renseignements prévus au paragraphe 131(2), la demande indique à la fois :

***a*) l'heure et la date où elle est présentée;**

***b*) les motifs donnant lieu de croire que le mandat doit être obtenu d'urgence et que cela serait impossible, avec toute la diligence raisonnable, en vertu de la section I;**

***c*) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne.**

Document de travail n° 47, rec. 53

COMMENTAIRE

On trouve énoncés à l'article 163 les renseignements complémentaires devant être fournis au juge par l'agent de la paix qui demande un mandat en cas d'urgence. Cette disposition doit être lue à la lumière du paragraphe 131(2), qui précise le contenu de la demande visant la délivrance d'un mandat ordinaire. Elle rend le droit plus clair en décrivant avec précision les indications devant être données par l'agent de la paix.

Règles de procédure

164. Les articles 10 à 12 s'appliquent à la demande de mandat visée par la présente section et les articles 134 à 142 s'appliquent à la délivrance du mandat.

COMMENTAIRE

Cette disposition rend expressément applicables à la délivrance des mandats en cas d'urgence les règles de procédure régissant l'audition des demandes de mandat et établies aux articles 10 à 12 du présent code de même que les garanties formulées aux articles 134 à 142 quant à la délivrance des mandats ordinaires en matière d'écoute électronique[205].

Expiration

165. (1) Le juge indique sur le mandat une date et une heure d'expiration, postérieures d'au plus trente-six heures à l'heure de la délivrance.

Renouvellement ou modification

(2) Le mandat ne peut être ni renouvelé ni modifié.

Code criminel, par. 188(2)

COMMENTAIRE

Conformément à la règle actuellement en vigueur, cet article dispose que le mandat délivré en cas d'urgence est valide pendant au plus trente-six heures. Il ne peut par ailleurs être ni renouvelé ni modifié. La police devra obtenir un mandat suivant la procédure normale si elle souhaite prolonger l'interception des communications privées.

Certaines dispositions de l'article 188 du *Code criminel* ont été omises. C'est le cas du paragraphe (3), suivant lequel, aux fins de la recevabilité de la preuve, l'interception d'une communication privée faite en vertu d'un tel mandat est réputée illégale à moins que le juge qui a donné l'autorisation — ou, en cas d'empêchement, un juge de la même juridiction — ne certifie que, si une demande d'autorisation ordinaire lui avait été présentée, il l'aurait accueillie. Comme, dans le régime proposé ici, le paragraphe 160(1) exige que le juge soit convaincu que la délivrance d'un mandat ordinaire serait justifiée, et vu l'établissement d'un dossier des procédures relatives à la demande, cette règle devient superflue.

Nous avons aussi écarté le paragraphe 188(5), où est posée la règle suivante : lorsqu'une autorisation a été délivrée suivant la procédure d'urgence après la délivrance d'une autorisation ordinaire, le juge du procès peut déclarer irrecevable la preuve obtenue grâce à cette deuxième autorisation si celle-ci «était fondée sur les mêmes faits et comportait l'interception des communications privées de la même ou des mêmes personnes, ou se rapportait à la même infraction, constituant le fondement de la demande de la première autorisation». Comme nous l'avons déjà expliqué, une autre partie de notre code de procédure pénale sera consacrée aux voies de recours et il y sera question de la recevabilité des éléments de preuve.

205. Il s'agit là d'un changement important. Nous avions souligné dans le document de travail n° 47 que l'un des grands problèmes, dans le moment, tient à l'absence de formalités d'enregistrement de la demande, ce qui empêche toute révision ultérieure. Nous avions donc recommandé (rec. 53, p. 75) l'enregistrement des demandes. C'est pourquoi l'article 11, qui exige l'enregistrement intégral des renseignements fournis par le demandeur, est repris ici par renvoi.

CHAPITRE IV
CONFIDENTIALITÉ

Documents confidentiels

166. Sont confidentielles les pièces suivantes :

***a*) le mandat;**

***b*) l'ordonnance de prolongation du délai de notification d'une interception ou d'une entrée clandestine;**

***c*) la demande de délivrance, de renouvellement ou de modification du mandat, la demande de prolongation du délai de notification d'une interception ou d'une entrée clandestine, ou encore l'enregistrement de la demande et sa transcription;**

***d*) tout élément de preuve ou témoignage reçu lors de l'audition de la demande, de même que la transcription de tout témoignage;**

***e*) l'ordonnance d'aide rendue conformément à l'article 139;**

***f*) l'ordonnance visant à rendre inintelligibles certains renseignements.**

Code criminel, par. 187(1)

COMMENTAIRE

En matière d'interception clandestine, le secret est essentiel. Aussi le législateur a-t-il voulu protéger le caractère confidentiel de tous les renseignements qui concernent l'autorisation. Il a ainsi établi au paragraphe 187(1) du *Code criminel* la règle de la confidentialité de tous les documents relatifs à la demande d'autorisation ordinaire, de renouvellement de l'autorisation ou de prolongation du délai pour aviser la personne de l'interception de ses communications privées. L'article 166 étend cette règle à d'autres pièces qui à notre sens devraient aussi être tenues pour confidentielles. L'utilisation du mot «mandat» dans cette disposition signifie qu'elle s'applique tant aux mandats décernés en cas d'urgence qu'aux autres. Il s'agit là d'un changement, car tel n'est pas le cas à l'heure actuelle, les demandes urgentes n'étant souvent appuyées d'aucun document et revêtant un caractère informel. Comme, dans le régime proposé ici, *toutes* les demandes doivent être enregistrées, nous avons jugé nécessaire d'étendre l'exigence de la confidentialité à celles qui sont présentées en cas d'urgence. Qui plus est, cette disposition présente l'avantage, par rapport à l'actuelle, d'indiquer clairement et précisément les documents concernés.

Ordonnance aux fins de rendre inintelligible un renseignement

167. (1) Le juge peut, sur requête du demandeur présentée au moment de la demande de délivrance, de renouvellement ou de modification du mandat, ou de la demande visant à obtenir une ordonnance de prolongation du délai de notification d'une interception ou d'une entrée clandestine, rendre ou faire

rendre inintelligible tout renseignement figurant sur une pièce confidentielle.

Motifs justifiant l'ordonnance

(2) Le juge peut rendre ou faire rendre inintelligibles les renseignements en cause s'il est convaincu que leur divulgation aurait l'une ou l'autre des conséquences suivantes :

a) elle mettrait en péril la sécurité de quelque personne;

b) elle nuirait à une enquête policière en cours;

c) elle mettrait au jour certains procédés de la criminalistique qu'il y aurait lieu de garder secrets;

d) elle causerait un préjudice grave à des personnes innocentes.

Document de travail n° 47, rec. 50
Document de travail n° 56, rec. 9(5)

COMMENTAIRE

On trouvera dans le commentaire relatif à l'alinéa 194(2)*c*) des détails sur les règles actuelles régissant l'accès de l'accusé aux documents confidentiels placés dans le paquet scellé. Essentiellement, cette disposition les modifie en exigeant une communication intégrale des documents à l'accusé, sauf ordonnance contraire du tribunal. La personne qui se verra avisée de l'intention du poursuivant de produire la preuve d'une communication privée recevra en même temps *a*) une copie du mandat (renouvelé ou modifié, le cas échéant) et *b*) une copie des pièces afférentes à toute demande de délivrance, de renouvellement ou de modification du mandat.

Suivant la présente disposition, le juge peut empêcher la remise à une personne de copies intégrales de ces documents en ordonnant que certains renseignements y soient rendus inintelligibles[206].

Suivant le paragraphe (1), au moment de la présentation de la demande de délivrance, de renouvellement ou de modification du mandat, ou de la demande visant à obtenir une ordonnance de prolongation du délai de notification d'une interception ou d'une entrée clandestine, le demandeur peut, par requête, demander au juge qui doit délivrer le mandat de faire rendre inintelligible tout renseignement contenu dans une pièce confidentielle déposée ou constituée au cours de l'audition de la demande.

Pour faire droit à cette requête, le juge doit être convaincu que la divulgation des renseignements en cause aurait l'une des conséquences énumérées au paragraphe (2)[207]. L'alinéa *a*) s'appliquerait, par exemple, lorsque l'on veut garder secrète l'identité d'indicateurs de police. L'alinéa *b*) s'explique par le fait que les enquêtes policières ne se terminent habituellement pas au moment où l'on a intercepté des communications privées. Quant aux alinéas *c*) et *d*), la validité des motifs qui y sont indiqués, en ce qui a

206. Cet article est fondé dans une large mesure sur des recommandations faites dans le document de travail n° 47 (rec. 50, p. 73), ainsi que dans le document de travail n° 56 (rec. 9(5), p. 67).

207. Les motifs décrits aux alinéas *a*) et *b*) avaient été mentionnés dans le document de travail n° 56, rec. 9(5), p. 67.

trait au refus de l'accès aux documents contenus dans le paquet, a été reconnue dans des décisions récentes de tribunaux ontariens[208].

Si le juge rejette la requête, l'agent a deux possibilités. Il peut maintenir sa demande; il lui faudra alors, le moment venu, signifier à la personne dont les communications privées auront été interceptées un avis de son intention de les produire en preuve, et lui donner en même temps une copie de tous les renseignements se trouvant antérieurement dans le paquet scellé et devant être divulgués. Ou bien il peut retirer sa demande, s'il l'estime préférable.

Forme et contenu de l'ordonnance

168. L'ordonnance visant à rendre inintelligibles certains renseignements est rédigée selon la formule prescrite, est revêtue de la signature du juge qui la rend et contient les renseignements suivants :

a) le nom du demandeur;

b) les renseignements qui doivent être rendus inintelligibles;

c) le lieu et la date où elle est rendue;

d) le nom du juge et son ressort.

Copie du document

169. (1) Lorsqu'un renseignement doit être rendu inintelligible, le document sur lequel il figure est reproduit.

Renseignement rendu inintelligible sur la copie

(2) Le renseignement est rendu inintelligible sur la copie du document et demeure intact sur l'original.

COMMENTAIRE

Cet article énonce la marche à suivre une fois que le juge a décidé que certains renseignements devraient être rendus inintelligibles. Pour des raisons évidentes, les pièces originales devraient demeurer intactes. En application de l'article 169, si des renseignements doivent être rendus inintelligibles, ils le seront sur une copie faite dans ce but.

Paquet scellé

170. (1) Dès qu'il a statué sur la demande de délivrance, de renouvellement ou de modification du mandat, ou la demande visant à obtenir une ordonnance de prolongation du délai de notification d'une interception ou d'une entrée

208. Voir *R.* c. *Parmar* (1987), 34 C.C.C. (3d) 260, pp. 281-282 (H.C. Ont.); *R.* c. *Rowbotham* (1988), 63 C.R. (3d) 113, pp. 150-151 (C.A. Ont.).

clandestine, le juge place dans un paquet scellé les pièces suivantes :

***a*) l'original de toutes les pièces confidentielles;**

***b*) la copie des pièces sur laquelle un renseignement a été rendu inintelligible.**

Document de travail n° 47, rec. 18
Code criminel, par. 187(1)

Garde du paquet

(2) Ce paquet est gardé par le tribunal, en un lieu prescrit par le juge et auquel le public n'a pas accès.

Code criminel, par. 187(1)

COMMENTAIRE

Aux termes du paragraphe 187(1) du *Code criminel* actuel, tous les documents relatifs à la demande d'autorisation, de renouvellement de l'autorisation ou de prolongation du délai pour aviser la personne de l'interception de ses communications privées doivent (sauf l'autorisation elle-même) être placés dans un paquet scellé dès qu'une décision est prise au sujet de cette demande. Ce paquet doit être gardé par le tribunal, en un lieu auquel le public n'a pas accès ou en tout autre lieu que le juge peut autoriser.

Les paragraphes (1) et (2) sont pour l'essentiel semblables aux dispositions actuelles. Le premier confirme l'obligation du juge de placer dans un paquet scellé tous les renseignements relatifs à la demande. Certaines modifications ont cependant été apportées, en raison des formalités prévues dans le présent régime quant à la demande de mandat. Le présent article s'applique à toutes les demandes faites unilatéralement et à huis clos en application de la présente partie, y compris la demande présentée en cas d'urgence. Il s'applique aussi implicitement aux demandes d'ordonnances présentées à l'occasion d'une demande, notamment l'ordonnance d'aide et l'ordonnance visant à rendre inintelligibles certains renseignements. Il faut mettre dans le paquet l'original du mandat et de toute ordonnance rendue par le juge. La police conserverait une copie officielle du mandat ou de l'ordonnance pour les besoins de l'exécution, comme le prévoit l'article 171. Doit également être placée dans le paquet la copie de toute pièce sur laquelle des renseignements ont été rendus inintelligibles.

Le paragraphe (2) dispose que le paquet scellé est en tout temps gardé par le tribunal en un lieu auquel le public n'a pas accès.

Copie

171. Le demandeur peut garder une copie de toutes les pièces contenues dans le paquet scellé.

Document de travail n° 47, rec. 48*b*)

COMMENTAIRE

La Commission avait recommandé dans le document de travail n° 47[209] que l'agent spécialement désigné qui demande un mandat ou le renouvellement d'un mandat puisse

209. Recommandation 48*b*), p. 73.

conserver une copie conforme de tous les documents relatifs à la demande; l'article étend encore davantage la portée de cette recommandation. Cette disposition s'applique à toutes les demandes présentées unilatéralement et à huis clos sous le régime de la présente partie. Le demandeur doit disposer d'une copie des pièces et ce, pour deux raisons. En premier lieu, il doit pouvoir conserver un dossier complet de la procédure. En second lieu, il doit être en mesure d'exécuter ses fonctions convenablement. Par exemple, comme nous l'avons déjà souligné, l'agent peut difficilement exécuter le mandat s'il n'en possède pas de copie. D'autre part, il est indispensable de remettre une copie de toutes les pièces qui étayent la demande (le cas échéant, il s'agira de la reproduction sur laquelle des renseignements ont été rendus inintelligibles si une décision a été prise à cet effet) à la personne dont les communications privées ont été interceptées et à qui a été notifiée l'intention du poursuivant de produire la preuve des communications interceptées.

Interdiction

172. Il est interdit à quiconque d'ouvrir le paquet scellé ou d'en enlever le contenu, sauf suivant les directives d'un juge.

Code criminel, par. 187(1)

COMMENTAIRE

L'article 172 reprend une partie des dispositions que l'on trouve au paragraphe 187(1) du Code actuel. Il vise à garantir le caractère confidentiel du contenu du paquet.

Autre procédure

173. Le juge peut faire ouvrir le paquet scellé et en examiner le contenu s'il estime que cela est nécessaire pour statuer sur toute autre demande dont il est saisi.

Document de travail n° 47, rec. 48*a*)
Code criminel, par. 187(1)

COMMENTAIRE

L'article 173 précise les circonstances dans lesquelles le juge peut faire ouvrir le paquet scellé : lorsque cela est nécessaire en vue de statuer sur toute demande qui lui est présentée en application de la présente partie. La raison d'être de cette disposition saute aux yeux. Le juge saisi d'une demande de renouvellement du mandat, par exemple, devra avoir accès aux documents fournis à l'appui de la demande initiale pour être en mesure de rendre une décision éclairée[210].

210. Cet article découle également d'une recommandation faite dans le document de travail n° 47 (p. 54), suivant laquelle l'accès aux documents placés dans le paquet scellé devrait être permis lorsqu'une demande d'autorisation est présentée relativement à une enquête connexe.

Ouverture du paquet aux fins de transcription

174. Le juge peut faire ouvrir le paquet scellé et en faire retirer le contenu pour faire préparer une transcription des enregistrements sonores qui s'y trouvent.

COMMENTAIRE

Cet article permet au juge de faire ouvrir le paquet scellé pour la réalisation d'une transcription des enregistrements afférents à toute demande présentée sous le régime de la présente partie.

Nous n'avons toutefois pas repris au présent chapitre les dispositions de l'alinéa 187(1)*b*) du Code actuel, suivant lesquelles le contenu du paquet scellé ne peut être détruit que sur l'ordre du juge. C'était inutile puisque l'auteur de cette destruction serait coupable du crime d'entrave à l'administration de la justice prévu à l'article 125 du projet de code criminel de la Commission[211].

CHAPITRE V
INTERCEPTION ET ENTRÉE CLANDESTINE

Personnes pouvant effectuer l'interception

175. L'interception d'une communication privée, lorsqu'elle est autorisée par un mandat, peut être effectuée par :

a) toute personne désignée par les autorités fédérales, si le mandat a été décerné à un demandeur désigné par les autorités fédérales;

b) toute personne désignée par les autorités provinciales, si le mandat a été décerné à un demandeur désigné par les autorités provinciales;

c) toute personne qui est partie à la communication.

Code criminel, par. 186(5)

COMMENTAIRE

Le paragraphe 186(5) du *Code criminel* donne au solliciteur général du Canada ou au procureur général, selon le cas, le pouvoir de désigner des personnes habilitées à intercepter des communications privées en vertu d'une autorisation. Cette disposition est reprise aux alinéas *a*) et *b*) de l'article 175, avec les modifications propres à garantir que les désignations seront faites par le ministre fédéral ou provincial responsable. L'alinéa 175*c*), nouveau, est indispensable d'une part pour énoncer dans leur intégralité les règles applicables et, d'autre part, parce que, comme nous l'avons vu, l'interception clandestine de communications privées effectuée avec le consentement d'une partie est subordonnée, depuis la décision récente de la Cour suprême du Canada, à l'obtention préalable d'un mandat. Or il peut arriver, dans les enquêtes où l'on utilise des

211. Voir le rapport n° 31, p. 225.

indicateurs portant sur eux des microphones, que l'interception soit accomplie seulement par l'indicateur, et non par la personne qui a demandé le mandat.

Réparation et indemnisation

176. Si des biens ont été endommagés par suite d'une entrée effectuée en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, l'Administration ou l'organisme dont un employé ou un mandataire a causé les dommages prend rapidement les mesures raisonnables pour effectuer les réparations requises et, après que l'avis d'entrée a été donné, indemnise le propriétaire de tout dommage non réparé.

Document de travail n° 47, rec. 38

COMMENTAIRE

Cette disposition est à bien des égards conforme à la recommandation 38 faite dans le document de travail n° 47 (p. 55), relativement aux entrées clandestines. Il s'agit d'une application du principe de la responsabilité : on prévoit la réparation des dommages causés ou l'indemnisation du propriétaire, peu importe que l'entrée ait été clandestine ou qu'elle ait eu lieu avec le consentement de l'intéressé.

CHAPITRE VI
NOTIFICATION DE L'INTERCEPTION ET DE L'ENTRÉE CLANDESTINE

SECTION I
AVIS

Avis écrit

177. Le solliciteur général du Canada ou le ministre provincial au nom duquel la demande de mandat a été présentée transmet un avis écrit :

***a*) à toute personne qui a fait l'objet d'une interception effectuée en vertu du mandat, à moins qu'elle n'ait déjà été informée qu'on se propose de produire la preuve de l'interception;**

***b*) à toute personne occupant le lieu où une entrée clandestine a été effectuée en vertu du mandat.**

Document de travail n° 47, rec. 37 et 69
Code criminel, par. 196(1)

COMMENTAIRE

Suivant les dispositions de l'article 196 du *Code criminel*, le procureur général de la province où la demande d'autorisation a été présentée, ou le solliciteur général du Canada, selon le cas, doit transmettre un avis écrit à la personne dont les communications ont été interceptées en vertu de l'autorisation. Le délai pour la remise de cet avis est variable : la règle générale, établie au paragraphe 196(1), veut qu'il soit donné dans les quatre-vingt-dix jours qui suivent la période pour laquelle l'autorisation a été délivrée ou renouvelée. Cependant, on peut demander la fixation d'un délai plus long — d'une durée maximum de trois ans —, soit (suivant les paragraphes 185(2) et (3)) au moment où l'on présente la première demande d'autorisation, soit (suivant les paragraphes 196(2) et (3)) après que l'autorisation a été accordée ou renouvelée[212]. Pour accueillir la demande, le juge doit être convaincu que l'une des conditions exigées par la loi est remplie. La réception de l'avis par le destinataire doit être certifiée au tribunal de la façon prescrite par règlement.

D'après la jurisprudence, il suffit pour satisfaire aux exigences de l'article 196 d'aviser la personne qu'une interception a eu lieu. On n'a pas à l'informer de la date ou de la durée de cette interception, à lui permettre d'avoir une copie de l'autorisation ni à lui permettre d'avoir accès aux enregistrements sonores[213].

L'article 177 précise à qui l'avis doit être donné. Ses dispositions modifient le droit actuel sous deux rapports. Premièrement, l'avis est obligatoire pour toute entrée clandestine effectuée en vue de l'installation d'un dispositif de surveillance[214]. Cette règle vise à forcer les autorités policières à rendre compte de la façon dont elles exercent ce pouvoir.

Deuxièmement l'alinéa *a*) précise qu'il n'est pas nécessaire de donner avis de l'interception lorsque la personne a déjà été informée qu'on se propose d'en produire la preuve[215]. Dans un tel cas, elle aura en effet déjà reçu encore plus de renseignements que ceux dont la présente disposition exige la communication.

Délai

178. Cet avis est donné dans les quatre-vingt-dix jours suivant l'expiration du mandat.

Code criminel, par. 196(1)

COMMENTAIRE

L'article 178 clarifie le droit actuel; il pose comme règle générale que la signification de l'avis doit avoir lieu dans les quatre-vingt-dix jours qui suivent l'expiration du mandat (initial ou renouvelé). Le tribunal peut toutefois prolonger ce délai par ordonnance, en s'appuyant sur les dispositions des articles 181 à 183.

212. La prolongation doit être demandée avant l'expiration des délais fixés par la loi.

213. *Re Zaduk and The Queen* (1979), 46 C.C.C. (2d) 327 (C.A. Ont.).

214. Ce changement avait été recommandé dans le document de travail n° 47 de la Commission, rec. 37, p. 55.

215. *Id.*, rec. 69, p. 104.

Contenu de l'avis d'interception

179. (1) L'avis d'interception indique la date de celle-ci et est accompagné d'une copie du mandat.

Document de travail n° 47, rec. 69

Contenu de l'avis d'entrée clandestine

(2) L'avis d'entrée clandestine indique le lieu où l'entrée a été effectuée et la date de celle-ci; il est accompagné d'une copie du mandat.

COMMENTAIRE

Les exigences de l'article 179 touchant les renseignements à fournir avec l'avis d'interception ou d'entrée clandestine dépassent celles du droit actuel. L'avis devrait indiquer non seulement le fait de l'interception, mais encore la date des communications interceptées. Il devrait en outre être accompagné d'une copie du mandat autorisant l'interception. (Certaines parties du mandat pourront éventuellement avoir été rendues inintelligibles afin d'empêcher la personne d'apprendre, par exemple, que les communications d'autres personnes ont été interceptées en vertu du même mandat.) Comme nous l'avions souligné dans le document de travail n° 47 (p. 102), ce changement répond aux principes de la révision et de la responsabilité. Suivant l'article 40, la police est tenue de remettre une copie du mandat de perquisition à la personne apparemment responsable des lieux fouillés (ou d'y laisser une copie du mandat); il nous semble logique d'établir une règle similaire dans le cas des «perquisitions» visant des communications privées.

Signification

180. (1) La signification de l'avis et la preuve de cette signification se font en conformité avec les règlements pris par le gouverneur en conseil à ce sujet.

Code criminel, par. 196(1)

Signification impossible

(2) Lorsque la signification de l'avis s'avère impossible, un agent de la paix au courant des faits remet à la cour un affidavit où sont exposées les raisons pour lesquelles l'avis n'a pas été signifié et les tentatives faites en vue de retrouver l'intéressé.

Document de travail n° 47, rec. 73

COMMENTAIRE

L'article 180 fixe les modalités de la signification des avis d'interception et d'entrée clandestine. Le paragraphe (1) réitère les dispositions du paragraphe 196(1) du *Code criminel* actuel et prévoit l'établissement de règlements en ce qui concerne la signification de l'avis et la preuve de cette signification.

Le paragraphe (2) ne nécessite aucune explication[216].

216. *Id.*, rec. 73, p. 105.

SECTION II
DEMANDE DE PROLONGATION DU DÉLAI DE NOTIFICATION

Pouvoir de prolonger le délai

181. (1) Le juge saisi d'une demande à cet effet peut ordonner la prolongation du délai de notification d'une interception ou d'une entrée clandestine s'il est convaincu :

***a*) d'une part, que l'enquête sur le crime auquel le mandat a trait, ou une enquête ultérieure sur un autre crime visé au sous-alinéa 133(1)*a*)(i), entreprise par suite de la première enquête, est toujours en cours;**

***b*) d'autre part, que cela servirait au mieux l'administration de la justice.**

Prolongations successives

(2) Le juge peut accorder plus d'une prolongation, la durée totale des prolongations ne devant toutefois pas dépasser trois ans.

Document de travail n° 47, rec. 72
Code criminel, par. 196(3)

COMMENTAIRE

Les articles 181 à 183 prévoient la possibilité d'une prolongation du délai de notification. Le paragraphe 181(1) indique les deux conditions devant être remplies pour que le juge puisse rendre une ordonnance à cet effet. Sauf de légères différences de formulation, elles correspondent à celles que l'on trouve énoncées au paragraphe 196(3) du Code actuel.

Quant au paragraphe (2), il précise la durée totale maximale des prolongations. À l'heure actuelle, aucune limite ne semble être imposée sous ce rapport; la loi dit simplement qu'aucune des périodes de prolongation ne peut dépasser trois ans[217]. Or, cet état de choses se concilie mal avec un régime où l'on veut insister sur la notion de responsabilité. C'est pourquoi l'on précise au paragraphe 181(2) que la durée totale des prolongations successives ne peut dépasser trois ans[218].

Demandeur

182. La demande de prolongation peut être présentée par le solliciteur général du Canada ou par le ministre provincial tenu de donner l'avis d'interception ou d'entrée clandestine.

Code criminel, par. 196(2)

Mode de présentation

183. (1) La demande est présentée à un juge unilatéralement, en personne et à huis clos, de vive voix ou par écrit,

217. Voir WATT, *op. cit.*, note 158, p. 193.

218. Voir le document de travail n° 47, rec. 72, p. 105.

avant l'expiration du délai de quatre-vingt-dix jours ou de la prolongation accordée, le cas échéant; son contenu est attesté par l'affidavit d'un agent de la paix.

Code criminel, par. 196(2) et (4)

Contenu de l'affidavit

(2) L'affidavit contient les renseignements suivants :

***a*) les faits invoqués à l'appui de la demande;**

***b*) la liste de toutes les demandes de prolongation du délai de notification déjà présentées relativement au même mandat, avec la date de chacune d'entre elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas.**

Code criminel, par 196(4)

COMMENTAIRE

L'article 183 décrit les renseignements devant être fournis avec la demande de prolongation du délai de notification d'une interception ou d'une entrée clandestine, et précise quand elle doit être présentée. Le régime proposé marque un changement important par rapport au droit actuel. Car en vertu des dispositions présentées ici, la demande de prolongation ne peut être présentée qu'*après* la délivrance du mandat, tandis qu'à l'heure actuelle (suivant les paragraphes 185(2) et (3) du *Code criminel*), elle peut l'être en même temps que la demande de mandat. Cette modification est logique, puisque normalement, la nécessité de la prolongation ne peut tenir qu'à des faits qui ne sont pas connus ou ne se sont pas encore produits au moment de la délivrance. L'intimité de la vie privée se trouve ainsi davantage protégée, le tribunal étant mieux en mesure, grâce aux renseignements qu'on lui fournit, de décider si la prolongation souhaitée est véritablement nécessaire. Mais nous reconnaissons que, dans certaines enquêtes très compliquées ou d'une nature bien particulière, la personne qui demande le mandat peut prévoir dès le départ qu'il faudra obtenir une prolongation et peut en démontrer la nécessité au juge. La rédaction de cette disposition permet donc de présenter les demandes de prolongation immédiatement après la délivrance du mandat.

CHAPITRE VII
DEMANDE DE DÉTAILS SUR L'INTERCEPTION

Demandeur et préavis

184. L'accusé qui apprend qu'une communication privée à laquelle il était partie a été interceptée au moyen d'un dispositif de surveillance peut demander par écrit à un juge, avec préavis de deux jours francs au poursuivant, d'ordonner à ce dernier de lui fournir les détails de la communication privée interceptée.

Document de travail n° 47, rec. 70

COMMENTAIRE

Voir le commentaire qui accompagne l'article 191 pour des explications sur ce type de demande.

Contenu de la demande

185. (1) La demande contient les renseignements suivants :

a) **le nom du demandeur;**

b) **le lieu et la date où elle doit être présentée;**

c) **le crime reproché au demandeur;**

d) **la nature de l'ordonnance demandée;**

e) **les motifs invoqués à l'appui de la demande.**

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

COMMENTAIRE

Cet article précise les renseignements que doit contenir la demande visant à obtenir les détails d'une communication interceptée et exige qu'elle soit accompagnée d'un affidavit. Ces formalités correspondent à celles qui sont établies pour les autres demandes d'ordonnances prévues au présent code et devant être notifiées à d'autres personnes — par exemple, dans la partie VI (*La disposition des choses saisies*).

Préavis

186. Un préavis indiquant le lieu, la date et l'heure de l'audition est signifié au poursuivant avec la demande et l'affidavit.

COMMENTAIRE

Conçue sur le modèle de l'article 216 (disposition des choses saisies), cette disposition prévoit la signification, avec la demande et l'affidavit, d'un préavis au poursuivant.

Preuve à l'audience

187. Le juge saisi de la demande peut recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit.

COMMENTAIRE

Les dispositions de cet article correspondent à celles de l'alinéa 218*c*) (disposition des choses saisies).

Signification de l'affidavit

188. (1) Lorsqu'un affidavit doit être produit en preuve, il est signifié au poursuivant dans un délai raisonnable avant l'audition de la demande.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit produit en preuve peut être interrogé sur le contenu de celui-ci.

Serment

189. Le serment est obligatoire pour tout témoin.

Enregistrement

190. (1) Les témoignages entendus par le juge sont intégralement enregistrés par écrit ou sur support électronique.

Désignation de l'enregistrement

(2) L'enregistrement indique l'heure, la date et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

Ordonnance de divulgation de détails

191. Le juge saisi d'une demande à cet effet peut ordonner au poursuivant de divulguer, sur la communication privée interceptée, les détails qui peuvent être obtenus avec une diligence raisonnable, s'il est convaincu qu'ils présentent un lien avec le crime reproché au demandeur et que celui-ci en a besoin pour présenter une défense pleine et entière.

Document de travail n° 47, rec. 70

COMMENTAIRE

Habituellement, lorsque la police procède à l'interception de communications privées, son but est d'obtenir des éléments de preuve contre une personne, qui seront éventuellement utilisés au procès si des accusations sont portées relativement au crime à l'égard duquel l'interception a été autorisée. Mais les personnes dont on enregistre ainsi les communications privées ne sont pas toujours poursuivies, ou encore peuvent l'être pour un crime différent. Car la police est parfois amenée à conclure, à la faveur de l'opération, qu'elles ne sont impliquées dans la commission d'aucun crime, qu'elles ont commis un autre crime, ou que le crime faisant l'objet de l'enquête est imputable à quelqu'un d'autre.

Prenons un exemple. L'interception des communications privées de «X», intermédiaire innocent, permet d'établir que «Y», et non «X», est mêlé à la commission d'un crime. «X» ne sera donc accusé d'aucun crime à la suite de l'écoute électronique. Puisque le poursuivant ne produira pas la preuve des communications privées contre «X», celui-ci ne se verra pas remettre le préavis exigé à l'article 194. Il est toutefois plausible que «X» ait besoin d'obtenir l'enregistrement des communications privées pour présenter une défense pleine et entière à l'égard d'un autre chef d'accusation, relativement auquel le poursuivant n'avait pas l'intention de produire la preuve des communications interceptées. «X» pourrait tout de même vouloir avoir accès aux communications

interceptées, dans le cas où elles pourraient servir à corroborer un alibi ou un autre moyen de défense.

D'autre part, l'accusé qui n'est pas avisé de l'intention du poursuivant de produire contre lui la preuve de communications interceptées peut quand même être mis au courant, de façon officielle ou non, que ses communications privées ont été interceptées. La façon officielle est celle que prévoit l'alinéa 177*a*), aux termes duquel la personne doit être avisée de toute interception de ses communications privées. Mais rien n'exige que cet avis indique le contenu des communications interceptées. La façon non officielle est celle par laquelle la personne apprend, généralement d'une source digne de foi, que ses communications privées ont été interceptées.

Des propositions avaient été faites dans le document de travail n° 47[219] afin de remédier aux lacunes du droit actuel; ces propositions sont à l'origine des dispositions contenues aux articles 184 à 193. D'après l'article 184, la demande de détails peut être présentée par l'accusé qui était partie à la communication privée interceptée, avec préavis de deux jours francs au poursuivant. Les articles 185 à 190 énoncent certaines règles connexes touchant notamment le contenu de la demande, la signification de celle-ci et de l'avis qui doit l'accompagner, ainsi que la réception d'éléments de preuve ou de témoignages au moment de l'audition. L'article 191 énonce les motifs dont le juge peut s'autoriser pour ordonner la divulgation des détails de la communication interceptée.

Forme de l'ordonnance

192. L'ordonnance est rédigée selon la formule prescrite et porte la signature du juge qui la rend.

Contenu

193. L'ordonnance contient les renseignements suivants :

a) **le nom du demandeur;**

b) **le crime reproché au demandeur;**

c) **la décision du juge;**

d) **le lieu et la date où elle est rendue;**

e) **le nom et le ressort du juge.**

219. Recommandation 70, p. 104.

CHAPITRE VIII
FORMALITÉS DE LA PRÉSENTATION EN PREUVE ET DE L'OBTENTION DE RENSEIGNEMENTS SUPPLÉMENTAIRES

SECTION I
PRÉAVIS DE L'INTENTION DE PRODUIRE EN PREUVE

Préavis

194. (1) Le poursuivant qui entend produire la preuve d'une communication privée interceptée au moyen d'un dispositif de surveillance donne à l'accusé un préavis raisonnable de cette intention.

Document de travail n° 47, rec. 57
Code criminel, par. 189(5)

Contenu

(2) Ce préavis contient les éléments suivants :

***a*) la transcription de toute communication privée qui sera produite sous forme d'enregistrement, ou une déclaration donnant les détails complets de toute communication privée qui sera produite par un témoin;**

***b*) le lieu, la date et l'heure de la communication privée, et le nom de tous les interlocuteurs, s'il est connu;**

***c*) dans le cas où la communication privée a été interceptée en vertu d'un mandat, une copie du mandat et des pièces afférentes à toute demande de délivrance, de renouvellement ou de modification du mandat.**

Document de travail n° 47, rec. 49
Code criminel, par. 189(5)

COMMENTAIRE

Suivant le paragraphe 189(5) du *Code criminel*, l'admissibilité en preuve d'une communication privée interceptée en conformité avec la loi est subordonnée à la remise à l'accusé, par la partie qui entend en produire la preuve, d'un préavis raisonnable de son intention, accompagné : *a*) d'une transcription de la communication privée (lorsqu'elle sera produite sous forme d'enregistrement) ou d'une déclaration qui en indique tous les détails (lorsque la preuve de la communication sera donnée de vive voix); *b*) d'une déclaration relative à l'heure, à la date et au lieu de la communication privée et aux personnes y ayant pris part, si elles sont connues[220].

220. Suivant l'article 189 du Code, l'obligation de notification n'est pas limitée aux cas où le poursuivant désire produire directement contre l'accusé la preuve des communications interceptées. Elle s'applique également lorsque le poursuivant tente de produire indirectement la preuve de ces communications — par exemple, lorsque le poursuivant tente de produire la preuve des communications à l'occasion du contre-interrogatoire d'un témoin à décharge, afin de réfuter un moyen de défense avancé par l'accusé. Voir *R.* c. *Nygaard*, [1989] 2 R.C.S. 1074.

Si l'article 194 conserve pour une bonne part les mêmes règles, nous avons apporté certains changements afin de garantir la divulgation du plus de renseignements possible à l'accusé.

D'après le paragraphe (1), le poursuivant est tenu de donner le préavis lorsqu'il a l'intention de produire la communication privée en preuve. La règle s'applique non seulement aux communications privées interceptées légalement sous le régime de la présente partie (en vertu d'un mandat ou avec le consentement de toutes les parties), mais aussi aux communications privées qui, interceptées illégalement, peuvent néanmoins être jugées recevables, dans l'intérêt de la justice. À l'heure actuelle, l'obligation de donner le préavis ne s'applique pas lorsque la preuve est produite avec le consentement de l'une des parties[221]. Dans le document de travail n° 47, nous avions souligné que cette règle est incompatible avec le principe de la communication pleine et entière de la preuve à l'accusé : le préavis devrait être donné dans tous ces cas[222].

Le paragraphe 194(1) ne prévoit pas que la communication doit être écartée si les formalités du préavis n'ont pas été remplies. Il y aurait plutôt lieu sans doute, dans un tel cas, d'ajourner le procès.

Les alinéas *a*) et *b*) du paragraphe (2) sont dans une large mesure fidèles au droit actuel. Il en va toutefois autrement de l'alinéa *c*). Nous avons voulu garantir la communication à l'accusé de l'ensemble des pièces contenues dans le paquet scellé (y compris les renseignements fournis à l'appui de la demande visant l'obtention, le renouvellement ou la modification du mandat, ainsi que le mandat lui-même et la modification si elle figure sur un document distinct). Car suivant le régime actuel, ces renseignements, à l'exception de l'autorisation et du renouvellement, sont placés dans un paquet scellé et l'accusé doit obtenir une ordonnance judiciaire pour y avoir accès. Bien que les tribunaux soient maintenant davantage disposés à lui reconnaître le droit de pouvoir examiner les pièces se trouvant dans le paquet scellé en vue de pouvoir présenter une défense pleine et entière, la procédure n'en demeure pas moins compliquée et c'est l'accusé qui doit prendre l'initiative des démarches nécessaires. Nous avons conclu que la communication de la preuve serait favorisée si la loi obligeait le poursuivant à remettre à l'accusé une copie de toutes ces pièces, tout en lui permettant de demander au juge une ordonnance visant à rendre inintelligibles certains renseignements, ainsi que le prévoit l'article 167. (Il peut être mis fin aux effets de cette ordonnance, conformément à la section III du présent chapitre, si l'accusé estime que l'accès aux renseignements est indispensable à une défense pleine et entière.)

221. Voir *R.* c. *Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224 (C.A. Ont.).

222. Document de travail n° 47, p. 82; rec. 57, p. 98.

SECTION II
DEMANDE DE DÉTAILS COMPLÉMENTAIRES

Demandeur et préavis

195. L'accusé à qui a été notifiée l'intention du poursuivant de produire la preuve d'une communication privée interceptée peut demander par écrit à un juge, avec préavis de deux jours francs au poursuivant, des détails complémentaires sur cette communication.

Code criminel, art. 190

COMMENTAIRE

Aux termes de l'article 190 du Code actuel, «tout juge du tribunal devant lequel se tient ou doit se tenir le procès du prévenu peut [. . .] ordonner que des détails complémentaires soient fournis relativement à la communication privée que l'on a l'intention de présenter en preuve». Cette règle est reprise ici, mais par souci de logique nous avons établi dans des articles distincts la procédure en vertu de laquelle la demande est présentée (art. 195 et 197) et le pouvoir conféré au juge pour accueillir celle-ci (art. 196).

Ordonnance

196. Le juge saisi d'une demande à cet effet et convaincu que cela est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière peut ordonner que des détails complémentaires soient fournis à l'accusé.

Code criminel, art. 190

Règles de procédure

197. Les dispositions des articles 185 à 190, 192 et 193 s'appliquent à cette demande.

COMMENTAIRE

Cet article rend applicables à l'égard de ces demandes les règles de procédure qui régissent la demande de détails (voir les articles 185 à 190, 192 et 193). Ces règles concernent le contenu de la demande, ainsi que la signification du préavis et de la demande elle-même. Elles portent aussi sur la réception des éléments de preuve et témoignages, leur enregistrement, ainsi que la forme et le contenu de l'ordonnance éventuellement rendue.

SECTION III
DEMANDE DE MISE AU JOUR DE RENSEIGNEMENTS RENDUS ININTELLIGIBLES

Demandeur

198. L'accusé à qui a été notifiée l'intention du poursuivant de produire la preuve d'une communication privée

interceptée peut demander par écrit une ordonnance afin que soient mis au jour des renseignements rendus inintelligibles dans les pièces qui accompagnaient le préavis.

Document de travail n° 56, rec. 9(6)

COMMENTAIRE

S'il a été décidé de rendre certains renseignements inintelligibles, l'accusé en recevra copie, en même temps que le préavis d'intention de produire la communication en preuve prévu à l'article 194.

Dans le document de travail n° 56, intitulé *L'accès du public et des médias au processus pénal*[223], nous avions recommandé la mise sur pied d'un mécanisme permettant de rétablir l'intelligibilité des renseignements à l'intention de l'accusé, pour qu'il soit en mesure de présenter une défense pleine et entière. Le bien-fondé de cet objectif a récemment été reconnu dans plusieurs décisions judiciaires portant sur l'accès aux documents placés dans le paquet scellé[224]. L'article 198 permet donc la présentation d'une demande visant la mise au jour de renseignements rendus inintelligibles et indique qui peut la présenter.

Mode de présentation

199. La demande est présentée en personne au juge, avec préavis de deux jours francs au poursuivant.

Audition de la demande

200. Au moment de l'audition de la demande, le juge examine les pièces contenues dans le paquet scellé, en présence de l'accusé et du poursuivant, mais sans permettre à l'accusé de les examiner.

Divulgation des renseignements

201. Le juge saisi d'une demande à cet effet et convaincu que l'accusé a besoin, pour présenter une défense pleine et entière, de renseignements rendus inintelligibles dans quelque pièce qui lui a été remise relativement au mandat, peut ordonner la divulgation de ces renseignements à l'accusé.

Document de travail n° 56, rec. 9(6)

Règles de procédure

202. Les dispositions des articles 185 à 190, 192 et 193 s'appliquent à cette demande.

Appel

203. Appel peut être interjeté de la décision du juge, devant un juge de la cour d'appel.

223. Recommandation 9(6)*a*), p. 67.

224. Voir par exemple *R.* c. *Rowbotham*, précité, note 208; et *R.* c. *Parmar*, précité, note 208.

CHAPITRE IX
RÈGLES DE PREUVE

Preuve sous forme d'affidavit

204. La preuve des faits suivants peut être présentée sous la forme d'un affidavit :

***a*) le lieu, la date et l'heure où une communication privée a été interceptée;**

***b*) les moyens par lesquels une communication privée a été interceptée;**

***c*) tous les faits relatifs à la garde de l'enregistrement d'une communication privée interceptée;**

***d*) la signification du préavis de l'intention de produire la preuve d'une communication privée.**

Document de travail n° 47, rec. 66

COMMENTAIRE

Les procès où sont utilisés des éléments de preuve obtenus par l'écoute électronique peuvent facilement s'éterniser. C'est qu'il faut citer de nombreux témoins pour établir des faits de nature technique, mais souvent sans aucune incidence sur le fond, concernant par exemple l'installation et la surveillance du dispositif, la préparation des enregistrements sonores et des transcriptions. Dans le document de travail n° 47[225], nous avions proposé, dans le but de favoriser l'efficacité et la rapidité des procédures, que des règles moins strictes s'appliquent à la preuve de ce type de faits. Le présent article est fondé sur ces recommandations.

Qualité du demandeur

205. Lorsque la qualité d'agent désigné ou d'agent de la paix désigné d'une personne est énoncée dans le mandat, elle est présumée établie, sauf preuve contraire.

Document de travail n° 47, rec. 68

COMMENTAIRE

L'article 205 dispense le poursuivant de l'obligation d'établir la qualité d'agent désigné ou d'agent de la paix désigné qui est énoncée dans le mandat, sauf preuve contraire.

Absence de l'original du mandat

206. Dans toute procédure où il importe au tribunal d'être convaincu que l'interception d'une communication privée a été autorisée par un mandat délivré à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de

225. Recommandations 66 et 67, p. 100.

télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que l'interception n'a pas été autorisée par mandat.

Rapport n° 19, partie II, rec. 2(12)
Code criminel, par. 487.1(11)

COMMENTAIRE

L'article 206 est le pendant de dispositions figurant dans d'autres parties du présent code (par exemple l'article 41 relatif aux fouilles, perquisitions et saisies). Il atteste la prédilection de la Commission pour la production de l'original du mandat (et non d'une simple copie) lorsque la demande a été présentée par téléphone ou à l'aide d'un autre moyen de télécommunication; l'original confirme en effet d'une manière péremptoire l'autorisation d'accomplir les actes qui y sont indiqués.

CHAPITRE X
RAPPORTS ANNUELS

Rapports fédéral et provinciaux

207. (1) Le solliciteur général du Canada et chaque ministre provincial établissent, dès que possible après la fin de chaque année, un rapport relatif à la surveillance électronique effectuée en leur nom au cours de l'année.

Code criminel, par. 195(1) et (5)

Dépôt au Parlement

(2) Le solliciteur général du Canada fait déposer sans retard son rapport au Parlement.

Code criminel, par. 195(4)

Publication

(3) Chaque ministre provincial publie sans retard le rapport ou fait en sorte que le public puisse y avoir accès par quelque autre moyen.

Code criminel, par. 195(5)

COMMENTAIRE

Pour obliger la puissance publique à rendre compte de l'application des dispositions sur l'écoute électronique, le législateur a exigé à l'article 195 du *Code criminel* que le solliciteur général du Canada et les procureurs généraux des provinces publient tous les ans des rapports détaillés sur les demandes d'autorisations et les interceptions faites en leur nom au cours de l'année. Ces dispositions sont reprises aux articles 207 et 208; des modifications mineures ont été apportées pour faciliter la lecture et par souci d'uniformité avec d'autres dispositions de la présente partie.

Contenu des rapports annuels

208. Les rapports annuels contiennent les indications suivantes :

a) le nombre de demandes de mandats, de renouvellements et de modifications, dans des listes distinctes;

b) le nombre de mandats, de renouvellements et de modifications qui ont été accordés ou refusés, ou encore accordés suivant des conditions établies par le juge;

c) le nombre de personnes identifiées dans des mandats qui ont été poursuivies par le procureur général du Canada ou de la province, par suite d'interceptions effectuées en vertu de mandats, relativement :

(i) à un crime spécifié dans le mandat,

(ii) à un crime visé au sous-alinéa 133(1)*a*)(i) qui n'était pas spécifié dans le mandat,

(iii) à un crime autre que ceux qui sont visés au sous-alinéa 133(1)*a*)(i);

d) le nombre de personnes non identifiées dans un mandat et qui, par suite de renseignements obtenus grâce à l'interception de communications privées effectuée en vertu de mandats, ont été poursuivies par le procureur général du Canada ou de la province relativement :

(i) à un crime spécifié dans un mandat,

(ii) à un crime visé au sous-alinéa 133(1)*a*)(i) qui n'était pas spécifié dans un mandat,

(iii) à un crime autre que ceux qui sont visés au sous-alinéa 133(1)*a*)(i);

e) la durée moyenne de validité des mandats et des renouvellements de mandats qui ont été accordés;

f) le nombre de mandats qui, une fois renouvelés, ont été valides pendant les périodes suivantes :

(i) de soixante à cent dix-neuf jours,

(ii) de cent vingt à cent soixante-dix-neuf jours,

(iii) de cent quatre-vingts à deux cent trente-neuf jours,

(iv) plus de deux cents quarante jours ou plus jours;

g) les crimes spécifiés dans les mandats, ainsi que le nombre de mandats, de renouvellements et de modifications accordés pour chaque crime;

h) la description de tous les genres de lieux spécifiés dans les mandats et le nombre de mandats accordés pour chaque genre de lieu;

i) une description sommaire des méthodes d'interception spécifiées dans les mandats;

j) le nombre de personnes arrêtées par suite des renseignements obtenus grâce à l'interception de communications privées en vertu d'un mandat;

k) le nombre d'avis d'interception ou d'entrée clandestine qui ont été donnés;

l) le nombre de poursuites pénales engagées par le procureur général du Canada ou de la province, dans lesquelles des communications privées interceptées en vertu d'un mandat ont été produites en preuve, et le nombre de poursuites qui ont entraîné la condamnation de l'accusé;

m) le nombre d'enquêtes au cours desquelles des renseignements obtenus par suite de l'interception de communications privées en vertu d'un mandat ont été utilisés, bien que les communications privées n'aient été produites en preuve dans aucune poursuite pénale;

n) le nombre de poursuites engagées contre des fonctionnaires ou préposés de Sa Majesté, en vertu de l'article 66 (interception des communications privées), de l'article 67 (installation d'appareils d'interception) ou de l'article 68 (communication) du projet de code criminel de la CRD;

o) une évaluation d'ensemble de l'importance de l'interception des communications privées pour le dépistage, la prévention et la poursuite des crimes au Canada ou dans la province.

Code criminel, par. 195(2) et (3)

COMMENTAIRE

Voir le commentaire qui accompagne l'article 207.

PARTIE VI

LA DISPOSITION DES CHOSES SAISIES

Textes à l'origine de la partie VI

PUBLICATIONS DE LA CRD

Les fouilles, les perquisitions et les saisies, Rapport n° 24 (1984)

Les procédures postérieures à la saisie, Document de travail n° 39 (1985)

La façon de disposer des choses saisies, Rapport n° 27 (1986)

L'accès du public et des médias au processus pénal, Document de travail n° 56 (1987)

Pour une cour criminelle unifiée, Document de travail n° 59 (1989)

LÉGISLATION

Code criminel, art. 487- 492, 605

OBSERVATIONS PRÉLIMINAIRES

Cette partie présente l'ensemble des règles applicables à l'égard des «choses saisissables[226]» saisies en conformité avec les dispositions des parties II (*Les fouilles, les perquisitions et les saisies*) ou III (*La recherche d'indices sur les personnes*; dans ce dernier cas, les dispositions contenues ici s'appliquent uniquement aux choses saisissables extraites du corps d'une personne). C'est toutefois dans la partie VII (*Les privilèges en matière de saisie*) du présent code que l'on trouvera la façon dont il est statué sur l'existence du privilège invoqué à l'égard d'une chose saisie (les dossiers d'un avocat, par exemple) et la façon dont il en est disposé dans le cas où elle est jugée privilégiée.

À l'heure actuelle, les procédures régissant la façon dont il est finalement disposé des choses saisies sont décrites dans des dispositions complexes du *Code criminel* et, en particulier pour les choses saisies sans mandat, dépendent de la politique établie par chaque corps policier. Aussi la Commission a-t-elle voulu proposer dans la présente partie des règles qui soient frappées au coin de la clarté, de l'uniformité et de la simplicité tout à la fois.

Les personnes qui ont un intérêt dans les choses saisies se voient donner la possibilité de savoir où celles-ci se trouvent et qui en a la responsabilité. Les autorités sont quant à elles encouragées dans le présent régime à décider le plus tôt possible si la rétention des choses saisies est nécessaire. Si elles concluent rapidement que tel n'est pas le cas et que le droit à la propriété ou à la possession ne paraisse pas contesté, elles pourront passer outre aux formalités prévues à la présente partie et restituer les choses saisies aux possesseurs légitimes. Le processus dans son ensemble est soumis au contrôle judiciaire et les personnes responsables de la saisie doivent rendre compte de tous leurs actes.

Dans le même ordre d'idées, les autorités ont l'obligation de préparer un inventaire détaillé des choses saisies, d'en remettre une copie aux intéressés et d'en joindre une autre au procès-verbal de saisie présenté au juge de paix. L'agent de la paix qui effectue la saisie est tenu de prendre les mesures nécessaires à la protection et à la conservation des choses saisies, mais les juges de paix du district judiciaire où est produit le procès-verbal sont investis d'un pouvoir de surveillance à l'égard de la rétention de ces choses, des conditions relatives à la garde et de la disposition.

Lorsqu'il s'avère nécessaire de retenir une chose saisie, les victimes et toute personne se prétendant titulaire d'un droit de propriété ou de possession peuvent se prévaloir de procédures de restitution facilement compréhensibles, accessibles et efficaces.

On protège aussi, bien sûr, l'intérêt public en ce qui a trait à l'application des lois pénales et au déroulement des procès. Enquêteurs et poursuivants se voient conférer les pouvoirs qui s'avèrent nécessaires, dans une mesure raisonnable, à la rétention, à la conservation et éventuellement à la production, dans le cadre de poursuites criminelles, des choses saisies.

226. L'expression «choses saisissables» est définie à l'article 2.

Nous avons par ailleurs prévu des procédures spéciales régissant la saisie de choses dangereuses ou périssables.

La présente partie est le complément des réformes entreprises avec l'entrée en vigueur par proclamation, le 2 décembre 1985, de la *Loi de 1985 modifiant le droit pénal*[227]. Celle-ci était du reste inspirée de propositions législatives faites dans le document de travail n° 39 de la Commission. La loi de 1985 ne visait pas à réglementer la question d'une manière exhaustive. En effet, ses dispositions n'étant applicables que sous réserve des dispositions de toute autre loi fédérale[228], les règles établies dans la *Loi sur les stupéfiants*[229] et la *Loi sur les aliments et drogues*[230], par exemple, restaient en vigueur. Le champ d'application de la présente partie est beaucoup plus vaste. Elle régit la rétention et la disposition de toutes les choses saisies à titre de «choses saisissables» soit sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*), soit sous celui de la partie III (*La recherche d'indices sur les personnes*) lorsqu'elles ont été extraites du corps d'une personne, et partant influe sur le sort des choses saisies en vertu de toute loi fédérale de nature pénale.

Si elle a une portée plus large que le Code actuel et les lois connexes, cette partie ne s'applique néanmoins pas aux choses suivantes : (1) les échantillons de substances corporelles, les résidus ou les choses prélevés sous le régime de la partie III, à moins, comme nous venons de le dire, qu'ils aient été saisis à titre de «choses saisissables» par extraction du corps d'une personne (par exemple, des drogues dissimulées dans un orifice corporel); (2) les choses saisies à l'égard desquelles un privilège est invoqué; (3) les échantillons de sang ou d'haleine prélevés sous le régime de la partie IV; (4) les choses saisies à des fins étrangères à une enquête ou à une poursuite criminelle (par exemple, les chose trouvées par hasard); (5) les choses saisies en vertu des règlements d'établissements de détention (exception faite des «choses saisissables» mentionnées ici); (6) les choses saisies en vue de déterminer la légalité de leur possession, sans égard à des crimes précis ni aux droits que des personnes peuvent avoir sur elles[231]; (7) les «produits de la criminalité[232]».

227. S.C. 1985, ch. 19.

228. Voir par exemple le paragraphe 489.1(1) du *Code criminel*.

229. Précitée, note 21.

230. L.R.C. (1985), ch. F-27.

231. On vise ici les procédures applicables aux armes, etc. (*Code criminel* , art. 103), à la propagande haineuse (*Code criminel* , art. 320) ainsi qu'aux publications obscènes ou aux histoires illustrées de crime (*Code criminel*, art. 164). La Commission a recommandé dans une autre publication que les articles 103, 164 et 320 soient retirés du Code pour être insérés ailleurs dans la législation fédérale. Voir le rapport n° 24, pp. 57-61.

232. Nous remettons à plus tard l'inclusion de règles régissant la saisie et la façon de disposer de ces produits, pour étudier attentivement les dispositions législatives récemment adoptées en la matière. Voir la *Loi modifiant le Code criminel, la Loi des aliments et drogues et la Loi sur les stupéfiants*, précitée, note 13. Les conclusions de la Commission sur le point de savoir s'il y aurait lieu d'incorporer ces nouvelles dispositions au présent code seront exposées dans des documents ultérieurs.

CHAPITRE PREMIER
CHAMP D'APPLICATION

Application

209. (1) La présente partie s'applique aux choses saisissables saisies sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*) ainsi qu'aux choses saisissables extraites du corps d'une personne et saisies sous le régime de la partie III (*La recherche d'indices sur les personnes*).

Exception

(2) Lorsqu'une chose saisie ou les renseignements y contenus font l'objet d'une opposition fondée sur un privilège, il en est disposé en conformité avec les dispositions de la partie VII (*Les privilèges en matière de saisie*).

COMMENTAIRE

Nous avons voulu ici indiquer d'une manière précise le champ d'application de la présente partie. Le terme «choses saisissables» est défini à l'article 2.

On trouvera dans un autre volume du code, à paraître, les règles régissant la façon de disposer des choses — autres que les «choses saisissables» extraites du corps d'une personne — obtenues en vertu des dispositions de la partie III. Quant aux règles relatives à la disposition des échantillons de sang et d'haleine prélevés sous le régime de la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*), elles sont dans une certaine mesure contenues dans cette partie-là. Et lorsque la chose saisie ou les renseignements y contenus font l'objet d'une opposition fondée sur un privilège, l'accès à la chose ou aux renseignements, de même que la façon d'en disposer, sont régis par les dispositions de la partie VII (*Les privilèges en matière de saisie*).

CHAPITRE II
OBLIGATIONS DE L'AGENT DE LA PAIX PRATIQUANT UNE SAISIE

SECTION I
INVENTAIRE DES CHOSES SAISIES

Préparation de l'inventaire

210. (1) Au moment de la saisie ou dès que cela est matériellement possible après celle-ci, l'agent de la paix :

***a*) dresse et signe un inventaire décrivant toutes les choses saisies avec une précision raisonnable;**

***b*) offre une copie de l'inventaire à toute personne apparemment en possession des choses saisies au moment de la saisie et lui en remet une copie si elle en fait la demande.**

Renseignements copiés

(2) Si l'agent de la paix réalise une copie de quelque renseignement contenu dans une chose saisie, il en fait mention dans l'inventaire.

Affichage de l'inventaire

(3) Si personne ne semble être en possession des choses saisies, l'agent de la paix peut afficher une copie de l'inventaire sur le lieu de la saisie.

Personnes ayant un droit de propriété ou ayant droit à la possession

(4) L'agent de la paix qui effectue une saisie offre, si cela est matériellement possible, une copie de l'inventaire à toute autre personne qui lui paraît avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, et lui en remet une copie si elle en fait la demande.

Rapport n° 27, rec. 2(1)
Code criminel, par. 487.1(9), art. 489.1

COMMENTAIRE

Lorsqu'une chose saisie en vertu d'un mandat n'est pas remise à la personne qui a légitimement droit à sa possession[233], l'agent de la paix ou la personne qui a effectué la saisie est tenu suivant l'article 489.1 du Code actuel de l'emmener devant «le juge de paix qui a décerné le mandat ou un autre juge de paix de la même circonscription territoriale[234]». Il peut aussi «faire rapport au juge de paix qu'il a saisi les biens et qu'il les détient[235]». Si aucun mandat n'a été délivré et que la chose n'ait pas été restituée, il faut faire rapport à «un juge de paix qui a compétence dans les circonstances» ou lui apporter la chose en question[236]. Et dans le cas d'une saisie pratiquée en vertu d'un mandat délivré par téléphone ou à l'aide d'un autre moyen de télécommunication, l'agent doit déposer un rapport «auprès du greffier du tribunal de la circonscription territoriale où le mandat devait être exécuté[237]».

Les dispositions du Code actuel n'exigent pas systématiquement l'établissement d'un rapport lorsqu'un bien a été saisi sans être restitué à son propriétaire ou à son possesseur. Elles n'exigent pas non plus que l'on dresse un inventaire qui serait remis aux personnes ayant un intérêt soit à l'égard de la chose saisie, soit à l'égard du lieu ou du véhicule où la saisie a été pratiquée.

Les règles établies au présent chapitre diffèrent de celles qui sont en vigueur actuellement. L'article 210, fondé sur le principe de la responsabilité, exige qu'au moment opportun, l'agent de la paix prépare l'inventaire des choses saisies et s'efforce de le remettre au possesseur apparent. Celui-ci pourra ainsi veiller à la protection de ses

233. Suivant l'alinéa 489.1(1)*a*).

234. *Code criminel*, sous-al. 489.1(1)*b*)(i), al. 489.1(2)*a*).

235. *Code criminel*, sous-al. 489.1(1)*b*)(ii), al. 489.1(2)*b*). Le rapport doit suivant le paragraphe 489.1(3) être rédigé selon la formule 5.2; il comporte par conséquent, entre autres choses, une description de chaque bien saisi.

236. *Code criminel*, al. 489.1(1)*b*), par. 489.1(2).

237. *Code criminel*, par. 487.1(9). Le paragraphe 489.1(3) impose également l'utilisation de la formule 5.2, avec en plus les indications exigées au paragraphe 487.1(9).

intérêts, par exemple en demandant la permission d'examiner les choses en question, en demandant qu'elles lui soient restituées ou en contestant la validité de la saisie elle-même.

SECTION II
REMISE DES CHOSES SAISIES PAR L'AGENT DE LA PAIX

Personne ayant droit à la possession

211. (1) L'agent de la paix peut, avant de présenter le procès-verbal de saisie à un juge de paix, remettre la chose saisie à la personne qui lui paraît avoir droit à sa possession si, à la connaissance de l'agent de la paix, la possession n'est pas contestée et que la chose ne soit plus nécessaire ni utile aux fins de quelque enquête ou procédure.

Récépissé

(2) L'agent de la paix obtient un récépissé pour toute chose saisie qu'il remet.

Rapport n° 27, rec. 2(6) et (7)
Code criminel, al. 489.1(1)*a*)

COMMENTAIRE

L'article 211 reprend pour l'essentiel les dispositions de l'alinéa 489.1(1)*a*) du *Code criminel*. C'est ainsi que l'on maintient une règle fondamentale de la common law, suivant laquelle les enquêteurs doivent disposer d'un délai raisonnable pour déterminer s'il y a lieu de garder le bien saisi, soit pour les besoins de l'enquête en cours, soit parce qu'il pourrait constituer un élément de preuve utile en cas d'éventuelles poursuites pénales[238]. Souvent, en effet, les policiers constatent, peu après la saisie, qu'il serait inutile de retenir la chose. C'est pourquoi l'agent pourra en vertu du paragraphe (1) la restituer rapidement à la personne qui lui paraît avoir droit à la possession s'il n'a pas encore remis au juge de paix le procès-verbal de saisie et si la possession n'est pas contestée.

On n'attend pas du tout ici de l'agent de la paix qu'il apprécie la valeur juridique des prétentions à la propriété d'une chose saisie. La restitution opérée en vertu du présent article n'a pour effet ni de créer ni d'éteindre quelque droit de nature civile. Car si, à la connaissance de l'agent, le droit à la possession de la chose est litigieux, les formalités prévues à la présente partie devront être observées.

En cas de restitution sous le régime du paragraphe 211(1), il suffira d'obtenir un récépissé (par. 211(2)), que l'on joindra au procès-verbal de saisie (par. 212(3)); cette formalité répond au principe de la responsabilité et aux exigences administratives.

238. Voir *Ghani et al.* c. *Jones*, [1970] 1 Q.B. 693 (C.A.); *Lavie* c. *Hill* (1918), 29 C.C.C. 287 (C.S. N.-É.). Lire aussi les observations du juge Galligan dans l'affaire *In Re Famous Player's Ltd. et al.* c. *Director of Investigation and Research* (1986), 29 C.C.C. (3d) 251, p. 263 (H.C.J. Ont.).

SECTION III
PROCÈS-VERBAL DE SAISIE

Établissement d'un procès-verbal

212. (1) L'agent de la paix dresse un procès-verbal relativement à toute chose saisie et non remise.

Contenu

(2) Ce procès-verbal contient les renseignements suivants :

a) **le lieu, la date et l'heure de la saisie;**

b) **le nom de l'agent de la paix qui a effectué la saisie ainsi que le nom de la force policière ou autre organisme pour lequel l'agent de la paix a agi;**

c) **le nom de toute personne à qui une copie de l'inventaire a été remise;**

d) **le cas échéant, les raisons pour lesquelles des choses non mentionnées dans un mandat de fouille ou de perquisition ont été saisies au cours de l'exécution de celui-ci ou les raisons pour lesquelles des choses ont été saisies sans mandat;**

e) **le nom des personnes qui, à la connaissance de l'agent, peuvent avoir un droit de propriété sur quelque chose saisie ou avoir droit à sa possession;**

f) **le cas échéant, les raisons pour lesquelles un mandat visant plusieurs choses saisissables n'a pas été exécuté à l'égard de certaines d'entre elles.**

Inventaire et récépissé

(3) L'agent de la paix joint au procès-verbal l'inventaire des choses saisies et le récépissé relatif aux choses qui ont été remises.

Rapport n° 27, rec. 2(2), (3) et (4)
Code criminel, par. 487.1(9), art. 489.1

COMMENTAIRE

Avant 1985, les agents de la paix ne pouvaient, suivant le *Code criminel*, se contenter de remettre un rapport écrit après la saisie : ils devaient, en règle générale, apporter les objets saisis en vertu d'un mandat (ou à la faveur de l'exécution de celui-ci) devant le juge de paix qui avait délivré le mandat ou un autre juge de paix de la même circonscription territoriale. C'est depuis la réforme de cette année-là que la présentation d'un rapport peut remplacer la remise concrète des choses saisies au juge de paix[239]. Signalons par ailleurs qu'à l'heure actuelle, ni la *Loi sur les stupéfiants* ni la *Loi sur les aliments et drogues* ne contiennent d'indications à cet égard.

239. Cette possibilité n'existe pas dans tous les cas; voir les paragraphes 102(3), 199(1) et (2), 395(2) et 447(2) du *Code criminel*.

Lorsqu'un agent de la paix saisit une chose en bonne et due forme (à savoir, la saisit sans la remettre), un rapport décrivant sommairement mais de façon exacte les faits et circonstances de l'opération devrait, estime la Commission, être remis à un fonctionnaire judiciaire[240]. Les dispositions de l'article 212 répondent à cet objectif.

Pour simplifier les formalités, nous avons choisi de ne pas donner à l'agent, aux articles 212 et 213, la possibilité d'apporter les choses saisies devant le juge de paix. Il doit, lorsqu'elles seront gardées sous main de justice, dresser et présenter un procès-verbal de saisie, que le juge de paix fera déposer auprès du greffier. Le paragraphe 212(2) indique clairement les renseignements qui doivent figurer dans ce procès-verbal, auquel sera joint l'inventaire établi conformément à l'article 210 ainsi que le récépissé concernant les choses éventuellement remises en vertu de l'article 211 (par. 212(3)).

Les formalités du procès-verbal et de l'inventaire répondent aux exigences du principe de la responsabilité.

Présentation

213. (1) Le procès-verbal de saisie est présenté, dès que cela est matériellement possible après la saisie, à un juge de paix du district judiciaire où celle-ci a été effectuée.

Réception et dépôt

(2) Le juge de paix qui reçoit le procès-verbal de saisie le fait déposer auprès du greffier du district judiciaire où la saisie a été effectuée.

Rapport n° 27, rec. 2(5)
Code criminel, par. 487.1(9) et 489.1(1)

COMMENTAIRE

Lorsqu'un agent de la paix a pratiqué une saisie sans mandat et n'a pas remis par la suite la chose saisie à la personne ayant droit à la possession légitime, il doit aux termes du paragraphe 489.1(1) du *Code criminel* faire rapport à «un juge de paix qui a compétence dans les circonstances» ou emmener devant celui-ci les choses saisies. Il semble légitime de conclure que cette disposition s'applique aux saisies pratiquées sans mandat. Toutefois, il n'est pas toujours facile de savoir quel juge de paix «a compétence dans les circonstances».

Nous sommes arrivés à la conclusion que toute saisie devrait donner lieu à la préparation d'un procès-verbal, et que l'accès du public aux documents relatifs à cette saisie et aux procédures concernant la façon de disposer des choses visées ne nuirait pas sensiblement aux enquêtes criminelles, ni ne porterait gravement atteinte à l'efficacité de l'application de la loi. Il est donc opportun, selon la Commission, de permettre l'accès du public à ces documents et à ces procédures, sous réserve de quelques exceptions[241]. Toutes les dispositions du présent code qui prévoient le dépôt de documents répondent au souci de faciliter, dans la mesure du possible, l'accès aux pièces où sont consignées et justifiées les atteintes à l'intimité de la vie privée et à la sécurité des

240. Rapport n° 27, pp. 12-13.

241. Document de travail n° 56, recommandation 11 et commentaire, pp. 79-80.

personnes et des biens[242]. Il est indispensable que le lieu où sont déposés les documents pertinents soit clairement indiqué et puisse facilement être connu. L'article 213 fixe les modalités de la présentation et du dépôt du procès-verbal de saisie.

CHAPITRE III
GARDE ET DISPOSITION DES CHOSES SAISIES

SECTION I
RÈGLES GÉNÉRALES RÉGISSANT LES ORDONNANCES

1. Présentation de la demande

Présentation de la demande

214. Toute demande d'ordonnance est adressée par écrit à un juge de paix du district judiciaire où le procès-verbal de saisie a été déposé, de celui où la chose saisie a été placée sous garde ou de celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

COMMENTAIRE

Diverses ordonnances touchant des choses saisies sont susceptibles d'être demandées sous le régime de la présente partie; ces demandes diffèrent de celles qui visent la délivrance d'un mandat. En effet, ces dernières sont unilatérales, aucun préavis ne devant être donné à quelque autre partie. Le demandeur doit présenter des motifs permettant d'une façon raisonnable de croire à l'existence de faits justifiant la délivrance du mandat, mais il n'est pas tenu d'avoir une connaissance personnelle de ces faits. En revanche, le préavis aux intéressés est obligatoire pour la plupart des demandes d'ordonnance visées par la présente partie. Elles sont du reste susceptibles de contestation et la décision doit être fondée sur des dépositions faites sous serment au sujet de faits dont les témoins ont une connaissance personnelle.

Le *Code criminel* actuel prévoit que la plupart de ces ordonnances peuvent être obtenues au moyen de «demandes sommaires», avec préavis à certaines parties[243].

242. Sous réserve, bien sûr, des cas où il y a lieu, au nom de l'intérêt public ou des exigences de l'application de la loi, de garantir la confidentialité ou la sécurité de documents relatifs à des enquêtes criminelles et de protéger des privilèges juridiquement reconnus. Nous avons tenu compte de cette nécessité dans le présent code. Citons à titre d'exemple les articles 166 à 174 qui exigent que les documents liés aux demandes de mandat autorisant l'écoute électronique soient placés dans un paquet scellé et tenus pour confidentiels; l'article 53 relatif aux fouilles, perquisitions et saisies; les dispositions de la partie VII qui régissent les mesures à prendre quant aux choses et renseignements à l'égard desquels un privilège est invoqué, ainsi que la façon d'en disposer.

243. *Code criminel*, al. 490(2)*a*) et (3)*a*); par. 490(7), (10) et (15).

D'autres — par exemple celles qui sont visées aux paragraphes 490(5) et (6) — supposent la présentation d'une «demande» et la remise d'un avis (le législateur exige alors que le juge ou le juge de paix, avant de rendre l'ordonnance, donne à certaines personnes «l'occasion de démontrer» certaines choses). Or, la distinction entre la «demande» et la «demande sommaire» demeure obscure, c'est le moins qu'on puisse dire[244].

À notre sens, toutes les demandes d'ordonnance, en matière pénale, devraient être régies par des règles uniformes et clairement définies. Aucune divergence ne devrait exister entre la façon dont les demandeurs, les avocats et les autorités judiciaires interprètent les règles applicables aux aspects suivants : (1) les conditions auxquelles est subordonnée l'audition de la demande; (2) les renseignements et les avis qui doivent être donnés aux autres parties et au tribunal avant que les procédures puissent être engagées; (3) la nature et les caractéristiques de l'audience elle-même, et notamment les témoignages et éléments de preuve susceptibles d'être reçus. Il ne faudrait pas croire qu'une telle uniformisation accroîtrait nécessairement la durée ou la lourdeur des procédures. Elle devrait au contraire, comme c'est le cas en ce qui a trait aux requêtes en droit civil, favoriser la concision des procédures, qui porteront désormais sur les questions importantes et pertinentes. En outre, des mécanismes permettent de raccourcir les formalités des demandes lorsque cela s'avère opportun; ainsi, il serait possible d'abréger le délai prévu pour la remise d'un préavis, et le juge pourrait rendre une ordonnance fondée sur le consentement des parties.

On trouvera dans cette section les règles de procédure applicables aux demandes d'ordonnance contestées ayant trait à la garde et à la disposition des choses saisies à titre de choses saisissables sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*) et celui de la partie III (*La recherche d'indices sur les personnes*) lorsqu'elles ont été extraites du corps d'une personne. La procédure applicable aux demandes d'ordonnance contestées concernant d'autres pouvoirs de la police est exposée dans d'autres parties. Par exemple, la partie VII (*Les privilèges en matière de saisie*) énonce les règles régissant les oppositions fondées sur un privilège. La procédure de demande présentée ici pourrait bien se retrouver dans une autre partie de la version finale et complète du code. Comme d'autres parties du présent volume prévoient la

244. Nous nous sommes demandé si le législateur, en employant le terme «sommaire», a voulu indiquer que la procédure se caractérise par la rapidité ou le peu de formalités. Ou encore, peut-être pensait-il à des restrictions ayant trait au type de preuves susceptibles d'être présentées? Selon la Cour d'appel de la Colombie-Britannique, on avait l'intention de donner le droit d'agir *ex parte* : *Suttles* c. *Cantin*, [1915] 8 W.W.R. 1293 (C.A. C.-B.). D'après une autre décision, le terme «demande sommaire» ne signifie pas «sans préavis»; il indiquerait que les procédures doivent être plus brèves que normalement : *Re Freeman Estate*, [1923] 1 D.L.R. 378, pp. 380-381 (C.S. N.-É., Div. d'app.). Le mot «sommaire» renvoie peut-être à certaines caractéristiques du mécanisme de décision : par exemple, il pourrait signifier qu'il y a lieu de trancher selon l'«instinct» plutôt que selon des principes juridiques; ou encore, que les décisions doivent être rendues oralement, immédiatement après l'audience, et non par écrit après délibération prolongée. Voir l'alinéa 488.1(4)*d*) du *Code criminel*, qui oblige le juge à qui l'on demande de décider si des documents sont visés par le privilège des communications entre client et avocat, de «trancher la question de façon sommaire». En résumé, la procédure «sommaire» n'est définie nulle part; on ne peut faire que des conjectures sur l'intention du législateur. C'est pourtant le terme le plus couramment utilisé pour décrire les demandes préalables au procès dans le *Code criminel*. Il nous paraît dès lors indéniable que l'imprécision des textes actuels constitue un problème.

présentation de demandes contestées et qu'on en trouvera aussi dans d'autres volumes de ce code, il pourrait bien s'avérer souhaitable de réunir toutes les dispositions semblables dans un chapitre révisé de la partie I (*Dispositions générales*).

L'article 214 énonce les caractéristiques fondamentales des demandes d'ordonnance : elles doivent être faites par écrit et être adressées à un juge de paix. Pour faciliter les choses au demandeur, la règle concernant le lieu de présentation se caractérise par une grande souplesse.

Les dispositions qui réglementent les divers types de demandes précisent pour chaque cas le délai du préavis et les personnes à qui il doit être donné.

Contenu de la demande

215. (1) La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime reproché ou faisant l'objet de l'enquête;

d) la description de la chose saisie visée par la demande;

e) la date de la saisie;

f) le nom du gardien;

g) la nature de l'ordonnance demandée;

h) les motifs invoqués à l'appui de la demande;

i) tout renseignement supplémentaire exigé par la présente partie à l'égard de la demande.

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

COMMENTAIRE

Les alinéas (1)*a*) à *h*), explicites, énoncent les renseignements que doit obligatoirement contenir toute demande d'ordonnance visée par la présente partie. Quant à l'alinéa *i*), il indique que d'autres renseignements doivent être fournis avec certaines demandes, suivant les dispositions spécifiques applicables à celles-ci.

En exigeant au paragraphe (2) la présentation d'un affidavit avec la demande, on vise à ce que les faits invoqués dans celle-ci ne le soient pas gratuitement.

Préavis

216. Un préavis indiquant le lieu, la date et l'heure de l'audition est signifié, avec la demande et l'affidavit, à toutes les parties auxquelles ce préavis doit être donné.

COMMENTAIRE

Il s'agit ici de veiller à ce que les parties soient avisées de la présentation d'une demande et aient suffisamment de temps pour s'y préparer.

Transmission du dossier

217. Si la demande est présentée dans un district judiciaire autre que celui où le procès-verbal de saisie a été déposé, le greffier du district judiciaire où le procès-verbal de saisie a été déposé transmet, sur requête écrite du demandeur, le procès-verbal et toutes les pièces y afférentes au greffier du district où la demande doit être entendue.

COMMENTAIRE

L'article 217 autorise le greffier du district où le procès-verbal de saisie a été déposé à transmettre, sur requête écrite du demandeur, l'ensemble du dossier à son collègue du district où la demande sera entendue. Suivant les articles 225 et 229, le juge de paix peut, s'il est convaincu que cela servirait au mieux les intérêts de la justice, ordonner que la demande soit présentée dans un autre district judiciaire et faire transmettre le dossier au greffier de ce district.

2. Audition de la demande

Pouvoir du juge de paix

218. Le juge de paix saisi de la demande ou habilité à rendre une ordonnance d'office peut prendre les mesures suivantes s'il l'estime opportun :

a) faire comparaître personnellement le gardien et l'interroger;

b) examiner toute chose saisie et à cette fin en exiger la production;

c) recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit.

COMMENTAIRE

Cette disposition vise à permettre au juge de paix de fonder sa décision sur le plus de renseignements possible (qu'on lui ait demandé la délivrance d'une ordonnance ou qu'il envisage d'en délivrer une d'office, lorsque la loi le lui permet). Il peut recevoir ces renseignements de la façon traditionnellement employée devant les tribunaux (dépositions faites sous serment) ou encore sous la forme d'affidavits. On donne donc au juge de paix les moyens de ne pas se limiter au contenu de la demande d'ordonnance pour déterminer, de façon active et efficace, si les conditions prévues par la loi sont remplies.

Dans certains cas, il pourra s'avérer important que le gardien fournisse des renseignements au juge de paix saisi d'une demande d'ordonnance spéciale ayant une incidence sur la façon de disposer d'une chose saisie; d'où l'alinéa *a*).

D'ordinaire, les demandes d'ordonnance seront fondées sur des éléments de preuve ou des renseignements donnés par les parties ou par des personnes qui ont reçu notification de la demande. La présente disposition confère toutefois au juge de paix toute latitude pour citer le gardien et l'interroger.

Le pouvoir établi à l'alinéa *b*) est le complément du pouvoir discrétionnaire conféré au juge de paix à l'alinéa *a*). La Commission estime qu'avant de rendre une ordonnance relative à une chose saisie, le juge de paix devrait avoir accès à tous les renseignements dont il a besoin, y compris ceux qu'il peut obtenir en examinant la chose en question.

L'alinéa *c*) permet au juge de paix de recevoir des témoignages présentés aussi bien oralement que sous la forme d'affidavits. Grâce à ce dernier mécanisme, il n'est plus nécessaire d'obliger les témoins à se présenter devant lui, avec tous les inconvénients que cela suppose pour eux. Il devrait aussi en résulter des économies de temps et d'argent. Tout bien pesé, ces avantages l'emportent sur les retards inhérents à l'obligation de permettre le contre-interrogatoire sur affidavit au moment de l'audition d'une demande[245].

Signification de l'affidavit

219. (1) Lorsqu'un affidavit doit être produit en preuve, il est signifié, dans un délai raisonnable avant l'audition, à toutes les parties à qui a été notifiée la demande.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit reçu en preuve peut être interrogé sur le contenu de cet affidavit.

COMMENTAIRE

Cet article fixe les règles touchant la signification des affidavits produits en preuve. Les parties à qui a été notifiée la demande devraient également recevoir ces affidavits, assez longtemps d'avance pour être en mesure de se préparer en vue de l'audience. Cela ne peut qu'accélérer la procédure. Par ailleurs, le souscripteur peut être interrogé sur le contenu de l'affidavit.

Serment

220. Le serment est obligatoire pour tout témoin.

Enregistrement

221. (1) Les témoignages entendus par le juge de paix sont intégralement enregistrés par écrit ou sur support électronique.

Désignation de l'enregistrement

(2) L'enregistrement indique l'heure, le jour et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

245. Voir *Re Senechal and The Queen* (1980), 52 C.C.C. (2d) 313 (H.C. Ont.), le juge Linden. Si la preuve par affidavit peut être reçue au moment de l'«audition» de la demande, il faut donner à la partie adverse la possibilité de procéder à un contre-interrogatoire.

COMMENTAIRE

Cet article est le pendant d'une disposition relative aux demandes de mandat (art. 11). Il s'agit de prévoir la réalisation d'enregistrements propres à permettre une révision ultérieure[246], eu égard au principe de la responsabilité.

3. Délivrance de l'ordonnance

Forme de l'ordonnance

222. L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge de paix qui la rend.

Contenu de l'ordonnance

223. L'ordonnance contient les renseignements suivants :

a) le nom du demandeur, le cas échéant;

b) le crime reproché ou faisant l'objet de l'enquête;

c) une description de la chose saisie faisant l'objet de l'ordonnance;

d) la date de la saisie;

e) le nom du gardien;

f) la décision du juge de paix et les conditions dont elle est assortie;

g) le lieu et la date où elle est rendue;

h) le nom et le ressort du juge de paix qui la rend;

i) tout renseignement additionnel exigé par la présente partie à l'égard de l'ordonnance.

COMMENTAIRE

On trouve énoncés aux alinéas *a*) à *h*) de cette disposition les éléments que toute ordonnance doit obligatoirement comporter. L'alinéa *i*) indique que des dispositions de la présente partie exigent d'autres indications spéciales dans le cas de certaines ordonnances.

4. Dépôt de documents

Demande et pièces y afférentes

224. (1) Dès que cela est matériellement possible après l'audition, le juge de paix fait déposer auprès du greffier du district judiciaire où le procès-verbal de saisie a été déposé les documents suivants :

a) le préavis relatif à la demande;

246. Voir le commentaire qui accompagne l'article 11.

b) la demande;

c) l'enregistrement des témoignages qu'il a entendus, ou la transcription de cet enregistrement;

d) les autres éléments de preuve qu'il a reçus;

e) l'original de l'ordonnance rendue, le cas échéant.

Renvoi de documents

(2) Lorsque le procès-verbal de saisie et les pièces connexes avaient été transmis, en vue de l'audition de la demande, par le greffier du district judiciaire où ils avaient été déposés, le juge de paix les renvoie après l'audition.

COMMENTAIRE

Cette disposition est fondée sur le même objectif que celles qui régissent le dépôt de documents dans le cas des demandes de mandat[247] : veiller à la conservation des documents sur lesquels la demande est fondée et les mettre à la disposition des intéressés, pour qu'ils puissent ultérieurement vérifier si l'ordonnance a été rendue en toute légalité.

En vertu de l'article 214, la demande peut être présentée dans divers districts judiciaires; le juge de paix est cependant tenu suivant le paragraphe (1) du présent article de faire déposer, après l'audition, tous les documents connexes dans le district où le procès-verbal de saisie l'a été[248]. Habituellement, cet endroit sera le plus commode et le plus accessible pour les personnes directement touchées par la saisie. Et suivant le paragraphe 224(2), si le procès-verbal et les pièces connexes ont en vertu de l'article 217 été transmis au greffier du district où la demande a été entendue, ils doivent être renvoyés dans le district où ils avaient été déposés au départ. Au bout du compte, le dossier dans son intégralité se trouvera donc réuni au même endroit.

5. Renvoi de la demande

Ordonnance de renvoi

225. (1) Lorsqu'une demande a été déposée et notifiée, le juge de paix qui en est saisi peut, sur demande distincte, soit en ordonner le renvoi et l'audition dans un autre district judiciaire, soit ordonner la présentation d'une nouvelle demande dans un autre district judiciaire, s'il est convaincu que cela servirait au mieux l'administration de la justice, compte tenu de l'intérêt des témoins et des parties.

Autre district judiciaire

(2) Cet autre district judiciaire doit être celui où le procès-verbal de saisie a été déposé, celui où la chose a été placée sous garde ou celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

247. Voir l'article 13.

248. C'est à l'article 213 qu'est précisé le lieu où doit être déposé le procès-verbal (soit le district judiciaire où la saisie a été effectuée). Voir aussi le commentaire qui accompagne l'article 213.

COMMENTAIRE

On confère au juge de paix, par cette disposition, le pouvoir d'ordonner sur demande que l'audition ait lieu à l'endroit qui est le plus commode pour toutes les parties. On a ici tenu compte de la latitude laissée au demandeur, à l'article 214, quant au choix du district où il présente au départ sa demande d'ordonnance.

Demande de renvoi

226. La demande de renvoi peut être faite par toute personne à qui la demande principale a été notifiée.

Préavis

227. La demande de renvoi est notifiée au moyen d'un préavis de trois jours francs aux personnes suivantes :

a) **la personne qui a présenté la demande principale;**

b) **toute autre personne à qui a été notifiée la demande principale.**

Renseignements supplémentaires

228. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande de renvoi indique les motifs pour lesquels le demandeur estime que le renvoi de la demande principale servirait au mieux l'administration de la justice, compte tenu de l'intérêt des témoins et des parties.

Transmission du dossier

229. Le juge de paix qui ordonne que la demande principale soit renvoyée ou présentée dans un autre district judiciaire fait transmettre le dossier au greffier de ce district judiciaire.

SECTION II
MESURES DE PROTECTION ET DE CONSERVATION

Gardien

230. Les choses saisies et non remises par l'agent de la paix sont placées sous sa garde. Il lui incombe de prendre des mesures pour en assurer la protection et la conservation.

Rapport n° 27, rec. 3(1) et (3)
Code criminel, al. 489.1(1)*b*)

COMMENTAIRE

La Commission avait à l'origine recommandé[249] que les autorités soient tenues, chaque fois qu'elles procèdent à une saisie, de demander une «ordonnance de garde»

249. Rapport n° 27, rec. 3.

réglant l'entreposage et la surveillance des choses saisies. Cette procédure devait être automatiquement amorcée par la production, devant un juge de paix, du procès-verbal de saisie figurant à l'endos du mandat de perquisition ou dressé postérieurement à la saisie. On exigeait la comparution d'au moins un agent connaissant les faits relatifs à la saisie[250].

Après réflexion, cependant, nous nous sommes ravisés; nous pensons maintenant que les objectifs poursuivis pourraient être atteints plus efficacement au moyen d'une procédure simplifiée qui n'exigerait pas systématiquement la tenue d'une audience en bonne et due forme, ni la comparution de témoins à des procédures judiciaires, formalité qui prend un temps énorme. C'est la raison qui explique la procédure établie à l'article 230, déjà employée du reste de façon courante par de nombreux agents et corps de police. Suivant cette disposition, l'agent de la paix qui effectue la saisie a, du moins au départ, la garde des choses saisies. La règle présente l'avantage de la simplicité et permet aux personnes concernées de savoir qui est responsable des objets frappés par la saisie.

Suivant l'alinéa 490(1)*a*) du Code actuel, il incombe au «poursuivant» de convaincre le juge de paix «que la détention des choses saisies est nécessaire aux fins d'une enquête, d'une enquête préliminaire, d'un procès ou de toute autre procédure». Une fois convaincu, le juge de paix peut ordonner la rétention et la conservation des choses saisies pendant une période d'une durée maximum de trois mois à compter de la date de la saisie (ce délai étant toutefois sujet à prolongation)[251].

La procédure établie dans le présent régime est moins compliquée. L'intervention du poursuivant n'est pas nécessaire aux premiers stades, l'article 230 confiant à l'agent de la paix le soin de prendre des mesures pour assurer la protection et la conservation de la chose saisie et retenue. Toute dérogation aux exigences fondamentales établies à l'article 230 doit être autorisée en conformité avec les pouvoirs conférés dans la présente partie. Les dispositions suivantes, en fait, énoncent pour l'essentiel les circonstances dans lesquelles de telles dérogations sont possibles[252].

Chose saisie confiée à un tiers

231. Le gardien peut confier une chose saisie à toute personne, notamment au saisi, aux conditions raisonnablement nécessaires pour en assurer la protection et la conservation.

COMMENTAIRE

Il n'est pas indispensable que le gardien ait la possession physique de la chose saisie. La présente disposition est liée à l'article 20, aux termes duquel le pouvoir de saisie s'entend du pouvoir de prendre possession d'une chose ou de retirer à quiconque

250. *Id.*, pp. 15-16.

251. *Code criminel*, al. 490(1)*b*), par. 490(2).

252. Conformément à la règle figurant actuellement dans le Code, l'article 270 fixe à trois mois la durée maximum de la période initiale de rétention. Les articles 273 et 274 précisent les formalités régissant la demande de prolongation et les motifs qui la justifient.

la possibilité de disposer d'une chose ou de fonds déposés à un compte dans un établissement financier. Dans bien des cas, il sera indispensable de laisser physiquement la chose saisie à une autre personne que le gardien. Aussi établit-on clairement dans la présente disposition que celui-ci est habilité à la confier à un tiers, voire au saisi lui-même, si la protection et la conservation de la chose ne risquent pas d'en pâtir; le gardien continue néanmoins dans ce cas à exercer un rôle de surveillance.

Cet article donne aussi une certaine latitude en ce qui a trait aux moyens à prendre pour la protection et la conservation de biens d'une nature particulière, comme des denrées périssables ou des objets très volumineux ne pouvant être entreposés dans des lieux placés sous la surveillance concrète du gardien.

Ordonnance sur demande

232. Le juge de paix saisi d'une demande à cet effet peut rendre une ordonnance en vue de la protection et de la conservation de toute chose saisie, et peut notamment remplacer le gardien ou nommer des gardiens supplémentaires.

COMMENTAIRE

L'article 232 confère au juge de paix le pouvoir d'ordonner, sur demande, des modifications aux conditions générales applicables à la rétention des choses énumérées au procès-verbal de saisie[253]. Le processus fait ainsi l'objet d'une surveillance judiciaire impartiale.

Demandeur

233. La demande peut être présentée par l'agent de la paix, l'accusé, le poursuivant ou toute personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

COMMENTAIRE

L'article 233 indique clairement quelles personnes peuvent demander une ordonnance ayant pour effet de modifier les conditions fixées relativement à la garde des choses saisies. Comme pour d'autres ordonnances visées par la présente partie[254], figurent notamment dans cette courte liste les personnes qui prétendent «avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession». Cette expression, d'une portée relativement large, pourrait par exemple embrasser la caution, le vendeur impayé, le créancier nanti, le titulaire d'un droit de rétention, le prêteur sur gages.

Préavis

234. Le demandeur donne un préavis de trois jours francs à toute personne qui, à sa connaissance, pourrait avoir un droit

253. L'agent de la paix qui saisit une chose sans la remettre en a au départ la garde. Voir l'article 230 et le commentaire qui l'accompagne.

254. Voir les articles 248 et 261.

de propriété sur la chose saisie ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix saisi de la demande.

COMMENTAIRE

À l'article 234, nous avons voulu veiller à ce que les personnes autres que le demandeur, susceptibles d'avoir un droit de propriété sur la chose saisie ou d'avoir droit à sa possession, soient avisées et aient le temps de préparer les arguments qu'elles pourraient souhaiter faire valoir quant aux mesures à prendre pour la protection de la chose saisie ou de leurs intérêts.

Renseignements supplémentaires

235. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique :

***a*) la qualité du demandeur, à savoir s'il s'agit de l'agent de la paix, de l'accusé, du poursuivant ou d'une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession;**

***b*) la nature du droit invoqué si le demandeur est une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.**

Rapport n° 27, rec. 3(2)
Code criminel, al. 490(1)*b*), par. 490(15) et (16)

COMMENTAIRE

Le paragraphe 215(1), nous l'avons vu, énumère les renseignements que doit contenir toute demande d'ordonnance faite sous le régime de la présente partie et prévoit, à l'alinéa *i*), l'inclusion «de tout renseignement supplémentaire exigé par la présente partie à l'égard de la demande». On trouve à l'article 235 les renseignements qui doivent ainsi être ajoutés dans la demande faite en vertu des articles 232 à 235.

Ordonnance rendue d'office

236. (1) Le juge de paix qui reçoit un procès-verbal de saisie peut, d'office, rendre une ordonnance en vue de la protection et de la conservation de toute chose saisie visée par le procès-verbal, et peut notamment remplacer le gardien ou nommer des gardiens supplémentaires.

Préavis

(2) Le juge de paix qui envisage de rendre une ordonnance d'office avise de son intention, trois jours francs avant l'audience tenue pour trancher la question, le poursuivant de même que toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Rapport n° 27, rec. 3

COMMENTAIRE

À la lecture du procès-verbal de saisie, le juge de paix pourra se demander si les mesures de protection et de conservation prises par la police sont adéquates. Le présent article lui confère le pouvoir de tenir d'office une audience en vue de déterminer s'il y a lieu de rendre une ordonnance relative à la protection et à la conservation d'une chose saisie (par exemple, ordonner le remplacement du gardien). Dans ce cas, aucune demande n'est présentée; le juge de paix doit cependant aviser les intéressés de la tenue de l'audience.

Renseignements supplémentaires

237. Outre les renseignements exigés par les alinéas 223*a*) à *h*), l'ordonnance indique, le cas échéant, le nom du remplaçant du gardien ou des gardiens supplémentaires.

SECTION III
ANALYSE OU EXAMEN

Analyse par l'agent de la paix

238. L'agent de la paix peut faire examiner ou analyser toute chose saisie et le gardien est tenu de la lui remettre à cette fin.

COMMENTAIRE

Cette disposition, ajoutée par souci de clarté et conforme à une pratique dont le bien-fondé est reconnu, repose sur le fait qu'il est souvent nécessaire de faire examiner ou analyser la chose saisie pour être en mesure de déterminer sa valeur probante.

Ordonnance de remise

239. Le juge de paix saisi d'une demande à cet effet et convaincu que cela est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière peut ordonner qu'une chose saisie soit remise à celui-ci en vue d'une analyse ou d'un examen. Le juge de paix assortit l'ordonnance des conditions qu'il estime nécessaires pour assurer la protection et la conservation de la chose.

Code criminel, art. 605

COMMENTAIRE

Les enquêteurs et les poursuivants jouissent en ce moment du droit absolu de faire procéder à des examens ou à des analyses scientifiques sur toute chose à partir du moment où elle a été saisie. Les possibilités offertes à l'accusé sous ce rapport se limitent en revanche à ce qui est prévu au paragraphe 605(1) du *Code criminel*. Selon cette disposition, le poursuivant ou l'accusé peut demander la communication de «pièces» «aux fins d'épreuve ou d'examen scientifique ou autre». À notre sens, le pouvoir conféré par cet article est trop limité et devrait être établi en termes plus simples.

Le fait que seules les «pièces»[255] soient visées dans la disposition actuelle et que les demandes de communication doivent être présentées à une juridiction supérieure[256] est susceptible de retarder inutilement les procédures et, partant, de causer un préjudice à l'accusé. Nous pensons en outre qu'il n'y a pas lieu d'encombrer le rôle des cours supérieures avec des demandes de cette nature. Aussi l'article 239 autorise-t-il l'accusé à demander une ordonnance à n'importe quel juge de paix; cette demande peut être présentée en tout temps après la saisie, peu importe que la chose ait ou non été officiellement produite à titre de pièce dans les procédures.

Le fait d'assortir au pouvoir de remise de la chose celui de fixer des conditions favorise la continuité de la possession et la protection de l'intégrité de la chose, qui ne risque pas ainsi de perdre sa valeur probante.

Indépendamment des dispositions du présent article, il demeure nécessaire de permettre à l'accusation comme à la défense de demander, en vue d'examens ou d'analyses, la communication de pièces devant être produites au procès. Des dispositions à cet effet seront incluses dans une autre partie de notre code, consacrée aux règles régissant le déroulement du procès.

Demande de remise

240. La demande est présentée par l'accusé avec préavis de trois jours francs au poursuivant.

Code criminel, art. 605

SECTION IV
ACCÈS AUX CHOSES SAISIES

Demande d'accès

241. (1) La personne ayant un intérêt dans une chose saisie peut demander au gardien l'autorisation d'examiner la chose à l'endroit où elle est gardée.

Pouvoir du gardien

(2) Le gardien peut donner cette autorisation, aux conditions qu'il juge nécessaires à la protection et à la conservation de la chose saisie, s'il estime que :

***a*) d'une part, la personne a effectivement un intérêt dans la chose saisie;**

***b*) d'autre part, l'autorisation ne nuira pas à quelque enquête policière en cours, ne constituera pas une menace pour la sécurité de quelque personne, ne portera atteinte à aucun droit de propriété sur la chose saisie ni au droit à sa**

255. Voir cependant l'arrêt *R.* c. *Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (C.A. Ont.).

256. Voir l'affaire *R.* c. *Walsh* (1981), 59 C.C.C. (2d) 554 (C. prov. Ont.) : le juge de paix qui préside une enquête préliminaire ne peut ordonner la communication de pièces en vertu de cette disposition.

possession, ni ne mettra en jeu la protection et la conservation de la chose.

COMMENTAIRE

Un certain nombre de dispositions du *Code criminel* réglementent sous divers aspects l'accès aux choses saisies. Ainsi, le paragraphe 490(15) permet à la personne qui a «un intérêt dans la chose détenue [suivant les paragraphes 490(1), (2) ou (3)]» de demander à «un juge d'une cour supérieure de juridiction criminelle ou un juge au sens de l'article 552[257]», après un avis de trois jours francs au procureur général, une ordonnance lui permettant d'examiner la chose en question. Le juge qui rend l'ordonnance peut, en vertu du paragraphe 490(16), fixer les conditions qu'il «estime nécessaires ou souhaitables pour sauvegarder et préserver» l'objet.

Dans la présente partie, ce sont les articles 241 à 246 qui énoncent les règles générales visant l'accès aux choses saisies.

Comme nous l'avons vu, il est en ce moment possible de demander, suivant les dispositions du paragraphe 605(1) du *Code criminel*, la communication d'une «pièce» «aux fins d'épreuve ou d'examen scientifique ou autre». La demande visant la communication à ces fins de choses saisies (et non l'accès à ces choses) sont régies par les articles 239 et 240 de la présente partie.

Par ailleurs, la personne qui invoque au sujet de documents sous main de justice le privilège des communications entre client et avocat peut, suivant le paragraphe 488.1(9) du Code actuel, être autorisée à les examiner ou à en faire des copies. Cette éventualité est régie par les articles 301 à 310 de notre code.

Nous en sommes venus à la conclusion que l'accès aux choses saisies devrait être limité aux personnes qui y ont un intérêt[258]. (L'existence d'un tel intérêt est normalement exclue en ce qui concerne le public en général.) Le mécanisme actuel nous semble par ailleurs alambiqué et empreint de formalisme[259].

Alors que le Code actuel dispose qu'une demande officielle doit être présentée à un juge «[l]orsqu'une chose est détenue aux termes des paragraphes (1) à (3) [de l'art. 490]», le paragraphe 241(1) exige simplement la présentation d'une demande au gardien. Les articles 243 à 246 prévoient la possibilité de s'adresser à un juge de paix en cas de refus[260].

Le paragraphe (2) indique les critères sur lesquels le gardien se fondera pour statuer sur la demande. Les tribunaux ont donné une interprétation tantôt large, tantôt étroite à l'exigence actuelle d'«un intérêt [du demandeur] dans la chose détenue[261]». Ils ont étendu la signification du mot «intérêt» au-delà du domaine des droits réels

257. Le terme «cour supérieure de juridiction criminelle» est défini à l'article 2 du *Code criminel*.

258. Rapport n° 27, p. 20.

259. *Id.*, p. 21.

260. *Id.*, rec. 4, et p. 21.

261. Voir document de travail n° 39, pp. 38-42.

proprement dits, pour lui faire embrasser l'intérêt légitime quelconque à connaître le contenu de documents saisis[262]. Une interprétation trop stricte nuirait à la réalisation des objectifs du régime proposé ici. L'alinéa (2)*a*) repose donc sur l'idée que les gardiens — et si c'est nécessaire, les juges de paix — veilleront à ce que les personnes qui ont vraiment besoin d'examiner les choses saisies ne s'en voient pas refuser la possibilité.

Certains motifs pouvant justifier le rejet de la demande sont énoncés à l'alinéa (2)*b*). Soulignons que les refus fondés sur l'un d'entre eux devraient être chose rare dans les cas où une inculpation a déjà eu lieu relativement à une chose saisie.

Copies

242. (1) La personne ayant un intérêt dans un renseignement contenu dans une chose saisie et susceptible d'être reproduit peut demander au gardien de lui remettre des copies de ce renseignement.

Pouvoir du gardien

(2) Le gardien peut fournir les copies, sur paiement des droits prescrits, lorsque les conditions suivantes sont réunies :

***a*) il estime que la personne a effectivement un intérêt dans le renseignement;**

***b*) il estime que la fourniture des copies ne nuira pas à quelque enquête policière en cours, ne constituera pas une menace pour la sécurité de quelque personne, ne portera atteinte à aucun droit de propriété sur la chose saisie ni au droit à sa possession, ni ne mettra en jeu la protection et la conservation de la chose;**

***c*) il est en mesure de fournir les copies demandées.**

COMMENTAIRE

Cette disposition régit l'obtention de copies des renseignements contenus dans une chose saisie — par exemple, l'information figurant dans un document écrit ou emmagasinée sur un disque d'ordinateur. Dans ce dernier cas, l'accès à la chose elle-même, à savoir le disque, risque de s'avérer sans intérêt. Il faudra sans doute obtenir la permission de faire imprimer l'information qui y est contenue et d'en faire réaliser des copies. Le mécanisme et les critères établis sont semblables à ceux qui ont trait à l'accès aux choses saisies en général.

La question du coût des reproductions est également traitée au paragraphe (2). Le tarif sera fixé par règlement. Le paragraphe 243(2) permet cependant au juge de paix de dispenser sur demande l'intéressé d'acquitter les droits prévus s'il est convaincu que le paiement causerait à celui-ci un préjudice grave ou serait inéquitable dans les circonstances. Nous avons voulu faire en sorte par ces dispositions que l'accès aux choses saisies soit permis lorsqu'il est nécessaire, en éliminant tous obstacles de nature administrative, financière ou bureaucratique.

262. Rapport n° 27, p. 20.

Ordonnance relative à l'accès

243. (1) Le juge de paix saisi d'une demande à cet effet et convaincu qu'une personne devrait être autorisée à examiner la chose saisie ou devrait obtenir des copies des renseignements y contenus peut ordonner au gardien d'autoriser le demandeur à examiner la chose ou de lui fournir les copies demandées. Le juge de paix assortit l'ordonnance des conditions nécessaires pour assurer la protection et la conservation de la chose.

Dispense de paiement des droits

(2) Le juge de paix saisi d'une demande à cet effet peut ordonner que le demandeur soit dispensé de l'obligation d'acquitter les droits prévus s'il est convaincu que le paiement des droits causerait un préjudice grave au demandeur ou serait inéquitable dans les circonstances.

Rapport n° 27, rec. 4(1)
Code criminel, par. 490(15) et (16)

COMMENTAIRE

L'article 243 permet à quiconque s'est vu refuser par le gardien, soit l'accès à une chose saisie, soit l'obtention de copies de l'information qui y est contenue, de présenter une nouvelle demande, à un juge de paix cette fois. On peut aussi demander à celui-ci d'être dispensé de l'obligation d'acquitter les droits prévus pour la réalisation de copies[263].

Demande d'accès, de copies ou de dispense de paiement des droits

244. La demande peut être présentée par toute personne à qui l'autorisation d'examiner la chose saisie ou l'obtention de copies des renseignements y contenus a été refusée, ou par toute personne à qui le paiement des droits relatifs à l'obtention des copies causerait un préjudice grave ou envers qui le paiement de tels droits serait inéquitable dans les circonstances.

Rapport n° 27, rec. 4(1)
Code criminel, par. 490(15)

Préavis

245. La demande est notifiée au moyen d'un préavis de trois jours francs au poursuivant.

Rapport n° 27, rec. 4(1)
Code criminel, par. 490(15)

263. La Commission avait recommandé au départ que la personne qui s'est vu refuser l'accès à une chose saisie soit tenue de s'adresser à la «cour d'appel». Mais comme il s'agit de la révision d'une décision de nature essentiellement administrative, il serait inopportun de la confier à cette juridiction au moment où les procédures sont à peine engagées. La solution retenue ici s'accorde davantage à notre volonté, maintes fois exprimée, d'atténuer la lourdeur et le formalisme des procédures. Voir le rapport n° 27, rec. 4(2).

Renseignements supplémentaires

246. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique la nature de l'intérêt du demandeur dans la chose saisie.

SECTION V
CHOSES PÉRISSABLES

Ordonnance sur demande

247. Le juge de paix saisi d'une demande à cet effet et convaincu qu'une chose saisie est périssable ou susceptible de se déprécier rapidement peut ordonner :

***a*) soit la remise de la chose saisie à son possesseur légitime, à certaines conditions, le cas échéant, si le droit à la possession de la chose n'est pas contesté;**

***b*) soit la vente de la chose saisie, suivant les modalités qu'il fixe, si le droit à la possession de la chose est contesté.**

COMMENTAIRE

À l'heure actuelle, le *Code criminel* ne comporte pas de règles précises sur la façon de disposer (notamment par la vente) des choses périssables qui ont été saisies. On peut, avant l'expiration de la période de rétention, demander la restitution de toute chose saisie pourvu qu'un juge ou un juge de paix soit convaincu qu'un «préjudice sérieux[264]» sera causé s'il refuse qu'une telle demande soit présentée.

Les articles 247 à 250 de notre code permettent spécifiquement au juge de paix d'ordonner sur demande la remise de la chose saisie au possesseur légitime ou la vente de cette chose, si elle est périssable ou susceptible de se déprécier rapidement. Ils visent à empêcher que des personnes — en particulier les victimes d'actes criminels — subissent un préjudice grave du fait de la rétention inutile des choses saisies. Ces dispositions, de même que celles des articles 266 à 269 (qui prévoient la production en preuve de photographies ou d'autres représentations de choses saisies), protège les intérêts des personnes ayant droit à la possession, sans porter sérieusement atteinte à ceux de l'État quant à l'utilisation d'éléments de preuve dans des poursuites pénales.

Demandeur

248. La demande peut être présentée par l'agent de la paix, l'accusé, le poursuivant ou toute personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

264. *Code criminel*, par. 490(7) et (8).

COMMENTAIRE

L'article 248 précise qui est recevable à demander une ordonnance en vue de la remise au possesseur légitime d'une chose «périssable ou susceptible de se déprécier rapidement», ou en vue de la vente de cette chose. Cette disposition sera vraisemblablement invoquée dans des situations d'urgence; nous l'avons donc rédigée en des termes relativement généraux, de telle sorte que la demande puisse être présentée par diverses catégories de personnes susceptibles de savoir que la détérioration ou la dépréciation est imminente.

Préavis

249. Le demandeur donne un préavis d'un jour franc à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix.

COMMENTAIRE

L'article 249 indique à qui la demande doit être notifiée. Les personnes qui, à la connaissance du demandeur, ont un droit de propriété sur une chose saisie périssable ou susceptible de se déprécier rapidement — ou ont droit à sa possession — sont en droit d'être avisées de toute demande de restitution. La brièveté du préavis exigé tient à l'urgence des situations auxquelles s'appliquent ces dispositions.

Renseignements supplémentaires

250. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique :

***a*) la qualité du demandeur, à savoir s'il s'agit de l'agent de la paix, de l'accusé, du poursuivant ou d'une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession;**

***b*) la nature du droit invoqué si le demandeur est une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.**

Rapport n° 27, rec. 3(3) et (4)
Code criminel, al. 490(1)*b*), par. 490(7), (8), (9), (10) et (11)

Ordonnance rendue d'office

251. (1) Le juge de paix qui reçoit le procès-verbal de saisie et qui est convaincu qu'une chose saisie est périssable ou susceptible de se déprécier rapidement peut, d'office, ordonner :

***a*) soit la remise de la chose saisie à son possesseur légitime, à certaines conditions, le cas échéant, si le droit à la possession n'est pas contesté;**

***b*) soit la vente de la chose saisie, suivant les modalités qu'il fixe, si le droit à la possession de la chose est contesté.**

Préavis

(2) Le juge de paix qui envisage de rendre une ordonnance d'office avise de son intention, un jour franc avant l'audience tenue pour trancher la question, le poursuivant de même que toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Rapport n° 27, rec. 3(3) et (4)
Code criminel, al. 490(1)*b*), par. 490(8), (9) et (11)

COMMENTAIRE

Cet article permet au juge de paix qui reçoit le procès-verbal de saisie de tenir d'office une audience pour déterminer s'il y a lieu de remettre au possesseur légitime ou de faire vendre une chose saisie qui paraît périssable ou susceptible de se déprécier rapidement. Dans ce cas, aucune demande n'est présentée; le juge de paix doit cependant aviser les intéressés de son intention, pour leur permettre d'assister à l'audience.

Produit de la vente

252. Le produit de la vente de la chose saisie est déposé par le gardien à un compte portant intérêt suivant les conditions fixées par le juge de paix.

COMMENTAIRE

L'article 252 indique au gardien ce qu'il doit faire du produit d'une vente ordonnée en vertu des alinéas 247*b*) ou 251(1)*b*). Il s'agit de protéger les intérêts de la personne qui, éventuellement, se verra reconnaître le droit à la possession d'une chose périssable ou «susceptible de se déprécier rapidement». On présume ici que le juge de paix mettra tout en œuvre, en rendant l'ordonnance, pour que les intérêts tirés du produit de la vente soient les plus élevés possible.

SECTION VI
CHOSES DANGEREUSES

Obligation de l'agent de la paix

253. Lorsqu'il estime qu'une chose saisie présente un danger grave pour la santé ou la sécurité publiques, l'agent de la paix la place ou la fait placer en lieu sûr dès que cela est matériellement possible.

Rapport n° 27, rec. 3(6)
Code criminel art. 492

COMMENTAIRE

Les dispositions des sections VI et VII du présent chapitre établissent des pouvoirs spéciaux touchant les mesures à prendre à l'égard de choses saisies «dangereuses», par exemple des armes ou des substances explosives.

Lorsque l'agent de la paix estime qu'une chose saisie présente un danger grave pour la santé ou la sécurité publiques, il doit suivant l'article 253 la placer ou la faire

placer en lieu sûr[265]. Peut-être fait-il erreur, peut-être ses craintes reposent-elles sur des motifs déraisonnables; mais par souci de prudence et dans l'intérêt de la santé et de la sécurité publiques, cette disposition l'oblige à prendre les mesures propres à supprimer le risque appréhendé.

Le simple fait de mettre une chose saisie en lieu sûr sans l'autorisation d'un juge de paix ne saurait porter irrémédiablement atteinte aux intérêts de quiconque en est le possesseur légitime. Car il faudra nécessairement obtenir la sanction du juge de paix, en vertu de l'article 254, si l'on veut faire procéder à la destruction de cette chose ou en disposer autrement; et à ce stade, il sera possible à l'intéressé de dénoncer tout acte répréhensible ou négligent de l'agent de la paix. Dans ces conditions, il est inutile d'obliger l'agent de la paix à faire autoriser dans un premier temps par le juge de paix la mise en lieu sûr de l'objet.

Ordonnance

254. Le juge de paix saisi d'une demande à cet effet et convaincu qu'une chose saisie présente un danger grave pour la santé ou la sécurité publiques peut ordonner qu'elle soit détruite ou qu'il en soit disposé autrement. Il peut assortir l'ordonnance des conditions qu'il juge propres à supprimer ou à atténuer le danger.

Rapport n° 27, rec. 3(6)
Code criminel, art. 491 et 492

Demandeur et préavis

255. La demande est présentée par l'agent de la paix avec préavis raisonnable à toute personne pouvant selon lui avoir un droit sur la chose saisie ainsi qu'à toute personne désignée par le juge de paix saisi de la demande.

COMMENTAIRE

Nous avons simplement voulu ici faire en sorte que les intéressés se voient donner l'occasion d'exprimer leur point de vue avant que soient prises les mesures radicales prévues à l'article 254.

Préparation du rapport

256. (1) Un rapport confirmant l'exécution de l'ordonnance et faisant état de la façon dont la chose saisie a été détruite ou dont il en a été disposé est présenté, dès que cela est

265. Il existe une nette différence entre les motifs justifiant cette mesure et les conditions plus rigoureuses régissant l'exercice du pouvoir exceptionnel conféré à l'agent de la paix de détruire la chose qui selon lui présente un danger imminent et grave pour la santé ou la sécurité publiques, ou d'en disposer autrement. Voir l'article 257.

matériellement possible, à un juge de paix du district judiciaire où l'ordonnance a été rendue.

Dépôt

(2) Le juge de paix fait déposer le rapport auprès du greffier du district judiciaire où le procès-verbal de saisie a été déposé.

SECTION VII
CHOSES PRÉSENTANT UN DANGER IMMINENT ET GRAVE

Pouvoir de l'agent de la paix

257. L'agent de la paix qui croit, pour des motifs raisonnables, qu'une chose saisie présente un danger imminent et grave pour la santé ou la sécurité publiques peut la détruire ou en disposer autrement.

Rapport n° 27, rec. 3(6)

COMMENTAIRE

L'article 257 confère à l'agent de la paix le pouvoir, exceptionnel, de detruire dans certaines circonstances des choses qui ont été saisies. Les articles 258 et 259, dont les exigences sont rigoureuses, l'obligent à rendre compte de ses actes lorsqu'il s'est prévalu de ce pouvoir.

En cas de «danger imminent et grave», nous estimons que la sécurité du public doit l'emporter sur la protection des droits réels. Car de toute évidence, l'agent doit à ce moment-là passer immédiatement à l'action. Le délai nécessaire à l'obtention d'une autorisation judiciaire préalable ou à une révision judiciaire est un luxe qu'on ne peut se payer dans ce genre de situation.

La destruction d'une chose saisie effectuée en vertu de l'article 257 cause nécessairement un préjudice aux personnes qui ont un droit sur cette chose. Dans cette perspective, l'agent de la paix qui ferait preuve de négligence ou agirait de manière répréhensible s'exposerait à des poursuites en dommages-intérêts. Il y a donc lieu d'exiger qu'il «croi[e] pour des motifs raisonnables [que la] chose saisie présente un danger imminent et grave pour la santé et la sécurité publiques», non seulement pour empêcher la destruction inutile de biens, mais aussi pour se protéger lui-même.

Avis et rapport

258. Après avoir détruit la chose ou en avoir disposé, l'agent de la paix :

***a*) d'une part, transmet un avis au saisi et à toute autre personne qui lui paraît avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession;**

***b*) d'autre part, rédige un rapport contenant une description de la chose saisie, les motifs pour lesquels elle a été**

détruite ou il en a été disposé, ainsi que la façon dont l'opération a été effectuée.

Présentation du rapport

259. (1) Le rapport est présenté, dès que cela est matériellement possible, à un juge de paix du district judiciaire où le procès-verbal de saisie a été déposé.

Dépôt

(2) Le rapport est déposé avec le procès-verbal de saisie.

SECTION VIII
ORDONNANCE DE RESTITUTION

Restitution

260. Le juge de paix saisi d'une demande à cet effet ordonne la restitution au demandeur de toute chose saisie ou du produit de la vente de celle-ci s'il est convaincu que les conditions suivantes sont réunies :

a) **le droit à la possession de la chose ou du produit de la vente n'est pas contesté;**

b) **la possession du demandeur serait légitime;**

c) **la loi ne prévoit pas la confiscation de la chose ni du produit de la vente;**

d) **la rétention de la chose ou du produit de la vente n'est pas nécessaire ni utile aux fins de quelque enquête ou procédure.**

Rapport n° 27, rec. 9 et 12
Code criminel, par. 490(5), (9), (11), 491(2) et (3)

COMMENTAIRE

Le mécanisme de restitution prévu dans le régime proposé ici vise à permettre la prise en considération d'intérêts parfois contradictoires, au moyen d'une procédure simple à laquelle on puisse avoir recours en tout temps après la saisie. Ainsi, par une seule et même procédure, il sera possible de statuer sur toute prétention à la possession de la chose saisie ou du produit de la vente, et d'ordonner sans délai la restitution si elle est justifiée, tout en protégeant dans la mesure du possible l'intérêt public comme les intérêts individuels.

Il faut en cette matière tenir compte de trois intérêts fondamentaux. Premièrement, l'efficacité de l'administration de la justice exige que les autorités disposent de pouvoirs adéquats pour retenir et préserver les choses saisies tant que cela est raisonnablement nécessaire aux fins d'une enquête criminelle, de la production en preuve ou d'une éventuelle confiscation lorsqu'elle est prévue par la loi (ce dernier cas vise également le

produit de la vente). Au départ, cet intérêt public prime l'intérêt individuel des personnes qui souhaiteraient récupérer leurs biens[266].

Deuxièmement, les personnes dont les biens ont été saisis ont de toute évidence intérêt à ne pas être privées de la jouissance et de l'utilisation de ceux-ci. Mais cet intérêt est dans bien des cas incompatible avec le premier.

Troisièmement, les victimes (dont les biens ont pu être saisis auprès du présumé auteur du crime) voudront récupérer leurs choses le plus vite possible. Mais il faut ici encore tenir compte de la nécessité de faire en sorte que le délinquant puisse être efficacement poursuivi.

L'actuel paragraphe 490(9) du *Code criminel* dispose que le juge ou le juge de paix peut ordonner la restitution des choses à la personne entre les mains de qui elles ont été saisies s'il est convaincu, d'une part, «que les périodes de détention prévues aux paragraphes (1) à (3) [. . .] sont terminées et que des procédures à l'occasion desquelles la chose détenue peut être requise n'ont pas été engagées ou, si ces périodes ne sont pas terminées, que la détention de la chose saisie ne sera pas requise pour quelque fin mentionnée au paragraphe (1) ou (4)» et, d'autre part, que «la possession de cette chose par la personne entre les mains de qui elle a été saisie» est légale. Le paragraphe 490(9) autorise aussi le juge ou le juge de paix, «en cas d'illégalité de la possession de cette chose par la personne entre les mains de qui elle a été saisie», à «ordonner qu'elle soit retournée au propriétaire légitime ou à la personne ayant droit à la possession de cette chose, lorsqu'ils sont connus». Et, «en cas d'illégalité de la possession de cette chose par la personne entre les mains de qui elle a été saisie, ou lorsque ne sont pas connus le propriétaire légitime ni la personne ayant droit à la possession de cette chose, le juge peut en outre ordonner qu'elle soit confisquée au profit de Sa Majesté».

Si le demandeur n'est pas le saisi et que les conditions énoncées ci-dessus (à quelques différences près) soient réunies, la restitution de la chose à cette personne peut être ordonnée en vertu du paragraphe 490(11). Par ailleurs, si la chose saisie a, conformément au paragraphe 490(9), déjà été «confisquée, vendue ou qu'il en [ait] été autrement disposé de sorte qu'elle ne peut être rendue au demandeur», le juge ou le juge de paix peut ordonner en vertu de l'alinéa 490(11)*d*) que «le produit de la vente ou la valeur de la chose saisie soit remis au demandeur». On trouve des procédures similaires dans d'autres textes, avec quelques différences au niveau des détails[267].

L'article 260 reprend en gros les règles actuelles, en les simplifiant.

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266. Lorsqu'il s'agit de biens dont la possession est interdite, la confiscation au profit de l'État peut l'emporter pour des motifs d'intérêt public sur la demande de restitution, même lorsque l'on n'a plus besoin de ces biens aux fins de preuve ou d'enquête.

267. Suivant le paragraphe 15(2) de la *Loi sur les stupéfiants* ainsi que les paragraphes 43(2) et 51(1) de la *Loi sur les aliments et drogues*, par exemple, le tribunal peut ordonner la restitution immédiate de certains biens s'il «est convaincu [. . .] que le demandeur a droit à la possession de l'objet saisi et que celui-ci n'est pas susceptible de servir de preuve». Voir *Fleming* c. *La Reine*, [1986] 1 R.C.S. 415. Par ailleurs, le paragraphe 16(2) de la *Loi sur les stupéfiants* contient une disposition singulière prévoyant la confiscation à titre de sanction de tout «moyen de transport saisi sous le régime de l'article 11 et dont il a été prouvé qu'il a servi ou donné lieu» à la perpétration de certaines infractions prévues par la loi.

Même dans le cas où la rétention serait nécessaire au départ, la restitution pourra être ordonnée ultérieurement si les formalités prévues à la section IX du présent chapitre sont remplies. Les dispositions de cette section permettent en effet de produire en preuve des photographies ou d'autres représentations de la chose saisie, plutôt que la chose elle-même, à des fins d'identification. Cette possibilité n'a été admise sans réserve que très récemment dans le *Code criminel*[268].

À l'heure actuelle, la demande de restitution faite en vertu de l'article 490 du *Code criminel* peut être adressée à divers fonctionnaires judiciaires, selon les circonstances. Dans certains cas il peut n'exister aucun lien logique entre la chose saisie ou l'endroit où elle se trouve au moment de la demande, d'une part, et d'autre part la personne appelée à statuer sur cette demande. Ainsi, le paragraphe 15(1) de la *Loi sur les stupéfiants* et le paragraphe 43(1) de la *Loi sur les aliments et drogues* prévoient que les demandes doivent être présentées «à un juge de la cour provinciale ayant compétence dans le territoire où la saisie a été faite». Or, cette règle s'applique même lorsque les choses saisies se trouvent depuis longtemps dans un autre ressort, par exemple à la suite du choix exercé par l'accusé quant au lieu du procès.

L'article 260 établit clairement et simplement que toutes les demandes de restitution peuvent être présentées à un juge de paix (le juge exerçant d'office, selon l'article 2, toutes les attributions du juge de paix). Suivant le régime de juridiction criminelle unifiée proposé par la Commission (document de travail n° 59), les choses saisies au cours d'enquêtes criminelles relèveront de la compétence d'un même tribunal tout au long des procédures, ce qui permettra d'éviter les difficultés administratives susceptibles de surgir en ce moment du fait qu'une autorité judiciaire peut rendre une ordonnance de restitution à l'égard de choses saisies ne relevant aucunement d'elle. Par ailleurs, l'article 214 donne une grande latitude quant au choix du lieu où la demande est présentée[269]. D'une manière générale, les dispositions de la section I du chapitre III visent à ce que toutes les demandes présentées sous le régime de la présente partie soient entendues à l'endroit qui est le plus commode pour toutes les parties.

Demandeur

261. La demande peut être présentée par toute personne qui prétend avoir un droit de propriété sur la chose saisie ou le produit de la vente, ou avoir droit à sa possession.

Rapport n° 27, rec. 7
Code criminel, par. 490(7) et (10)

COMMENTAIRE

Les demandes présentées par les personnes qui avaient la possession des choses au moment de la saisie et par celles qui prétendent avoir un droit de propriété ou de possession sur ces choses sont en ce moment régies par des dispositions distinctes (les

268. *Loi modifiant le Code criminel (victimes d'actes criminels)*, L.C. 1988, ch. 30, art. 2; cette disposition se trouve maintenant à l'article 491.2 du *Code criminel*.

269. La demande peut être présentée dans le district judiciaire où a été déposé le procès-verbal de saisie, dans celui où la chose a été placée sous garde ou dans celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

paragraphes 490(7) et (10) du *Code criminel*). Celles-ci sont pourtant identiques pour l'essentiel quant aux éléments et aux intérêts devant être pris en considération. En outre, d'autres procédures de restitution encore plus complexes sont prévues par la *Loi sur les stupéfiants* et la *Loi sur les aliments et drogues*, bien que l'objectif fondamental et les critères à appliquer soient encore ici semblables.

Nous avons donc cherché, en rédigeant l'article 261, à simplifier le droit applicable en la matière.

Préavis

262. Le demandeur donne un préavis de huit jours francs au poursuivant, à l'accusé, à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix.

Rapport n° 27, rec. 8
Code criminel, par. 490(7) et (10)

COMMENTAIRE

Les dispositions régissant actuellement les délais et les avis pour les demandes de restitution présentées en vertu de l'article 490 du *Code criminel* se caractérisent par une complexité et une confusion inutiles. «Lorsque, en tout temps avant l'expiration des périodes de détention prévues aux paragraphes (1) à (3) [. . .], le poursuivant décide que la détention de la chose saisie n'est plus requise aux fins visées au paragraphe (1) ou (4)», il doit présenter une demande en conformité avec le paragraphe 490(5). «Lorsque les périodes de détention prévues aux paragraphes (1) à (3) [. . .] sont terminées et qu'aucune procédure pour laquelle la chose saisie aurait pu être requise n'a été engagée», le poursuivant doit présenter une demande en vertu du paragraphe 490(6). Or, aucune de ces dispositions ne fixe de délai pour la remise d'un avis aux intéressés. Le saisi peut présenter une demande «en donnant un avis de trois jours francs au procureur général» *après* l'expiration de la période de rétention (par. 490(7)); mais il peut aussi le faire plus tôt, si la prolongation de la détention est susceptible de causer un préjudice sérieux (par. 490(8)). Par ailleurs, une personne autre que le saisi peut suivant le paragraphe 490(10) présenter «d'une manière sommaire» une demande de restitution «en tout temps, après avis de trois jours francs au procureur général et à la personne qui, au moment de la saisie, en avait la possession». D'autres lois prescrivent des modalités différentes[270].

Les règles proposées ici sont plus simples. En vertu de l'article 262, la demande de restitution peut être présentée en tout temps, moyennant préavis aux personnes y désignées. L'article 5 du présent code permet l'abrégement du délai avec le consentement du destinataire ou encore suivant l'ordonnance rendue par un juge de paix. Le délai fixé dans la présente disposition est de huit jours francs; c'est que le demandeur est tenu

270. Suivant le paragraphe 43(1) de la *Loi sur les aliments et drogues*, une demande peut être présentée par «toute personne [. . .], dans un délai de deux mois après la date de cette saisie, moyennant avis préalable donné à la Couronne de la manière prescrite par les règlements»; la *Loi sur les stupéfiants* comporte une disposition semblable (par. 15(1)).

d'aviser, en particulier, toute personne qui à sa connaissance a un droit de propriété sur la chose visée ou a droit à sa possession. Par ailleurs, la présence de ces personnes peut rendre l'audition plus longue et plus complexe qu'elle ne le serait autrement.

Renseignements supplémentaires

263. Outre les renseignements exigés par les alinéas 215(1)*a)* à *h)*, la demande indique la nature du droit du demandeur sur la chose saisie.

Conditions

264. Le juge de paix peut assortir l'ordonnance de restitution des conditions qu'il estime nécessaires pour assurer la protection et la conservation de la chose saisie aux fins de quelque enquête ou procédure; il peut notamment exiger du demandeur qu'il remette la chose à la demande de la cour.

Rapport n° 27, rec. 10(3)

COMMENTAIRE

Le paragraphe 490(16) du *Code criminel* donne à l'heure actuelle au juge la possibilité de fixer, dans l'ordonnance donnant à une personne accès à la chose saisie, des conditions visant à la sauvegarde et à la préservation de celle-ci. Mais aucun pouvoir semblable n'est conféré pour l'ordonnance de restitution. L'article 264 de notre code comble cette lacune : il permet au juge de paix de l'assortir de conditions propres à assurer la protection et la conservation de la chose saisie. Nous avons voulu ici réaliser un meilleur équilibre entre les intérêts de l'État en tant que poursuivant et le droit à l'utilisation ou à la jouissance de la chose par le possesseur légitime.

Effet de l'ordonnance de restitution

265. L'ordonnance de restitution ne porte atteinte à aucun droit de propriété sur la chose saisie ou le produit de la vente de celle-ci, ni au droit à la possession de l'un ou de l'autre.

Rapport n° 27, rec. 13

COMMENTAIRE

L'article 265 est une disposition nouvelle. Elle déclare clairement que l'ordonnance de restitution consiste simplement dans la remise de la chose saisie (ou du produit de sa vente) à une personne qui a droit à la possession de celle-ci, pourvu que ce droit ne soit pas contesté. Elle ne constitue en aucun cas une décision concluante relativement aux droits de propriété ou de possession. En cas de litige quant au droit de possession au moment de l'audition de la demande de restitution, le gardien conserve la chose ou le produit de la vente jusqu'à ce que l'on puisse déterminer, en conformité avec les dispositions des articles 278 à 282, la façon dont il convient d'en disposer. De l'avis de la Commission, c'est devant les juridictions civiles et non à la faveur de procédures pénales qu'il convient de trancher les litiges portant sur le droit de possession. Le régime proposé est conforme à cette idée.

SECTION IX
REPRODUCTION DES CHOSES SAISIES

Photographie

266. (1) L'agent de la paix peut faire photographier toute chose saisie.

Admissibilité

(2) La photographie d'une chose saisie, accompagnée du certificat décrit au paragraphe 268(1), est admissible en preuve pour identifier la chose et a, à cette fin et sauf preuve contraire, la même force probante que la chose.

Rapport n° 27, rec. 11
Code criminel, par. 491.2(1) et (2)

COMMENTAIRE

Les dispositions de la présente section répondent à trois objectifs principaux : (1) faciliter la restitution rapide des choses saisies lorsque la poursuite peut préserver leur valeur probante sans avoir à les retenir; (2) faciliter la tâche de la police et des tribunaux, sur les plans de l'administration et de la surveillance, lorsqu'il faut entreposer de grandes quantités d'objets saisis; (3) encourager l'utilisation de solutions de rechange pour la production des éléments de preuve en matière pénale et favoriser leur acceptation.

Le *Code criminel* actuel permet, aux paragraphes 490(13) et (14), la réalisation et l'utilisation en preuve de copies d'un document, lorsque celui-ci est remis «ou lorsqu'il est ordonné qu'[il] soit remis ou confisqué ou qu'il en soit autrement disposé en vertu du paragraphe (1), (9) ou (11)». Dans une modification récente, l'article 491.2[271], le législateur, retenant une suggestion de la Commission, a élargi la portée de cette règle de façon à permettre la prise et la conservation de photographies «des biens [. . .] confisqués ou dont il doit être disposé en conformité avec les articles 489.1 ou 490 et qui normalement devraient être déposés à une enquête préliminaire, à un procès ou dans d'autres procédures engagées à l'égard [de certaines infractions]», et confirmé l'admissibilité en preuve de telles photographies. La disposition proposée ici répond au même objectif que cette modification récente, mais comporte des améliorations importantes.

Aux termes du paragraphe 491.2(2), la photographie est, à toutes fins utiles, revêtue de «la même force probante que les biens photographiés auraient eue s'ils avaient été déposés en preuve de la façon normale.» Rédigée en termes larges, cette disposition est susceptible de s'avérer commode dans le cas où l'on peut reproduire clairement, par photographie, les renseignements contenus dans des documents; ou encore, dans celui où l'on peut enregistrer au moyen de photographies les caractéristiques visuelles d'une chose, avec suffisamment de détails pour que celle-ci puisse être adéquatement identifiée à partir de la photographie. Mais il en va autrement s'il est impossible de vérifier la valeur probante d'une chose sans l'examiner ou y toucher. Par exemple, le poids d'un outil que l'on prétend destiné au cambriolage peut présenter un grand intérêt sur

271. Il en a été fait état dans le commentaire accompagnant l'article 260.

le plan de la preuve si l'accusé affirme ne pas être suffisamment robuste pour le transporter ou le manier. Or, la photographie de l'objet ne permettrait de tirer aucune conclusion à cet égard.

L'admissibilité et la force probante d'une photographie certifiée sont, dans la disposition proposée, énoncées en termes plus précis et plus étroits que dans le Code actuel. En effet, la photographie ne serait admissible en preuve que pour identifier la chose saisie, sa valeur probante se limitant à cet aspect. En outre, la force probante attribuée à la photographie pourrait, en vertu de cette règle, se trouver affaiblie en cas de preuve contraire.

Renseignement copié

267. (1) L'agent de la paix peut faire faire une copie de tout renseignement contenu dans une chose saisie.

Admissibilité

(2) La copie du renseignement, accompagnée du certificat décrit au paragraphe 268(1), est admissible en preuve et a, sauf preuve contraire, la même force probante que le renseignement.

COMMENTAIRE

Cette disposition est le complément de l'article 266. Celui-ci permet à l'agent de la paix de faire faire une photographie d'une chose saisie (un téléviseur par exemple), tandis que le présent article l'autorise à faire faire une copie de tout renseignement contenu dans une chose saisie (par exemple, en copiant sur une disquette l'information contenue dans un ordinateur).

Certificat

268. (1) Est admissible en preuve et, sauf preuve contraire, fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y apparaît, le certificat attestant ce qui suit :

a) **le signataire a fait la copie ou pris la photographie en vertu des dispositions de la présente section;**

b) **le signataire est un agent de la paix ou a agi sous la direction d'un agent de la paix;**

c) **selon le cas, la copie est conforme ou la photographie représente bien la chose saisie.**

Affidavit de l'agent de la paix

(2) Est admissible en preuve et, sauf preuve contraire, fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y apparaît ni la qualité officielle du signataire, l'affidavit de l'agent de la paix attestant ce qui suit :

a) **il a saisi une chose qui a été placée sous sa garde au moment de la saisie jusqu'à ce qu'une copie des renseigne-**

ments y contenus soit faite ou qu'une photographie en soit prise;

***b*) ni la chose ni les renseignements n'ont été modifiés avant que la copie soit faite ou que la photographie soit prise;**

Interrogatoire sur le certificat

(3) La cour peut ordonner à la personne qui paraît avoir signé un certificat ou un affidavit de se présenter devant elle pour être interrogée ou contre-interrogée sur le contenu du certificat ou de l'affidavit.

Rapport n° 27, rec. 11
Code criminel, par. 491.2 (3), (4) et (6)

COMMENTAIRE

Cette disposition reprend l'essentiel des règles énoncées aux paragraphes 491.2(3) à (6) du *Code criminel*, avec de légères différences sur le plan de la rédaction et de l'agencement.

Préavis de production d'une copie ou d'une photographie

269. À moins que la cour n'en décide autrement, les copies, photographies, certificats ou affidavits ne sont admissibles en preuve que si, avant les procédures, le poursuivant a donné à l'accusé un préavis raisonnable de son intention de les produire, accompagné d'une copie du document.

Code criminel, par. 491.2(5)

SECTION X
FIN DE LA RÉTENTION ET DISPOSITION

1. Durée légale de la rétention

Règle générale

270. La chose saisie, de même que le produit de la vente de celle-ci, peut être placée sous garde pendant quatre-vingt-dix jours à compter de la date de la saisie.

COMMENTAIRE

Le paragraphe 490(2) du *Code criminel*, relatif aux choses retenues en conformité avec l'alinéa 490(1)*b*), fixe à trois mois à compter de la date de la saisie la durée maximum de la période initiale de rétention. Le juge de paix peut ordonner la prolongation de celle-ci si des procédures au cours desquelles la chose est requise ont été intentées avant l'expiration de cette période, ou encore si, à la suite d'une demande faite avant l'expiration, il est convaincu que, «compte tenu de la nature de l'enquête», la prolongation est justifiée.

Le paragraphe 490(3) prévoit pour sa part que plusieurs prolongations successives peuvent être accordées en conformité avec les dispositions de l'alinéa 490(2)*a*). La durée totale de rétention ne peut toutefois dépasser un an à compter de la saisie, à moins que, avant l'expiration de cette année, «un juge d'une cour supérieure de juridiction criminelle ou un juge visé à l'article 552» n'en décide autrement, s'il est convaincu, à la suite d'une demande, que «compte tenu de la nature complexe de l'enquête, la prolongation de sa détention pendant une période spécifiée est justifiée» (al. 490(3)*a*)); ou encore, à moins que «des procédures [n'aient] été engagées au cours desquelles la chose détenue peut être requise» (al. 490(3)*b*)).

Si, avant l'expiration de la période de rétention, le poursuivant décide que la prolongation n'est pas nécessaire, il est tenu en vertu de l'actuel paragraphe 490(5) d'engager des procédures de restitution.

Les articles 270 et 271 n'entraînent pas de changements essentiels quant aux motifs pour lesquels la rétention ou la prolongation peut être ordonnée, mais ils énoncent les règles en des termes plus simples. Par ailleurs, un délai de trois mois à compter de la saisie (avec possibilité de prolongation lorsque c'est opportun) nous paraît raisonnable et adéquat dans la plupart des cas pour que les autorités puissent décider de l'opportunité d'intenter des poursuites criminelles. Et d'un autre côté, ce délai (de quatre-vingt-dix jours, plus précisément) n'entraîne pas de privation abusive pour le citoyen soucieux de coopérer à l'administration de la justice.

Prolongation

271. La rétention de la chose saisie ou du produit de la vente peut être prolongée :

a) soit, dans les quatre-vingt-dix jours qui suivent la saisie, dans l'un des cas suivants :

(i) des procédures dans lesquelles la production en preuve de la chose saisie peut être nécessaire, ou qui peuvent entraîner la confiscation de la chose ou du produit de la vente en conformité avec la loi, ont été engagées,

(ii) une demande de prolongation de la durée de la rétention a été présentée;

b) soit, avant l'expiration d'une période de rétention prolongée, lorsque des procédures ont été intentées ou une autre demande de prolongation a été présentée.

COMMENTAIRE

Il est manifestement souhaitable que les autorités soient périodiquement tenues de justifier la prolongation de la rétention des choses saisies. Lorsque cette prolongation s'avère véritablement nécessaire, elle doit être accordée. Nous avons toutefois supprimé la disposition — curieusement formulée — du *Code criminel* qui prévoit, en ce qui concerne les prolongations, une durée totale maximale d'un an, mais à laquelle il peut de toute façon être dérogé (voir le paragraphe 490(3)). Quant à l'alinéa 271*b*), il

reprend par ailleurs une règle existante; on y énonce explicitement que toute prolongation doit être accordée *avant* l'expiration de la période de rétention.

Rétention après la conclusion des procédures

272. La chose saisie, de même que le produit de la vente de celle-ci, peut être placée sous garde pour une durée maximale de trente jours après la conclusion de toutes les procédures à l'égard desquelles elle était retenue.

Rapport n° 27, rec. 5(1), (2) et (3)
Code criminel, par. 490(2), (3) et (12)

COMMENTAIRE

L'appel étant possible, l'article 272 dispose que la chose saisie (ou le produit de la vente) peut être gardée pendant une période de trente jours après la conclusion de toutes les procédures criminelles à l'égard desquelles elle était retenue aux fins d'enquête ou de preuve.

2. Demande de prolongation de la rétention

Demande du poursuivant

273. (1) À la demande du poursuivant, le juge de paix peut ordonner la prolongation de la rétention pour des périodes supplémentaires ne dépassant pas quatre-vingt-dix jours chacune, s'il est convaincu que la rétention de la chose saisie ou du produit de la vente de celle-ci doit être prolongée, eu égard à la complexité de l'enquête.

Demande d'un tiers

(2) À la demande d'une personne ayant un intérêt dans une chose saisie, le juge de paix peut ordonner la prolongation de la rétention pour des périodes supplémentaires ne dépassant pas quatre-vingt-dix jours chacune, s'il est convaincu que la rétention de la chose est nécessaire pour en assurer la conservation aux fins de preuve.

Rapport n° 27, rec. 5(2)
Code criminel, al. 490(2)*a*) et 490(3)*a*)

COMMENTAIRE

Cet article indique qui peut demander la prolongation de la rétention et pour quels motifs elle est susceptible d'être accordée (ceux-ci varient selon que la demande émane du poursuivant ou d'une autre personne). Habituellement, c'est le poursuivant qui souhaitera faire prolonger la rétention, l'enquête s'avérant complexe et par conséquent longue (voir le paragraphe 273(1)). Mais la demande peut aussi être faite, en vertu du paragraphe 273(2), par d'autres personnes pour qui la valeur probante de la chose saisie présente un intérêt. Il pourra s'agir par exemple de l'accusé ou du coaccusé qui, désireux d'utiliser cette preuve dans la même procédure ou dans une autre, souhaite faire prolonger la durée de la rétention.

Préavis

274. Le demandeur donne un préavis de trois jours francs à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou le produit de la vente de celle-ci, ou avoir droit à la possession de l'un ou de l'autre. Il le donne aussi au poursuivant de même qu'à toute autre personne désignée par le juge de paix.

Rapport n° 27, rec. 5(2)
Code criminel, par. 490(2) et (3)

COMMENTAIRE

À l'heure actuelle, les demandes de prolongation doivent normalement être précédées d'un préavis aux parties intéressées. Ce principe est repris au présent article. Suivant les alinéas 490(2)*a*) et (3)*a*) du Code actuel, seule doit être ainsi avisée «la personne qui, au moment de la saisie, avait la possession de la chose détenue»; or, il peut arriver que cette personne n'ait plus de droit réel sur cette chose après la saisie. La désignation précise, à l'article 274 de notre code, des personnes à qui le préavis doit être donné répond au souci d'empêcher dans la mesure du possible les prolongations inutiles. Il s'agit des personnes les plus susceptibles d'avoir intérêt à ce qu'il soit rapidement disposé des choses saisies. Il y a lieu de présumer qu'elles défendront vigoureusement leur point de vue lorsqu'une demande sera présentée pour faire prolonger la rétention de la chose saisie.

3. Remise des choses saisies

Pouvoir du poursuivant

275. Le poursuivant peut faire remettre la chose saisie ou le produit de la vente de celle-ci à la personne qui paraît avoir droit à sa possession si les conditions suivantes sont réunies :

a) la période de rétention autorisée est expirée, ou encore la chose ou le produit de la vente n'est plus utile;

b) à la connaissance du poursuivant, le droit à la possession de la chose ou du produit de la vente n'est pas contesté;

c) la loi ne prévoit pas la confiscation de la chose saisie ni du produit de la vente.

COMMENTAIRE

À l'expiration de la période de rétention, le poursuivant a l'obligation, selon les règles actuelles, de présenter ce qui constitue en fait une demande de restitution — il est également astreint à cette formalité s'il conclut auparavant que la rétention n'est plus nécessaire[272]. Les articles 275 à 277 instituent une procédure simple et efficace, qui permet au poursuivant de faire restituer, sans nécessité de tenir une audience, la chose

272. Voir les paragraphes 490(5) et (6) du *Code criminel*.

ou le produit de la vente à la personne qui, à sa connaissance, a légalement droit à sa possession, pourvu que ce droit ne soit pas contesté à sa connaissance et que la loi ne prévoie pas la confiscation de ce qui est ainsi remis.

Avis

276. Le poursuivant qui entend faire remettre la chose saisie ou le produit de la vente en avise par écrit le gardien et dépose une copie de l'avis auprès du greffier du district judiciaire où le procès-verbal de saisie a été déposé.

Remise

277. Le gardien remet la chose saisie ou le produit de la vente dès que cela est matériellement possible après réception de l'avis.

Rapport n° 27, rec. 5(1), (3) et 6(2)
Code criminel, par. 490(5) et (6)

4. Ordonnance de disposition

Obligation du poursuivant

278. Lorsque le poursuivant ne fait pas remettre une chose saisie ni le produit de la vente de celle-ci à l'expiration de la période de rétention autorisée, ou lorsque la chose ou le produit de la vente n'est plus utile, il demande, dès que cela est matériellement possible, une ordonnance de disposition.

COMMENTAIRE

Les articles 278 à 282 établissent la procédure à suivre par le poursuivant lorsqu'il ne prend pas les mesures prévues à l'article 275. Dans ce cas, il doit demander au juge de paix une ordonnance de disposition de la chose saisie ou du produit de la vente, en donnant à toutes les parties intéressées le préavis exigé à l'article 279.

Préavis

279. Le poursuivant donne un préavis de huit jours francs au gardien, à l'accusé, à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou le produit de la vente, ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix.

Renseignements supplémentaires

280. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique :

a) que la période de rétention autorisée est expirée, ou que la chose saisie ou le produit de la vente n'est plus utile;

b) le cas échéant, la date à laquelle expirait la période de rétention autorisée;

c) le cas échéant, que la loi prévoit la confiscation de la chose saisie ou du produit de la vente.

Pouvoir du juge de paix

281. Le juge de paix ordonne qu'il soit disposé de la chose ou du produit de la vente de l'une des façons suivantes :

a) la chose ou le produit de la vente est rendu à son possesseur légitime si le droit à la possession n'est pas contesté;

b) si le droit à la possession de la chose ou du produit de la vente est contesté mais qu'aucune procédure civile n'ait été intentée à cet égard, la chose ou le produit de la vente est remis au saisi s'il peut légitimement en avoir la possession;

c) la chose ou le produit de la vente est placé sous la garde du tribunal devant lequel ont été intentées des procédures civiles relativement au droit à la possession de la chose ou du produit de la vente;

d) la chose ou le produit de la vente est confisqué au profit de Sa Majesté pour qu'il en soit disposé selon les directives du procureur général dans l'un ou l'autre des cas suivants :

(i) l'identité du propriétaire ou possesseur légitime de la chose ou du produit de la vente est inconnue et personne ne s'en prétend le propriétaire ou le possesseur légitime,

(ii) le droit à la possession de la chose ou du produit de la vente est contesté mais aucune procédure civile n'a été intentée à cet égard, et le saisi ne peut légitimement en avoir la possession,

(iii) la loi prévoit la confiscation de la chose saisie ou du produit de la vente,

(iv) le propriétaire ou possesseur légitime de la chose ou du produit de la vente est introuvable.

Rapport n° 27, rec. 5(1), (3) et 6(2)
Code criminel, par. 490(5), (6), (9), art. 491.1

COMMENTAIRE

L'article 281 présente les diverses possibilités qui s'offrent au juge de paix quant à la disposition. À l'alinéa *a*), on prévoit la remise de la chose ou du produit au possesseur légitime lorsque son droit n'est l'objet d'aucune contestation. Ainsi, l'on pourra en vertu de cette disposition remettre rapidement au propriétaire un téléviseur sur lequel son nom est marqué.

Ce n'est pas devant la Cour criminelle qu'il convient de trancher les litiges concernant des droits réels. Les alinéas *b*) et *c*) ainsi que le sous-alinéa *d*)(ii) décrivent la procédure applicable aux biens dont la possession est contestée.

Lorsqu'il y a un litige mais qu'aucune procédure civile n'a été engagée, l'alinéa *b*) exige le rétablissement de la situation qui existait avant la saisie. Le juge de paix doit ordonner la remise de la chose au saisi, pourvu qu'il paraisse avoir droit à la possession. (Les biens saisis auprès d'une personne inculpée de recel ne pourraient être remis à cette dernière en vertu de cette disposition.) Si une procédure civile a été engagée en vue du règlement d'un litige relatif à la propriété ou à la possession de la chose, le juge de paix doit suivant l'alinéa *c*) ordonner que celle-ci soit confiée au tribunal civil saisi de l'affaire. Enfin, s'appuyant sur le sous-alinéa *d*(ii), il peut ordonner la confiscation de la chose si le saisi ne peut légitimement en avoir la possession et si, la possession de la chose ou du produit de la vente faisant l'objet d'un différend entre d'autres personnes, aucune procédure civile n'a néanmoins été intentée. Nous avons voulu par cette disposition inciter les intéressés à faire valoir leurs droits sur les biens saisis ou le produit de la vente. On attend du poursuivant, cela va sans dire, qu'il fasse preuve de circonspection et de modération dans l'exercice du pouvoir que lui confère cette disposition.

Par ailleurs, les sous-alinéas *d*)(i), (iii) et (iv) autorisent aussi le juge de paix à ordonner la confiscation de la chose ou du produit de la vente au profit de l'État dans l'un ou l'autre des cas que voici : le propriétaire ou le possesseur légitime est introuvable; son identité est inconnue; la confiscation est prévue par une disposition législative.

Chose de valeur négligeable

282. Si la chose saisie est de valeur négligeable, le juge de paix peut ordonner qu'elle soit détruite ou qu'il en soit disposé autrement.

COMMENTAIRE

L'article 282, sans équivalent dans le droit actuel, vise à simplifier l'administration du régime. Il permet au juge de paix d'ordonner que la chose soit détruite ou qu'il en soit disposé autrement si sa valeur est négligeable. La règle pourrait s'appliquer, par exemple, à une bouteille de bière brisée qui, malgré son importance sur le plan de la preuve, ne présente aucune valeur pour son «propriétaire». Puisque, normalement, nul ne demandera la restitution de telles choses et que la confiscation ne pourrait à proprement parler être ordonnée en vertu de l'alinéa 281*d*), nous avons établi une règle spécifique quant à leur disposition.

CHAPITRE IV
APPELS

Droit d'appel

283. Toute personne lésée par une décision rendue en vertu de l'article 232 (protection et conservation), des paragraphes 236(1) (protection et conservation), 243(1) (accès à la chose saisie; copies) ou 243(2) (dispense de paiement des droits), des articles 254 (choses dangereuses) ou 260 (restitution), ou de l'alinéa 281*d*) (confiscation) à l'égard d'une chose saisie peut en

appeler à une juridiction d'appel dans les trente jours qui suivent la date de la décision.

Rapport n° 27, rec. 14(1)
Code criminel, par. 490(17)

COMMENTAIRE

Les dispositions actuelles du *Code criminel* sont exagérément restrictives en ce qui a trait au droit d'interjeter appel des décisions rendues au sujet de choses saisies[273]. L'article 283 est fondé sur le fait que de nombreuses personnes — et pas seulement le saisi — sont touchées par la dépossession résultant d'une saisie. C'est pourquoi toute personne «lésée» est autorisée à se pourvoir contre toute décision qui, rendue en vertu de la présente partie, risque de battre en brèche les fins de la justice (par exemple, une ordonnance de restitution susceptible d'entraîner la perte d'éléments de preuve) ou de compromettre irrémédiablement les droits de la personne sur la chose saisie (comme une ordonnance de confiscation qui irait à l'encontre d'un droit de propriété ou de possession).

Garde après ordonnance ou pendant l'appel

284. Il n'est disposé d'aucune chose saisie, ni du produit de la vente de celle-ci, dans les trente jours qui suivent une ordonnance rendue en vertu d'une disposition mentionnée à l'article 283, ni pendant l'appel attaquant cette ordonnance, à moins que toutes les personnes lésées ne renoncent à leur droit d'appel par écrit ou que la chose saisie ne présente un danger imminent ou grave pour la santé ou la sécurité publiques.

Rapport n° 27, rec. 14(2)
Code criminel, par. 490(12)

COMMENTAIRE

L'article 284 vise à préserver dans son intégralité le droit d'appel. Il interdit de disposer des choses saisies ou du produit de leur vente tant que les décisions les concernant n'ont pas force de chose jugée. Contrairement au paragraphe 490(12) du Code actuel, cependant, on prévoit clairement ici la possibilité d'agir plus rapidement dans les circonstances énumérées.

273. Le paragraphe 490(15), par exemple, permet certes de demander l'accès aux choses saisies pour les examiner, mais aucune disposition ne prévoit la possibilité d'un appel en cas de refus. Voir *R.* c. *Stewart*, [1970] 3 C.C.C. 428 (C.A. Sask.).

PARTIE VII
LES PRIVILÈGES EN MATIÈRE DE SAISIE

Textes à l'origine de la partie VII

PUBLICATIONS DE LA CRD

Les fouilles, les perquisitions et les saisies, Rapport n° 24 (1984)

La façon de disposer des choses saisies, Rapport n° 27 (1986)

Pour une cour criminelle unifiée, Document de travail n° 59 (1989)

LÉGISLATION

Code criminel, art. 488.1

OBSERVATIONS PRÉLIMINAIRES

On trouve à l'article 53 de la partie II (*Les fouilles, les perquisitions et les saisies*) la procédure à suivre à l'égard des choses ou des renseignements visés par une opposition fondée sur un privilège et que des agents s'apprêtent à examiner, à photographier, à saisir (dans le cas de choses), ou dont ils veulent faire des copies. Les dispositions de la présente partie établissent les règles applicables une fois que les choses ont été mises sous scellés — ou qu'a été retirée à quiconque la possibilité d'en disposer — et placées sous garde selon les modalités prévues à l'article 53.

On comprendra mieux ces dispositions en les lisant à la lumière de l'évolution des règles actuellement en vigueur et des réformes préconisées par la Commission. Il convient aussi de tenir compte de dispositions connexes figurant dans d'autres parties du présent code.

Le *Code criminel* renferme des règles spéciales concernant les choses faisant l'objet d'une opposition fondée sur un privilège. Ainsi, l'adoption en 1985 de l'ancien article 444.1[274] (maintenant numéroté 488.1) a entraîné l'insertion dans le Code de règles de procédure (contenues exclusivement jusque-là dans la *Loi de l'impôt sur le revenu*[275]) applicables lorsque le privilège des communications entre client et avocat est invoqué. Le législateur entendait par cette réforme faire en sorte que les documents à l'égard desquels est invoqué le secret professionnel de l'avocat ne puissent être examinés ni communiqués de quelque façon au cours d'une perquisition. Suivant les dispositions du Code, ces documents ne peuvent être examinés que si un juge a conclu que le privilège invoqué ne s'y applique pas.

Les règles spéciales établies au Code permettent à l'avocat d'invoquer le privilège au moment de la saisie, au nom d'un client nommément désigné. En ce cas, l'agent saisissant doit, sans examiner le document, en faire un paquet scellé qu'il confie au shérif ou à une autre personne conformément à la loi. Les intéressés (soit le procureur général, le client ou l'avocat pour le compte de celui-ci) disposent alors d'un délai de quatorze jours pour demander à un juge une ordonnance fixant une date en vue d'une audience devant un juge de la cour supérieure. L'audience au terme de laquelle est déterminée l'existence du privilège invoqué doit débuter au plus tard vingt et un jours après la date de l'ordonnance. Si le juge conclut que les documents en question font l'objet d'un privilège, ils doivent être retournés à l'avocat ou à son client sans être examinés. Dans l'hypothèse contraire, ils sont remis à l'agent saisissant, sous réserve des restrictions et conditions que le juge estime appropriées.

Nous avons fait état de la réforme de 1985 dans les rapports n[os] 24 et 27 et recommandé deux changements[276], incorporés aux dispositions de la présente partie.

En premier lieu, rien dans les dispositions actuelles du Code n'indique si le client qui est en possession de documents privilégiés peut invoquer le privilège au moment de

274. *Loi de 1985 modifiant le droit pénal*, précitée, note 227, art. 72.

275. S.R.C. 1952, ch. 148; S.C. 1970-1971-1972, ch. 63.

276. Rapport n° 24, partie II, rec. 7 et le commentaire qui l'accompagne, pp. 66-69; rapport n° 27, rec. 3(5).

la saisie et si l'agent est dans ce cas tenu de mettre en mouvement la procédure de mise sous scellés. Vu la portée très large que la Cour suprême du Canada a reconnue au privilège dans l'affaire *Descôteaux* c. *Mierzwinski*[277], nous estimons que cette procédure spéciale devrait s'appliquer dans de tels cas. L'interdiction de dévoiler le contenu des communications faisant l'objet d'un privilège ne devrait pas dépendre de l'endroit où la perquisition est effectuée.

En second lieu, il y aurait lieu à notre sens de supprimer l'alinéa 488.1(4)*b*) du *Code criminel* actuel, qui permet au ministère public d'examiner pendant l'audience visant à trancher la question du privilège les documents saisis. Voici ce que nous disions à ce propos dans le rapport n° 24 (p. 68) :

> [I]l serait malavisé de permettre au ministère public de consulter les documents à l'égard desquels le secret professionnel est invoqué. Ce serait en effet violer le droit fondamental du citoyen à la confidentialité des communications avec son conseiller juridique, droit qui est maintenant reconnu de façon explicite par le plus haut tribunal du pays.

Par ailleurs, les règles proposées ici ne régissent pas seulement le privilège des communications entre client et avocat, mais toutes les oppositions fondées sur un privilège[278]. Nous avons tenu compte de cette modification dans les dispositions de la partie II (*Les fouilles, les perquisitions et les saisies*).

Si les dispositions figurant dans la présente partie reprennent certains aspects de la réforme de 1985, d'autres règles établies à ce moment-là ont été modifiées ou simplifiées. Des modifications ont ainsi été apportées au sujet de certains délais, notamment de préavis. À la procédure compliquée prévue au Code (suivant laquelle il faut dans un premier temps demander une ordonnance fixant la date de l'audience et dans un second temps en demander une autre en vue de faire trancher la question du privilège), est substitué un mécanisme plus simple, davantage conforme aux règles générales applicables aux autres demandes d'ordonnance prévues par la partie VI (*La disposition des choses saisies*). L'article 293 de la présente partie, semblable pour l'essentiel à la règle actuelle, donne au juge saisi d'une demande à cet effet le pouvoir de statuer sur tout privilège invoqué à propos d'une chose saisie. Eu égard toutefois à la reconnaissance d'une distinction (déjà signalée) entre la chose saisie et les renseignements qu'elle contient, l'article 293 précise en outre que le juge a aussi le pouvoir de déterminer si les renseignements sont visés par un privilège.

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277. Précitée, note 54.

278. Nous suivons en fait le point de vue exprimé dans l'arrêt *Slavutych* c. *Baker*, [1976] 1 R.C.S. 254, où la Cour suprême a elle-même retenu le critère établi par Wigmore pour statuer sur l'existence d'un privilège : J.H. WIGMORE, *Evidence in Trials at Common Law*, rév. par J.T. MCNAUGHTON, Boston, Little, Brown, 1961, vol. 8, p. 527, par. 2285). La décision de la Cour suprême permet la reconnaissance d'autres types de privilèges au Canada. Voir l'analyse du privilège des communications entre le prêtre et le pénitent au regard de ces autorités dans *Re Church of Scientology and The Queen (n° 6)* (1987), 31 C.C.C. (3d) 449 (C.A. Ont.), pp. 529-543.

CHAPITRE PREMIER
CHAMP D'APPLICATION

Application

285. La présente partie s'applique dès lors qu'une chose saisie conformément à la partie II (*Les fouilles, les perquisitions et les saisies*) ou les renseignements y contenus font l'objet d'une opposition fondée sur un privilège.

COMMENTAIRE

Cette disposition définit la portée de la présente partie, qui ne s'applique qu'à la revendication d'un privilège relativement à une chose saisissable ou aux renseignements qu'elle contient, saisis conformément à la partie II (*Les fouilles, les perquisitions et les saisies*). Il faudra s'en remettre aux autres parties du présent code et à la jurisprudence pour déterminer l'application du concept de privilège dans d'autres contextes — par exemple, la question de savoir si les échantillons de sang prélevés à la demande d'une personne accusée de conduite en état d'ébriété sont visés par un privilège quelconque.

CHAPITRE II
OBLIGATIONS DE L'AGENT DE LA PAIX PRATIQUANT UNE SAISIE

Inventaire et procès-verbal

286. Les articles 210 (inventaire des choses saisies), 212 (préparation du procès-verbal) et 213 (présentation du procès-verbal) s'appliquent à la saisie d'une chose faisant l'objet d'une opposition fondée sur un privilège.

COMMENTAIRE

Cet article énonce que les obligations de l'agent de la paix pratiquant une saisie, décrites au chapitre II de la partie VI (*La disposition des choses saisies*) s'appliquent aux choses saisies à l'égard desquelles un privilège est invoqué. (Seule exception : l'article 211, qui autorise l'agent de la paix à restituer la chose au saisi.) En cas d'opposition à la saisie d'une chose ou des renseignements y contenus, la chose est confiée à la police jusqu'à ce qu'il soit statué sur l'existence du privilège (voir l'article 53). Cette restriction répond à la logique, car lorsqu'il y a opposition fondée sur un privilège, la police ne peut examiner la chose en vue de déterminer si elle devrait être remise à la personne qui invoque le privilège (voir encore l'article 53).

CHAPITRE III
DEMANDE D'AUDIENCE SUR L'EXISTENCE DU PRIVILÈGE

SECTION I
PRÉSENTATION DE LA DEMANDE

Demandeur

287. Le poursuivant, de même que toute personne invoquant un privilège à l'égard d'une chose saisie ou des renseignements y contenus, peut demander qu'il soit statué sur l'existence du privilège.

Rapport n° 27, rec. 3(5)
Code criminel, par. 488.1(3)

COMMENTAIRE

Les dispositions de ce chapitre prévoient une procédure plus simple pour faire trancher rapidement, en une seule étape, la question du privilège. Le présent article indique clairement qui peut présenter la demande.

Mode de présentation

288. La demande est présentée par écrit, dans les quatorze jours qui suivent la date de la saisie, à un juge du district judiciaire où le procès-verbal de saisie a été déposé, dans celui où la chose a été placée sous garde ou dans celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

Code criminel, par. 488.1(3)

COMMENTAIRE

Cet article précise dans quel district judiciaire peut être portée la demande visant à ce qu'il soit statué sur la question du privilège. Il reprend la règle générale énoncée à l'article 214 quant au lieu où peut être présentée la demande contestée relative à la garde ou à la disposition de choses saisies. Il fixe en outre, pour la présentation de la demande, un délai de quatorze jours à compter de la date de la saisie.

Contenu de la demande

289. (1) La demande contient les renseignements suivants :

a) **le nom du demandeur;**

b) **le lieu et la date où elle est présentée;**

c) **le crime reproché ou faisant l'objet de l'enquête;**

d) **la description de la chose saisie visée par la demande;**

e) **la date de la saisie;**

f) le nom du gardien;

g) les motifs invoqués à l'appui de la demande;

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Préavis

290. (1) La demande est notifiée au moyen d'un préavis de cinq jours francs au gardien et, selon le cas :

a) soit au poursuivant, si le privilège est invoqué par le demandeur;

b) soit à la personne invoquant le privilège, si le demandeur est le poursuivant.

Contenu et signification

(2) Le préavis, qui indique le lieu, la date et l'heure où la demande sera entendue, est signifié avec la demande et l'affidavit.

Code criminel, par. 488.1(3)

COMMENTAIRE

Cet article fixe le délai du préavis; il précise aussi à qui celui-ci doit être donné ainsi que les renseignements qu'il doit contenir.

Production du paquet ou des renseignements

291. (1) Sur réception du préavis, le gardien produit le paquet scellé visé à l'alinéa 53(2)*b*) (opposition d'un privilège au cours d'une fouille ou d'une perquisition) ou les renseignements contenus dans la chose saisie à la date et à l'heure indiquées dans le préavis.

Demande du gardien

(2) Lorsqu'il est matériellement impossible de produire le paquet scellé ou les renseignements contenus dans la chose saisie, le gardien demande à un juge du district judiciaire où la saisie a été effectuée de donner des instructions sur les mesures à prendre pour permettre l'examen de la chose ou des renseignements.

Code criminel, par. 488.1(3)

COMMENTAIRE

Il s'agit ici de faire en sorte que le juge soit en mesure d'examiner la chose ou les renseignements à l'égard desquels le privilège est invoqué[279]. Le paragraphe (1) concerne le cas le plus courant, celui où la chose en question a été placée dans un paquet scellé. Le paragraphe (2) tient compte du fait qu'il peut s'avérer impossible ou inopportun en certains cas de produire la chose ou les renseignements, à cause de leur nature. (Par exemple, si le privilège invoqué vise des centaines de documents, ceux-ci ne pourront sans doute être placés dans le même paquet scellé.)

279. Voir l'alinéa 294*c*) de la présente partie.

Règles de procédure

292. Les articles 217 (transmission du dossier) et 225 à 229 (renvoi de la demande) s'appliquent à toute demande faite en vertu de la présente section.

COMMENTAIRE

Cet article incorpore au présent chapitre les règles prévues à la partie VI (*La disposition des choses saisies*) à l'égard des demandes d'ordonnance contestées pour le renvoi de la demande dans un autre district judiciaire.

SECTION II
AUDITION DE LA DEMANDE

Attributions du juge

293. Le juge saisi d'une demande à cet effet statue sur l'existence du privilège invoqué à l'égard de la chose saisie ou des renseignements y contenus. Il le fait à huis clos, dans les trente jours qui suivent la date de la saisie.

Code criminel, al. 488.1(3)*c*), par. 488.1(10)

COMMENTAIRE

Cet article confère aux juges de la Cour criminelle le pouvoir de statuer sur l'existence d'un privilège invoqué à l'égard d'une chose saisie ou de renseignements y contenus, et précise les modalités d'exercice de ce pouvoir. La demande, quoique normalement contestée, sera entendue à huis clos. La présence du public à l'audience pourrait en effet battre en brèche l'objet même de la procédure de mise sous scellés et de la demande. La présente disposition reprend donc la restriction établie à l'heure actuelle au paragraphe 488.1(10) du *Code criminel*.

Pouvoirs conférés au juge

294. Le juge peut prendre les mesures suivantes à l'audience :

***a*) faire comparaître personnellement le gardien et l'interroger;**

***b*) recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit;**

***c*) examiner la chose ou les renseignements, ou en exiger la production à cette fin, s'il le juge nécessaire pour statuer sur l'existence du privilège.**

Rapport n° 27, rec. 3(5)
Code criminel, al. 488.1(4)*a*), *b*), *c*) et *d*)

COMMENTAIRE

Cet article établit le pouvoir du juge d'obtenir l'information dont il a besoin à l'audience pour statuer sur la question du privilège. Les alinéas *a*) et *b*) sont fondés sur le même principe que les dispositions de la partie VI (*La disposition des choses saisies*), relatives aux pouvoirs conférés aux juges de paix saisis des diverses demandes d'ordonnance qu'elles autorisent. Deux différences importantes sont toutefois à signaler. En premier lieu, l'alinéa 294*c*) limite le pouvoir du juge quant à l'examen de la chose ou des renseignements à l'égard desquels le privilège est invoqué; nous avons repris ici la règle énoncée à l'alinéa 488.1(4)*a*) du Code actuel. En second lieu, comme nous l'avons souligné, le juge jouit suivant le Code actuel[280] du pouvoir de permettre au poursuivant d'examiner les documents en cause s'il est d'avis que cela l'aidera à statuer sur l'existence du privilège. Le régime ici proposé ne confère aucun pouvoir semblable[281]. Selon les dispositions du chapitre IV de la présente partie, en effet, seule la personne qui invoque le privilège peut, sur demande, avoir accès à la chose ou aux renseignements en cause avant que le juge ne rende sa décision.

Règles de procédure

295. Les articles 219 à 221 (preuve à l'audience) et 224 (dépôt de documents) s'appliquent à toute audience tenue en vertu de la présente section.

COMMENTAIRE

Cet article intègre au présent chapitre diverses dispositions de la partie VI (*La disposition des choses saisies*) ayant trait à la présentation de la preuve, aux témoignages, à l'enregistrement de ceux-ci à l'audience, et au dépôt de documents.

Décision et motifs

296. Le juge motive sa décision sans révéler les détails des renseignements ou de la chose à l'égard desquels le privilège est invoqué.

Code criminel, al. 488.1(4)*d*)

Existence du privilège

297. (1) Le juge qui conclut à l'existence du privilège ordonne :

***a*) soit le placement sous scellés de la chose et sa remise par le gardien au saisi;**

***b*) soit la remise de la chose à la disposition du saisi par le gardien et, en attendant, l'adoption des mesures que le juge estime nécessaires pour que la chose ou les renseignements y contenus ne soient pas examinés ni altérés.**

280. *Code criminel*, al. 488.1(4)*b*).

281. Voir les observations préliminaires au début de la présente partie.

Inexistence du privilège

(2) Le juge qui conclut à l'inexistence du privilège ordonne au gardien de remettre la chose à l'agent de la paix qui a pratiqué la saisie ou à toute autre personne désignée par le poursuivant, ou sous la responsabilité de l'un ou de l'autre, sous réserve des conditions que le juge estime nécessaires; il est disposé de la chose en conformité avec les dispositions des chapitres III et IV de la partie VI (*La disposition des choses saisies*).

Rapport n° 27, rec. 3(5)
Code criminel, al. 488.1(4)*d*)

COMMENTAIRE

Cette disposition reprend dans les grandes lignes la procédure prévue au Code actuel (al. 488.1(4)*d*)). Sa rédaction tient cependant compte du fait que sous le régime établi dans le code de procédure pénale proposé par la Commission, la saisie d'une chose ne suppose pas obligatoirement qu'on en prenne physiquement possession; on peut aussi l'effectuer en retirant à quiconque la possibilité de disposer de la chose en question (voir l'article 20). Elle précise en outre que si le juge conclut que la chose ou les renseignements qu'elle contient ne sont pas visés par un privilège, il en sera disposé comme de toute autre chose saisissable.

Forme de l'ordonnance

298. (1) L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge qui la rend.

Contenu

(2) L'ordonnance contient les renseignements suivants :

a) le nom du demandeur;

b) le crime reproché ou faisant l'objet de l'enquête;

c) une description de la chose saisie faisant l'objet de l'ordonnance;

d) la date de la saisie;

e) le nom du gardien;

f) la décision du juge et les conditions dont elle est assortie;

g) le lieu et la date où elle est rendue;

h) le nom et le ressort du juge.

Effet de la décision

299. Lorsque la chose saisie ou les renseignements y contenus sont jugés privilégiés, ils demeurent privilégiés et inadmissibles en preuve, à moins que la personne invoquant le privilège n'y consente ou que le privilège ne soit autrement perdu.

Code criminel, par. 488.1(5)

COMMENTAIRE

Cette disposition correspond à une règle actuellement en vigueur[282]. La formulation a toutefois été légèrement retouchée à cause de l'élargissement de la catégorie de privilèges susceptibles d'être invoqués, et aussi parce que l'opposition fondée sur un privilège pourrait suivant le régime proposé ici avoir trait à autre chose qu'à des documents.

SECTION III
DISPOSITION EN L'ABSENCE DE DEMANDE

Remise à l'agent de la paix

300. (1) Si, dans les quatorze jours qui suivent la saisie d'une chose à l'égard de laquelle un privilège est invoqué, aucune demande visant à ce qu'il soit statué sur l'existence du privilège n'a été notifiée au gardien, ce dernier remet la chose à l'agent de la paix qui a pratiqué la saisie ou lui en confie la responsabilité.

Disposition de la chose

(2) Il est disposé de la chose en conformité avec les dispositions des chapitres III et IV de la partie VI (*La disposition des choses saisies*).

Code criminel, par. 488.1(6)

COMMENTAIRE

Inspirée du paragraphe 488.1(6) du Code actuel, cette disposition explique en termes clairs la façon dont il doit être disposé de la chose saisie lorsque aucune demande visant à ce qu'il soit statué sur l'existence du privilège invoqué n'est présentée dans le délai prévu à l'article 288.

CHAPITRE IV
EXAMEN DE L'INFORMATION

Demandeur

301. La personne qui invoque un privilège à l'égard d'une chose saisie ou des renseignements y contenus peut demander une ordonnance lui permettant d'examiner la chose ou les renseignements et de faire une copie de ceux-ci.

Code criminel, par. 488.1(9)

282. *Code criminel*, par. 488.1(5).

COMMENTAIRE

Cet article vise d'une part à permettre à la personne qui invoque un privilège de se préparer à l'audience à l'issue de laquelle la question sera tranchée, et d'autre part à atténuer les embarras causés par la saisie. Le poursuivant ne peut présenter une telle demande. L'accès aux choses ou renseignements susceptibles d'être privilégiés est donc limité, afin d'éviter que l'opposition fondée sur un privilège ne perde toute signification.

Mode de présentation

302. La demande est présentée par écrit, unilatéralement et à huis clos, à un juge du district judiciaire où le procès-verbal de saisie a été déposé, de celui où a chose a été placée sous garde ou de celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

Code criminel, par. 488.1(9)

COMMENTAIRE

Cet article indique où et selon quelles modalités la demande doit être présentée. Contrairement à toutes les autres demandes touchant la garde et la disposition de choses saisies, celle-ci est présentée unilatéralement et à huis clos; il s'agit de préserver le caractère confidentiel des renseignements à l'égard desquels le privilège est invoqué.

Contenu de la demande

303. (1) La demande contient les renseignements suivants :

a) **le nom du demandeur;**

b) **le lieu et la date où elle est présentée;**

c) **le crime reproché ou faisant l'objet de l'enquête;**

d) **la description de la chose saisie visée par la demande;**

e) **la date de la saisie;**

f) **le nom du gardien;**

g) **la nature de l'ordonnance demandée;**

h) **les motifs invoqués à l'appui de la demande;**

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Transmission du dossier

304. L'article 217 (transmission du dossier) s'applique à toute demande faite en vertu du présent chapitre.

Pouvoirs conférés au juge

305. (1) Le juge saisi de la demande peut :

a) **faire comparaître personnellement le gardien et l'interroger;**

b) **interroger le demandeur;**

c) **recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit;**

d) **examiner la chose ou les renseignements, ou en exiger la production à cette fin, s'il le juge nécessaire.**

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit produit en preuve peut être interrogé.

Règles de procédure

306. Les articles 220 (témoignage sous serment), 221 (enregistrement des témoignages) et 224 (dépôt de documents) s'appliquent à toute audience tenue en vertu du présent chapitre.

Ordonnance

307. Le juge saisi d'une demande à cet effet peut, s'il est convaincu de la suffisance des motifs invoqués à l'appui de celle-ci, rendre une ordonnance autorisant le demandeur à examiner la chose ou les renseignements y contenus, et à faire une copie de ceux-ci, en sa présence ou celle du gardien. Le juge assortit l'ordonnance des conditions nécessaires pour assurer la protection et la conservation de la chose.

Code criminel, par. 488.1(9)

Mesures à prendre

308. Si la chose saisie avait été placée sous scellés, le juge précise dans l'ordonnance qu'elle doit être scellée à nouveau sans être endommagée ni altérée.

Code criminel, par. 488.1(9)

COMMENTAIRE

L'origine de cet article se trouve dans le paragraphe 488.1(9) du Code actuel. Il importe de préserver l'intégrité des choses ou renseignements à l'égard desquels le privilège est invoqué lorsqu'on autorise le demandeur à les examiner.

Forme de l'ordonnance

309. L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge qui la rend.

Contenu de l'ordonnance

310. L'ordonnance contient les renseignements suivants :

a) **le nom du demandeur;**

b) **le crime reproché ou faisant l'objet de l'enquête;**

c) **une description de la chose saisie faisant l'objet de l'ordonnance;**

d) **la date de la saisie;**

e) **le nom du gardien;**

f) **la décision du juge et les conditions dont elle est assortie;**

g) **le lieu et la date où elle est rendue;**

h) **le nom et le ressort du juge.**

CHAPITRE V
APPELS

Droit d'appel

311. Toute personne lésée par une décision rendue en vertu de l'article 293 (détermination de l'existence du privilège) peut en appeler à une juridiction d'appel dans les trente jours qui suivent la date de la décision.

Rapport n° 27, rec. 14(1)

COMMENTAIRE

Semblable à l'article 283, cette disposition établit le droit d'interjeter appel de la décision rendue au terme de l'audience tenue sur la question du privilège. Signalons que le refus de la part du juge d'autoriser le demandeur à examiner la chose ou les renseignements à l'égard desquels le privilège est invoqué n'est quant à lui pas susceptible d'appel. Il serait illogique de prévoir dans ce cas un droit d'appel d'une durée de trente jours alors que, suivant l'article 293, la demande visant à ce qu'il soit statué sur la question du privilège doit être entendue et tranchée dans les trente jours qui suivent la date de la saisie.

Garde après décision ou pendant l'appel

312. La chose saisie demeure en possession du gardien, sans que personne y touche ou l'examine, pendant les trente jours qui suivent la décision sur la question du privilège ou pendant l'appel attaquant cette décision, à moins que toutes les personnes lésées ne renoncent à leur droit d'appel par écrit.

Rapport n° 27, rec. 14(2)

COMMENTAIRE

Cet article est rédigé suivant le modèle de l'article 284 (disposition des choses saisies), avec les adaptations requises.

CODE DE PROCÉDURE PÉNALE

VOLUME PREMIER

Les pouvoirs de la police

TITRE PREMIER

Fouilles, perquisitions et matières connexes

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PREMIÈRE PARTIE

DISPOSITIONS GÉNÉRALES

CHAPITRE PREMIER
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1. *Code de procédure pénale.*

CHAPITRE II
DÉFINITIONS

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

«agent de la paix» (*peace officer*)

«agent de la paix» Selon le cas,

a) tout shérif, shérif adjoint et mandataire du shérif;

b) tout directeur, sous-directeur, instructeur, gardien, geôlier, garde et tout autre fonctionnaire ou employé permanent d'une prison;

c) tout agent de police, huissier ou autre personne employée à la préservation et au maintien de la paix publique ou à la signification ou à l'exécution des actes judiciaires au civil;

d) tout fonctionnaire ou personne possédant les pouvoirs d'un agent des douanes ou d'un préposé de l'accise lorsqu'il exerce une fonction en application de la *Loi sur les douanes* ou de la *Loi sur l'accise*;

e) les agents des pêches nommés ou désignés en vertu de la *Loi sur les pêches*, dans l'exercice des fonctions que confère cette loi;

f) le pilote commandant un aéronef :

(i) soit immatriculé au Canada en vertu des règlements d'application de la *Loi sur l'aéronautique*,

(ii) soit loué sans équipage et mis en service par une personne remplissant, aux termes des règlements d'application de la *Loi sur l'aéronautique*, les conditions d'inscription comme propriétaire d'un aéronef immatriculé au Canada en vertu de ces règlements,

pendant que l'aéronef est en vol;

g) les officiers et sous-officiers des Forces canadiennes qui sont :

(i) soit nommés pour l'application de l'article 156 de la *Loi sur la défense nationale*,

(ii) soit employés à des fonctions que le gouverneur en conseil, dans des règlements pris en vertu de la *Loi sur la défense nationale* pour l'application du présent alinéa, a prescrites comme étant d'une telle sorte que les officiers et les sous-officiers qui les exercent doivent nécessairement avoir les pouvoirs des agents de la paix.

«choses saisissables» (*objects of seizure*)

«choses saisissables» Les choses qui constituent ou fournissent un élément de preuve relatif à la perpétration d'un crime, y compris les fonds déposés à un compte dans un établissement financier. Sont cependant exclus :

a) les résidus qui adhèrent à la surface du corps d'une personne;

b) les tissus, les fluides corporels et les autres substances corporelles humaines, comme les échantillons d'haleine, les cheveux ou les ongles, à moins qu'ils aient été retirés du corps de la personne ou en soient dissociés.

«cour d'appel» (*court of appeal*)

«cour d'appel»

a) Dans les provinces de la Nouvelle-Écosse et de l'Île-du-Prince-Édouard, la Division d'appel de la Cour suprême;

b) dans les autres provinces, la Cour d'appel.

«crime» (*crime*)

«crime» Infraction définie dans le projet de code criminel de la CRD ou dans toute autre loi fédérale, et punissable d'une peine d'emprisonnement. Est exclue l'infraction dont l'auteur ne peut être condamné à l'emprisonnement que pour non-paiement d'une amende.

«district judiciaire» (*judicial district*)

«district judiciaire» Chacune des circonscriptions territoriales établies dans les provinces pour l'organisation de la Cour criminelle; en l'absence de circonscriptions territoriales, la province.

«greffier» (*clerk of the court*)

«greffier» Personne qui, sous quelque nom ou titre qu'elle puisse être désignée, remplit les fonctions de greffier de la cour.

«huis clos» (*in private*)

«huis clos»

a) Dans le cas d'une demande présentée unilatéralement, en l'absence du public et de toute partie autre que le demandeur;

b) dans le cas d'une audience devant être notifiée, en l'absence du public.

«juge» (*judge*)

«juge» Juge de la Cour criminelle.

«juge de paix» (*justice*)

«juge de paix» Le juge exerce d'office les attributions du juge de paix.

«médecin» (*medical practitioner*)

«médecin» Personne habilitée à exercer la médecine en vertu des lois de la province.

«photographie» (*photograph*)

«photographie» Toute image, fixe ou animée, représentant l'apparence d'une chose et produite à l'aide d'un appareil photographique ou d'une caméra.

«poursuivant» (*prosecutor*)

«poursuivant» Le procureur général ou, lorsque celui-ci n'intervient pas, la personne qui intente des poursuites auxquelles s'applique la présente loi. Est visé par la présente définition tout avocat agissant pour le compte de l'un ou de l'autre.

«prescrit» (*prescribed*)

«prescrit» Prescrit par règlement.

«unilatéralement» et «unilatérale» (*unilaterally*)

«unilatéralement» et «unilatérale» Se disent de la demande présentée par une partie sans qu'il soit nécessaire de la notifier à quelque autre partie.

CHAPITRE III
DISPOSITIONS GÉNÉRALES

Pouvoirs conférés par la common law

3. Les dispositions des parties II à VII remplacent les pouvoirs conférés par la common law aux agents de la paix pour l'application des techniques d'investigation suivantes en matière criminelle :

a) la fouille d'une personne, d'un lieu ou d'un véhicule, afin de saisir une chose ou de délivrer une personne séquestrée, de même que la rétention et la disposition des choses saisies;

b) les techniques d'investigation visées par la partie III (*La recherche d'indices sur les personnes*);

c) le prélèvement d'échantillons de l'air expiré par une personne ou de son sang, afin de déterminer son alcoolémie ou la présence d'alcool dans son sang;

d) l'interception de communications privées au moyen d'un dispositif de surveillance.

Mise en garde par l'agent de la paix

4. L'agent de la paix tenu de faire une mise en garde à une personne, ou de l'informer de quelque chose, doit le faire dans des termes et d'une manière susceptibles d'être compris par cette personne.

Abrégement du délai de préavis

5. (1) Le délai de préavis prescrit pour toute demande peut être abrégé, soit avec le consentement des destinataires, soit sur l'ordre d'un juge de paix.

Ordonnance d'abrégement

(2) Le juge de paix peut, sur demande unilatérale, ordonner l'abrégement du délai de préavis s'il est convaincu que cela serait raisonnable dans les circonstances et ne serait préjudiciable à aucun destinataire de l'avis.

Mesures visant à accélérer le déroulement de l'audience

6. Le juge de paix peut donner toute directive jugée nécessaire pour accélérer le déroulement de l'audience.

Exécution partout dans la province

7. Tout mandat ou ordonnance émanant d'un juge de paix peut être exécuté partout dans la province, sauf s'il comporte des restrictions à cet égard.

Présomption d'authenticité

8. Sauf preuve contraire, est réputé authentique l'original de tout mandat ou ordonnance apparemment signé par un juge de paix, sans qu'il soit nécessaire d'établir l'authenticité de cette signature.

CHAPITRE IV
FORMALITÉS GÉNÉRALES DE L'OBTENTION DES MANDATS

SECTION I
CHAMP D'APPLICATION

Application du chapitre

9. Le présent chapitre s'applique aux demandes de mandats présentées sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*), de la partie III (*La recherche d'indices sur les personnes*) et de la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*).

SECTION II
RÈGLES RÉGISSANT L'AUDITION DE LA DEMANDE

Témoignages et éléments de preuve

10. (1) Le juge de paix saisi d'une demande de mandat peut interroger le demandeur. Il peut aussi entendre d'autres témoins et recevoir tous éléments de preuve, notamment tout affidavit fondé

sur la conviction du souscripteur et sur les renseignements dont il dispose.

Interrogatoire du souscripteur

(2) Le juge de paix peut interroger le souscripteur d'un affidavit reçu en preuve sur le contenu de cet affidavit.

Serment

(3) Le serment est obligatoire pour tout témoin.

Enregistrement

11. (1) Les demandes présentées oralement et les témoignages entendus par le juge de paix sont intégralement enregistrés par écrit ou sur support électronique.

Renseignements

(2) L'enregistrement indique l'heure, la date et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

Mandat demandé par téléphone

12. Dans le cas d'un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix :

a) remplit le mandat;

b) en transmet deux exemplaires au demandeur ou lui en fait remplir deux exemplaires selon les directives qu'il lui donne.

SECTION III
DÉPÔT DE DOCUMENTS

Dépôt de documents

13. Le juge de paix saisi d'une demande de mandat fait déposer, dès que cela est matériellement possible, auprès du greffier du district judiciaire où la demande a été reçue, les documents suivants :

a) la demande, son enregistrement ou sa transcription;

b) l'enregistrement des témoignages qu'il a entendus, ou la transcription de cet enregistrement;

c) les éléments de preuve qu'il a reçus;

d) l'original du mandat qui, le cas échéant, a été décerné.

Exécution dans un autre district judiciaire

14. (1) L'agent de la paix qui exécute un mandat dans un district judiciaire autre que celui où il a été décerné en informe, dès que cela est matériellement possible, le greffier du district judiciaire d'origine, en lui indiquant le lieu d'exécution.

Dépôt de documents

(2) Une fois informé de ce fait, le greffier fait déposer, dès que cela est matériellement possible, les documents énumérés à l'article 13, ou une copie de ces documents, auprès du greffier du district judiciaire où le mandat a été exécuté.

PARTIE II

LES FOUILLES, LES PERQUISITIONS ET LES SAISIES

CHAPITRE PREMIER
DÉFINITIONS

Définitions

15. Les définitions qui suivent s'appliquent à la présente partie.

«nuit» (*night*)

«nuit» La période comprise entre vingt et une heures et six heures le lendemain.

«séquestrée» (*confined*)

«séquestrée» Séquestrée ou enlevée, au sens des dispositions des articles 49 (séquestration), 50 (enlèvement) ou 51 (rapt d'enfant) du projet de code criminel de la CRD.

«véhicule» (*vehicle*)

«véhicule» Toute chose utilisée ou destinée à être utilisée comme moyen de transport.

Définition du pouvoir de fouille corporelle

16. Le pouvoir de fouiller une personne non consentante pour rechercher une chose saisissable ou une personne séquestrée est limité à l'accomplissement des actes suivants :

a) interpeller et retenir cette personne;

b) pratiquer une fouille préventive sur cette personne;

c) fouiller toute chose que porte cette personne et dans laquelle il est raisonnable de croire que pourrait se trouver la chose saisissable ou la personne séquestrée;

d) examiner les parties de la surface du corps de cette personne où il est raisonnable de croire que pourrait se trouver la chose saisissable;

e) fouiller les vêtements de cette personne où il est raisonnable de croire que pourrait se trouver la chose saisissable ou la personne séquestrée;

f) enlever à cette personne les vêtements qu'il est raisonnable et nécessaire de lui enlever, soit pour voir si elle porte ou dissimule la chose saisissable ou la personne séquestrée, soit pour saisir cette chose ou délivrer cette personne.

Définition de la fouille préventive

17. Le pouvoir de pratiquer une fouille préventive sur une personne s'entend du pouvoir :

a) de pratiquer sur elle une fouille par palpation et de fouiller ses vêtements ainsi que toute chose qu'elle porte ou à sa portée, pour déceler l'éventuelle présence d'armes ou d'instruments susceptibles de faciliter son évasion;

b) si la fouille permet de découvrir qu'une chose considérée, pour des motifs raisonnables, comme une arme ou un instrument susceptible de faciliter l'évasion de la personne, se trouve sous ou dans ses vêtements, de lui enlever tout vêtement qu'il est raisonnable et nécessaire d'enlever pour pratiquer la saisie;

c) de saisir toute chose considérée, pour des motifs raisonnables, comme une arme ou un instrument susceptible de faciliter l'évasion de la personne.

Définition du pouvoir de fouiller un véhicule

18. Sauf s'il est obtenu par consentement, le pouvoir de perquisitionner dans un véhicule pour rechercher une chose saisissable ou une personne séquestrée se limite à immobiliser et à retenir le véhicule, à pénétrer dans le véhicule et à fouiller les parties du véhicule, ou de toute chose s'y trouvant, où il est raisonnable de croire que pourrait se trouver cette chose ou cette personne.

Définition du pouvoir de fouiller un lieu

19. Sauf s'il est obtenu par consentement, le pouvoir de perquisitionner dans un lieu pour rechercher une chose saisissable ou une personne séquestrée se limite à pénétrer dans le lieu et à fouiller les parties du lieu, ou de toute chose s'y trouvant, où il est raisonnable de croire que pourrait se trouver cette chose ou cette personne.

Définition du pouvoir de saisie

20. Le pouvoir de saisie s'entend du pouvoir,

a) dans le cas d'une chose, d'en prendre possession ou de retirer à quiconque la possibilité d'en disposer;

b) dans le cas de fonds déposés à un compte dans un établissement financier, le pouvoir de retirer à quiconque la possibilité d'en disposer.

CHAPITRE II
FOUILLES, PERQUISITIONS ET SAISIES AUTORISÉES PAR MANDAT

SECTION I
DEMANDE DE MANDAT

Recevabilité

21. Chacun peut demander un mandat de fouille ou de perquisition.

Demande en personne ou par téléphone

22. (1) La demande est présentée en personne. Toutefois, elle peut aussi l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, si elle émane d'un agent de la paix à qui il est matériellement impossible de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement, à huis clos et sous serment, de vive voix ou par écrit.

Forme de la demande écrite

(3) La demande présentée par écrit doit l'être selon la formule prescrite.

Compétence, demande en personne

23. (1) La demande présentée en personne est adressée à un juge de paix du district judiciaire où est censé avoir été commis le crime ou de celui où le mandat doit être exécuté.

Compétence, demande par téléphone

(2) La demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication est présentée à un juge de paix désigné par le juge en chef de la Cour criminelle pour exercer cette fonction.

Contenu de la demande

24. La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime faisant l'objet de l'enquête;

d) la personne, le lieu ou le véhicule devant être fouillé;

e) lorsque la demande vise l'obtention d'un mandat autorisant la recherche de choses saisissables :

(i) les choses saisissables recherchées,

(ii) les motifs sur lesquels le demandeur se fonde pour croire que ces choses seront trouvées sur la personne, dans le lieu ou dans le véhicule visé par la fouille ou la perquisition,

(iii) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne, au même lieu, au même véhicule ou aux mêmes choses saisissables, et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

f) lorsque le mandat demandé vise la recherche et la délivrance d'une personne séquestrée :

(i) la personne recherchée,

(ii) les motifs sur lesquels le demandeur se fonde pour croire que cette personne sera trouvée dans le lieu ou le véhicule où l'on veut perquisitionner ou sur la personne que l'on veut fouiller,

(iii) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne, au même lieu, au même véhicule ou à la même personne séquestrée, et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

g) le cas échéant, les motifs sur lesquels le demandeur se fonde pour croire que l'exécution de nuit est nécessaire;

h) le cas échéant, et à condition que la demande soit présentée en personne, les motifs sur lesquels le demandeur se fonde pour croire qu'il est nécessaire que le mandat puisse être exécuté plus de dix jours après sa délivrance;

i) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

SECTION II
DÉLIVRANCE DU MANDAT

Motifs, mandat concernant une chose saisissable

25. (1) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant la fouille d'une personne, d'un lieu ou d'un véhicule et la saisie d'une chose saisissable, s'il est convaincu qu'il existe des motifs raisonnables de croire que cette chose sera trouvée sur cette personne, dans ce lieu ou dans ce véhicule.

Motifs, mandat concernant une personne séquestrée

(2) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant la fouille d'une personne, d'un lieu ou d'un véhicule et la délivrance d'une personne y séquestrée, s'il est convaincu qu'il existe des motifs raisonnables de croire que la personne séquestrée sera trouvée sur cette personne, dans ce lieu ou dans ce véhicule.

Motifs supplémentaires, demande par téléphone

26. Dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix refuse la délivrance du mandat s'il n'est pas en outre convaincu de l'existence de motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

Conditions d'exécution

27. Le juge de paix qui décerne un mandat peut y fixer toutes conditions qu'il juge opportunes quant à son exécution.

Exécution de nuit

28. Si le demandeur a précisé les motifs sur lesquels il se fonde pour croire que le mandat doit être exécuté de nuit, le juge de paix, s'il est convaincu de l'existence de tels motifs, peut, sur le mandat, en autoriser l'exécution de nuit.

Forme du mandat

29. Le mandat est rédigé selon la formule prescrite et porte la signature du juge de paix qui le délivre.

Contenu du mandat

30. Le mandat contient les renseignements suivants :

a) le nom du demandeur;

b) le crime faisant l'objet de l'enquête;

c) la chose saisissable ou la personne séquestrée qui est recherchée;

d) la personne, le lieu ou le véhicule à fouiller;

e) les conditions fixées, le cas échéant, pour son exécution;

f) la date où il expire s'il n'est pas exécuté;

g) le lieu et la date où il est délivré;

h) le nom du juge de paix et son ressort.

SECTION III
EXPIRATION DU MANDAT

Demande en personne

31. (1) Le mandat décerné à la suite d'une demande présentée en personne expire dix jours après sa délivrance.

Abrégement du délai

(2) Le juge de paix peut fixer un délai plus court s'il est convaincu que ce délai est suffisant.

Prolongation du délai

(3) Le juge de paix peut fixer un délai de plus de dix jours mais d'au plus vingt jours, s'il est convaincu qu'il existe des motifs raisonnables de croire que cela est nécessaire.

Demande par téléphone

32. Le mandat délivré à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication expire trois jours après sa délivrance.

Exécution

33. Le mandat exécuté avant la date d'échéance qui y est fixée expire au moment de son exécution.

Dépôt du mandat expiré

34. Lorsque le mandat expire sans avoir été exécuté, les raisons pour lesquelles il ne l'a pas été sont notées sur une copie du mandat. Celle-ci est déposée dès que cela est matériellement possible auprès du greffier du district judiciaire où le mandat a été délivré.

SECTION IV
EXÉCUTION DU MANDAT

Compétence

35. Le mandat peut être exécuté dans la province où il est délivré par tout agent de la paix de la province.

Exécution dans une autre province

36. (1) Le mandat peut aussi être exécuté dans une autre province, s'il est visé par un juge de paix de cette province.

Visa du juge de paix

(2) Le juge de paix peut viser le mandat décerné à la suite d'une demande présentée en personne, s'il est convaincu que la personne, le lieu ou le véhicule à fouiller se trouve dans cette province.

Formule

(3) Le visa est apposé selon la formule prescrite.

Effet du visa

(4) Le mandat peut être exécuté dans la province où il a été visé, par tout agent de la paix de celle-ci ou de la province où il a été délivré.

Pouvoirs conférés par le mandat

37. Le mandat autorise l'agent de la paix à accomplir les actes suivants :

a) fouiller toute personne, tout lieu ou tout véhicule désigné dans le mandat;

b) fouiller toute personne trouvée dans le lieu ou le véhicule désigné dans le mandat, s'il croit, pour des motifs raisonnables, qu'elle porte ou dissimule la chose saisissable ou la personne séquestrée désignée dans le mandat;

c) saisir toute chose que, pour des motifs raisonnables, il tient pour la chose saisissable désignée dans le mandat;

d) délivrer toute personne que, pour des motifs raisonnables, il tient pour la personne séquestrée désignée dans le mandat.

Exécution de jour

38. Le mandat est exécuté entre six heures et vingt et une heures, à moins que le juge de paix qui l'a délivré n'en ait autorisé, par une mention expresse, l'exécution de nuit.

Présence de l'occupant

39. Sauf impossibilité matérielle, le mandat est exécuté en présence de la personne qui occupe le lieu ou le véhicule fouillé, ou qui en est apparemment responsable.

Remise d'une copie du mandat

40. (1) Avant d'entreprendre la fouille ou la perquisition, ou dès que cela est matériellement possible, l'agent de la paix remet une copie du mandat, selon le cas :

a) à la personne dont le mandat autorise la fouille;

b) à toute personne présente et apparemment responsable du lieu ou du véhicule dont le mandat autorise la fouille.

Affichage d'une copie du mandat

(2) Après avoir exécuté un mandat dans un lieu ou un véhicule sans qu'il y ait de personne présente et apparemment responsable, l'agent de la paix indique sur une copie du mandat la date et l'heure de l'exécution et, le cas échéant, le fait que des choses ont été saisies. Il affiche cette copie bien en vue dans le lieu ou le véhicule.

SECTION V
RÈGLE DE PREUVE EN CAS D'ABSENCE DE L'ORIGINAL DU MANDAT

Absence de l'original du mandat

41. Dans toute procédure où il importe au tribunal d'être convaincu qu'une perquisition ou une saisie a été autorisée par un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que la perquisition ou la saisie n'a pas été autorisée par mandat.

CHAPITRE III
FOUILLES, PERQUISITIONS ET SAISIES SANS MANDAT

SECTION I
FOUILLES, PERQUISITIONS ET SAISIES EN CAS D'URGENCE

Pouvoir de fouille et de perquisition

42. (1) L'agent de la paix peut, sans mandat, fouiller une personne, un lieu ou un véhicule pour rechercher une chose saisissable ou une personne séquestrée, s'il croit pour des motifs raisonnables :

a) d'une part qu'elle sera trouvée sur la personne, dans le lieu ou dans le véhicule en question;

b) d'autre part, que le délai nécessaire à l'obtention d'un mandat mettrait en péril la vie ou la sécurité de quelque personne.

Pouvoir de saisie

(2) L'agent de la paix qui, au cours de la fouille ou de la perquisition, trouve une chose ou une personne que, pour des motifs raisonnables, il tient pour celle qui est recherchée, peut saisir cette chose ou délivrer cette personne, selon le cas.

SECTION II
FOUILLES, PERQUISITIONS ET SAISIES EN CAS D'ARRESTATION

Fouille préventive

43. Toute personne qui en a arrêté une autre peut, à l'occasion de cette arrestation, pratiquer sur elle sans mandat une fouille préventive.

Pouvoirs supplémentaires de l'agent de la paix

44. L'agent de la paix qui a arrêté une personne peut, à l'occasion de cette arrestation, exercer sans mandat les pouvoirs suivants :

a) s'il croit, pour des motifs raisonnables, qu'il trouvera une chose saisissable sur cette personne et que le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de cette chose, il peut fouiller la personne et saisir toute chose que, pour des motifs raisonnables, il tient pour la chose saisissable;

b) si la personne arrêtée se trouve dans un véhicule ou en est responsable à ce moment, et que l'agent de la paix croie, pour des motifs raisonnables, qu'une chose saisissable sera trouvée dans ce véhicule et que le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de cette chose, il peut fouiller le véhicule et saisir toute chose que, pour des motifs raisonnables, il tient pour la chose saisissable.

SECTION III
FOUILLES ET PERQUISITIONS AVEC LE CONSENTEMENT DE L'INTÉRESSÉ

Pouvoir de fouille et de perquisition

45. (1) L'agent de la paix peut fouiller sans mandat :

a) toute personne, de même que tout objet qu'elle porte, si elle consent à la fouille;

b) tout lieu ou véhicule, avec le consentement d'une personne présente qui en est apparemment responsable et paraît habile à donner ce consentement.

Restriction

(2) Nul ne peut consentir, en vertu de la présente partie, à une fouille visant à rechercher une chose saisissable à l'intérieur de son corps.

Renseignements à fournir

46. (1) Lorsqu'il demande à une personne son consentement, l'agent de la paix lui fournit les renseignements suivants :

a) le crime faisant l'objet de l'enquête;

b) ce qu'il recherche;

c) ce en quoi consiste la fouille proposée;

d) le fait qu'elle peut refuser de donner ce consentement ou, une fois qu'il est donné, le retirer en tout temps.

Forme du consentement

(2) Le consentement peut être donné de vive voix ou par écrit.

Pouvoir de saisie

47. L'agent de la paix qui, au cours de la fouille, trouve une chose que, pour des motifs raisonnables, il tient pour saisissable, ou une personne que, pour des motifs raisonnables, il tient pour séquestrée, peut saisir cette chose ou délivrer cette personne.

CHAPITRE IV
SAISIE DE CHOSES BIEN EN VUE

Saisie

48. (1) L'agent de la paix peut saisir toute chose qu'il trouve, bien en vue, dans l'exercice légitime de ses fonctions si, pour des motifs raisonnables, il la croit saisissable.

Lieu privé

(2) Le pouvoir prévu au paragraphe (1) n'emporte pas celui de pénétrer dans un lieu privé.

Chose saisissable qui n'est pas bien en vue

49. Nulle chose saisissable n'est tenue pour bien en vue si l'agent de la paix ne peut avoir des motifs raisonnables de la croire saisissable sans la déplacer ni la manipuler.

CHAPITRE V
EXERCICE DES POUVOIRS DE FOUILLE, DE PERQUISITION ET DE SAISIE

Modalités de la fouille corporelle

50. (1) La fouille corporelle est exécutée d'une manière qui respecte la dignité de la personne visée. Compte tenu de sa nature et des circonstances,

a) d'une part, sa portée est limitée au strict nécessaire;

b) d'autre part, elle respecte le plus possible l'intimité de la personne.

Renonciation

(2) La personne devant être fouillée peut renoncer, de vive voix ou par écrit, aux exigences prévues aux alinéas (1)*a*) ou *b*).

Aide aux fouilles et aux perquisitions

51. L'agent de la paix qui effectue une fouille ou une perquisition peut obtenir l'aide de toute personne s'il est fondé à croire que cela est nécessaire à l'efficacité de l'opération.

Sommation d'ouvrir

52. Avant d'entrer dans un lieu privé où il est autorisé à perquisitionner, l'agent de la paix informe l'occupant de sa qualité et du but de sa présence, le somme de le laisser entrer et lui accorde

un délai raisonnable pour ce faire. Il est dispensé de ces formalités s'il croit pour des motifs raisonnables que cela entraînerait la perte ou la destruction d'une chose saisissable à l'égard de laquelle la perquisition est autorisée, ou mettrait en danger la vie ou la sécurité de quelque personne.

Opposition

53. (1) Nul agent de la paix ne peut examiner ou saisir une chose, ni examiner des renseignements contenus dans une chose, s'il est au fait de l'existence possible d'un privilège relatif à cette chose ou à ces renseignements, sans donner aux intéressés une occasion raisonnable de formuler une opposition fondée sur ce privilège; est également visée par cette interdiction toute personne qui aide l'agent de la paix.

Procédure à suivre

(2) Lorsqu'un privilège est invoqué, l'agent de la paix, sans examiner la chose ou les renseignements, ni les photographier ou en faire faire de copies, procède à la saisie de l'une des deux façons suivantes :

a) il retire à quiconque la possibilité de disposer de la chose, et prend les mesures nécessaires pour empêcher que la chose ou les renseignements y contenus fassent l'objet de quelque examen ou action;

b) il prend possession de la chose, en fait un paquet qu'il scelle et identifie convenablement, et qu'il confie à la garde du shérif du district judiciaire ou du comté où la saisie a été effectuée ou, s'il existe entre l'agent et la personne qui invoque le privilège une entente écrite désignant une personne qui agira en qualité de gardien, à la garde de cette dernière.

Gardien de la chose saisie

(3) Pour l'application de la partie VII (*Les privilèges en matière de saisie*), est tenu pour le gardien de la chose saisie, l'agent de la paix qui saisit la chose en retirant à quiconque la possibilité d'en disposer, ou encore la personne ou le shérif à la garde duquel le paquet est confié.

Restitution des armes saisies

54. (1) L'agent de la paix qui, au cours d'une fouille préventive, saisit une chose qu'il tient pour une arme ou un instrument susceptible de faciliter l'évasion, fait restituer cette chose à la personne à qui elle a été saisie dès que cela est matériellement possible et ne pose aucun risque, à moins que la saisie ou la rétention n'en soit par ailleurs autorisée.

Remise à un agent de la paix

(2) La personne autre qu'un agent de la paix qui, au cours d'une fouille préventive, saisit une chose qu'elle tient pour une arme ou un instrument susceptible de faciliter l'évasion, remet cette chose à un agent de la paix, dès que cela est matériellement possible, pour qu'il en dispose conformément au paragraphe (1).

PARTIE III

LA RECHERCHE D'INDICES SUR LES PERSONNES

CHAPITRE PREMIER
CHAMP D'APPLICATION

Application

55. (1) La présente partie s'applique à toute technique d'investigation utilisée, par un agent de la paix ou à sa demande, afin d'obtenir des indices ou des renseignements concernant l'imputabilité d'un crime à une personne, et qui suppose un contact physique avec cette personne ou sa participation consciente.

Exception

(2) Elle ne s'applique pas aux techniques d'investigation consistant uniquement dans l'interrogatoire, la fouille corporelle pratiquée sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*) ou le prélèvement d'échantillons d'haleine ou de sang effectué sous le régime de la partie IV (*Le dépistage de l'état alcoolique chez les conducteurs*).

CHAPITRE II
APPLICATION DE TECHNIQUES D'INVESTIGATION EN VERTU D'UN MANDAT

SECTION I
DEMANDE DE MANDAT

Demandeur et nature du mandat

56. L'agent de la paix peut demander un mandat autorisant l'application d'une ou plusieurs des techniques d'investigation énumérées ci-dessous :

a) l'examen visuel de la surface du corps d'une personne;

b) l'examen visuel des orifices corporels d'une personne, ainsi que la recherche, l'extraction et la saisie de toute chose saisissable dissimulée dans un orifice corporel;

c) le prélèvement d'empreintes de toute partie externe du corps d'une personne;

d) le prélèvement d'empreintes dentaires sur une personne;

e) le prélèvement de cheveux sur une personne;

f) le prélèvement de rognures ou de raclures sur les ongles des doigts ou des orteils d'une personne;

g) le prélèvement de résidus ou de substances sur la surface du corps d'une personne, par lavage ou encore au moyen de tampons ou d'adhésifs;

h) le prélèvement d'échantillons de salive dans la bouche d'une personne, au moyen d'un tampon ou autrement, dans un but autre que celui de déceler la présence de drogues ou d'alcool;

i) l'examen physique d'une personne par un médecin;

j) l'examen d'une personne au moyen de la radiographie ou de l'ultrasonographie.

Demande en personne ou par téléphone

57. (1) La demande est présentée en personne. Toutefois, elle peut aussi l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, s'il est matériellement impossible au demandeur de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement, à huis clos et sous serment, de vive voix ou par écrit.

Forme de la demande écrite

(3) La demande présentée par écrit doit l'être selon la formule prescrite.

Compétence, demande en personne

58. (1) La demande présentée en personne est adressée à un juge de paix du district judiciaire où est censé avoir été commis le crime ou de celui où le mandat doit être exécuté.

Compétence, demande par téléphone

(2) La demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication est présentée à un juge de paix désigné par le juge en chef de la Cour criminelle pour exercer cette fonction.

Contenu de la demande

59. La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime faisant l'objet de l'enquête;

d) la personne qui doit être soumise à l'application de la technique d'investigation;

e) le cas échéant, le fait que la personne a été arrêtée, inculpée ou a reçu une citation à comparaître, relativement au crime faisant l'objet de l'enquête;

f) la technique d'investigation devant être appliquée;

g) les motifs pour lesquels le demandeur croit que l'application de la technique fournira un indice probant relatif à l'implication de la personne dans le crime en question et qu'il est matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne;

h) s'il s'agit d'une demande de mandat autorisant l'examen de la personne au moyen de la radiographie ou de l'ultrasonographie, les motifs pour lesquels le demandeur croit que cet examen ne risque pas de mettre en danger la vie ou la santé du sujet;

i) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

j) le nom d'une personne qui, de l'avis du demandeur, est compétente, de par sa formation ou son expérience, pour l'application de la technique en cause, ou le nom d'une catégorie de personnes répondant à ce critère;

k) le cas échéant, et à condition que la demande soit présentée en personne, les motifs sur lesquels le demandeur se fonde pour croire qu'il est nécessaire que le mandat puisse être exécuté plus de dix jours après sa délivrance;

l) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

SECTION II
DÉLIVRANCE DU MANDAT

Motifs justifiant la délivrance

60. (1) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant l'application d'une technique d'investigation énumérée à l'article 56 si les conditions suivantes sont réunies :

a) la personne qui doit être soumise à l'application de cette technique a été inculpée d'un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou elle a été arrêtée ou a reçu une citation à comparaître relativement à un tel crime;

b) le juge de paix est convaincu qu'il existe des motifs raisonnables de croire :

(i) que l'application de la technique fournira un indice probant concernant l'implication de cette personne dans le crime,

(ii) qu'il est matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne,

(iii) dans le cas d'une demande de mandat autorisant l'examen de la personne au moyen de la radiographie ou de l'ultrasonographie, que cet examen ne risque pas de mettre en danger la vie ou la santé du sujet.

Motifs supplémentaires, demande par téléphone

(2) Dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix refuse la délivrance du mandat s'il n'est pas en outre convaincu de l'existence de motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

Conditions d'exécution

61. Le juge de paix qui décerne un mandat peut y fixer toutes conditions qu'il juge opportunes quant à son exécution.

Forme du mandat

62. Le mandat est rédigé selon la formule prescrite et porte la signature du juge de paix qui le délivre.

Contenu du mandat

63. Le mandat contient les renseignements suivants :

a) le nom du demandeur;

b) le crime faisant l'objet de l'enquête;

c) la personne qui doit être soumise à l'application de la technique d'investigation;

d) la technique d'investigation devant être appliquée;

e) les conditions fixées, le cas échéant, pour son exécution;

f) la date où il expire s'il n'est pas exécuté;

g) le lieu et la date où il est délivré;

h) le nom du juge de paix et son ressort.

SECTION III
EXPIRATION DU MANDAT

Demande en personne

64. (1) Le mandat décerné à la suite d'une demande présentée en personne expire dix jours après sa délivrance.

Abrégement du délai

(2) Le juge de paix peut fixer un délai plus court s'il est convaincu que ce délai est suffisant.

Prolongation du délai

(3) Le juge de paix peut fixer un délai de plus de dix jours, mais d'au plus vingt jours, s'il est convaincu qu'il existe des motifs raisonnables de croire que cela est nécessaire.

Mandat obtenu par téléphone

65. Le mandat délivré à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication expire trois jours après sa délivrance.

Exécution

66. Malgré la date d'échéance qui y est fixée, le mandat expire dès que toutes les techniques d'investigation dont il autorisait l'application ont été appliquées.

Mandat non exécuté

67. (1) Lorsque le mandat expire sans qu'aucune des techniques d'investigation qui y étaient autorisées ait été appliquée, les raisons pour lesquelles il n'a pas été exécuté sont notées sur une copie du mandat.

Dépôt

(2) La copie est déposée, dès que cela est matériellement possible, auprès du greffier du district judiciaire où le mandat a été délivré.

SECTION IV
EXÉCUTION DU MANDAT

Compétence

68. Le mandat peut être exécuté par tout agent de la paix de la province où il est délivré.

Remise d'une copie du mandat

69. Avant d'exécuter le mandat, ou dès que cela est matériellement possible, l'agent de la paix en remet une copie à la personne soumise à l'application de la technique d'investigation.

SECTION V
RÈGLE DE PREUVE EN CAS D'ABSENCE DE L'ORIGINAL DU MANDAT

Absence de l'original du mandat

70. Dans toute procédure où il importe au tribunal d'être convaincu que l'application d'une technique d'investigation a été autorisée par un mandat décerné à la suite d'une demande présen-

tée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que l'application de la technique n'a pas été autorisée par mandat.

CHAPITRE III
APPLICATION DE TECHNIQUES D'INVESTIGATION SANS MANDAT

SECTION I
APPLICATION DE TECHNIQUES D'INVESTIGATION EN CAS D'URGENCE

Motifs justifiant l'application de techniques d'investigation

71. Lorsqu'une personne a été inculpée d'un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou qu'elle a été arrêtée ou a reçu une citation à comparaître relativement à un tel crime, l'agent de la paix peut, sans mandat, soumettre ou faire soumettre cette personne à l'application de toute technique d'investigation énumérée aux alinéas 56*a*) à *i*), s'il croit, pour des motifs raisonnables, que les conditions suivantes sont réunies :

a) cela permettra d'obtenir un indice probant concernant l'implication de la personne dans le crime en question;

b) le délai nécessaire à l'obtention d'un mandat entraînerait la perte ou la destruction de l'indice en question;

c) il est matériellement impossible d'obtenir l'indice en question par des moyens moins attentatoires à la dignité de la personne.

SECTION II
APPLICATION DE TECHNIQUES D'INVESTIGATION EN CAS D'ARRESTATION

Examen visuel

72. L'agent de la paix qui a arrêté une personne pour un crime punissable d'une peine d'emprisonnement de plus de deux ans peut, à l'occasion de cette arrestation, procéder ou faire procéder sans mandat à l'examen visuel de la surface du corps de cette personne, à l'exclusion de ses parties génitales, de ses fesses et, s'il s'agit d'une femme, de ses seins, s'il croit, pour des motifs raisonnables,

* Certains commissaires s'opposent à l'inclusion de cette disposition dans le code.

a) d'une part, que cela permettra d'obtenir un indice probant concernant l'implication de la personne dans le crime en question;

b) d'autre part, qu'il est matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne.

SECTION III
APPLICATION DE TECHNIQUES D'INVESTIGATION AVEC LE CONSENTEMENT DE L'INTÉRESSÉ

Techniques pouvant être appliquées

73. (1) Tout agent de la paix peut, sans mandat, soumettre ou faire soumettre une personne, avec le consentement de celle-ci, à l'application de toute technique d'investigation, à l'exception de celles qui supposent l'administration d'une drogue destinée à modifier l'humeur, les inhibitions, le jugement ou la pensée, ou d'une drogue qui a notoirement cet effet.

Renseignements à fournir

(2) Le consentement n'est valide que si les conditions suivantes ont été préalablement remplies :

a) on a donné au sujet une description de la technique d'investigation, on lui en a expliqué la nature et on l'a informé des raisons qui motivent le recours à cette technique;

b) la personne qui doit procéder à l'application de la technique a informé le sujet, le cas échéant, des risques non négligeables que cela pose pour sa santé ou sa sécurité;

c) un agent de la paix a informé le sujet qu'il a le droit de consulter un avocat avant de décider s'il consent ou non à l'application de la technique, et qu'il peut refuser de donner ce consentement ou, une fois qu'il est donné, le retirer en tout temps.

Forme du consentement

(3) Le consentement peut être donné de vive voix ou par écrit.

CHAPITRE IV
EXERCICE DES POUVOIRS RELATIFS AUX TECHNIQUES D'INVESTIGATION

SECTION I
FORMALITÉS DE L'APPLICATION DES TECHNIQUES D'INVESTIGATION

Compétence du technicien

74. (1) L'application de toute technique d'investigation est confiée à une personne qui, de par sa formation ou son expérience, a la compétence requise.

Empreintes dentaires

(2) Les empreintes dentaires sont prélevées par une personne habilitée à ce faire en vertu des lois de la province.

Techniques d'ordre médical

(3) L'application de toute technique d'investigation qui suppose la recherche ou l'extraction d'une chose saisissable se trouvant dans le corps d'une personne est confiée à un médecin.

Exception

(4) Dans les circonstances prévues à l'article 71 (urgence), l'agent de la paix peut rechercher et extraire une chose saisissable dissimulée dans la bouche de la personne.

Renseignements à fournir

75. (1) Nul ne peut être soumis à l'application d'une technique d'investigation sans son consentement, à moins que les conditions suivantes n'aient été préalablement remplies :

a) on a donné au sujet une description de la technique d'investigation, on lui en a expliqué la nature et on l'a informé des raisons motivant le recours à cette technique;

b) on a informé le sujet que la loi l'oblige à s'y soumettre et autorise le recours à la force nécessaire et raisonnable dans les circonstances pour l'application de la technique.

Divulgation préalable

(2) Ces renseignements sont fournis à la personne avant l'application de la technique; en cas d'impossibilité matérielle, ils sont fournis à la première occasion raisonnable.

Renonciation

(3) La personne peut renoncer, de vive voix ou par écrit, aux exigences prévues à l'alinéa (1)*a*).

Modalités de l'application des techniques d'investigation

76. (1) Toute technique d'investigation est appliquée d'une manière qui respecte la dignité de la personne visée. Compte tenu de sa nature et des circonstances,

a) d'une part, elle est appliquée de façon à incommoder le moins possible la personne;

b) d'autre part, elle respecte le plus possible l'intimité de la personne.

Renonciation

(2) La personne peut renoncer, de vive voix ou par écrit, aux exigences prévues aux alinéas (1)*a*) ou *b*).

Absence de responsabilité

77. Ne constitue pas un crime, le fait d'omettre ou de refuser de soumettre une autre personne à une technique d'investigation.

SECTION II
POUVOIRS CONNEXES

Prise de photographies

78. Le pouvoir de procéder à l'examen visuel des orifices corporels ou de la surface du corps d'une personne non consentante comporte le pouvoir de photographier tout indice découvert par ce moyen.

Examen et analyse

79. (1) L'agent de la paix peut faire procéder à l'examen ou à l'analyse de toute chose prise ou obtenue grâce à l'application d'une technique d'investigation.

Préservation des indices

(2) Si l'examen ou l'analyse permet de découvrir un indice, la chose, ou ce qui en reste alors, est préservée de façon à pouvoir être utilisée dans le cadre de procédures ultérieures.

Inapplicabilité

(3) Le présent article ne s'applique pas aux choses saisies à titre de choses saisissables sous le régime de la présente partie.

SECTION III
RAPPORT SUR LES TECHNIQUES APPLIQUÉES

Contenu du rapport et exigences

80. (1) À la suite de l'application d'une technique d'investigation en vertu d'un mandat, de l'article 71 (urgence) ou de l'article 72 (arrestation), ou lorsqu'une chose a été prise ou obtenue grâce à l'application d'une technique d'investigation avec le consentement de l'intéressé, l'agent de la paix, dès que cela est matériellement possible, dresse et signe un rapport qui contient les renseignements suivants :

a) le crime faisant l'objet de l'enquête;

b) la personne soumise à l'application de la technique;

c) la technique utilisée et, le cas échéant, la description des choses prélevées ou obtenues;

d) le lieu, la date et l'heure de l'application de la technique;

e) le nom de la personne qui a procédé à l'application de la technique;

f) le nom de l'agent de la paix.

Cas d'urgence

(2) Dans le cas où le recours à la technique était fondé sur l'article 71 (urgence), le rapport indique en outre les motifs pour lesquels l'agent de la paix croyait que l'application de la technique fournirait un indice probant relatif à l'implication de la personne dans le crime en question, que le délai nécessaire à l'obtention d'un mandat aurait entraîné la perte ou la destruction de l'indice et qu'il était matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne.

Arrestation

(3) Dans le cas où le recours à la technique était fondé sur l'article 72 (arrestation), le rapport indique en outre les motifs pour lesquels l'agent de la paix croyait que l'application de la technique permettrait d'obtenir un indice probant concernant l'implication de la personne dans le crime en question et qu'il était matériellement impossible d'obtenir cet indice par des moyens moins attentatoires à la dignité de la personne.

Techniques non appliquées

(4) Dans le cas où l'application de la technique était fondée sur un mandat autorisant l'application de plusieurs techniques qui n'ont pas toutes été utilisées, le rapport indique en outre les raisons pour lesquelles certaines ne l'ont pas été.

Remise et dépôt du rapport

81. L'agent de la paix, dès que cela est matériellement possible :

a) remet une copie du rapport à la personne soumise à l'application de la technique;

b) fait déposer le rapport auprès du greffier du district judiciaire où la technique a été utilisée.

PARTIE IV

LE DÉPISTAGE DE L'ÉTAT ALCOOLIQUE CHEZ LES CONDUCTEURS

CHAPITRE PREMIER
DÉFINITIONS

Définitions

82. Les définitions qui suivent s'appliquent à la présente partie.

«alcootest» (*preliminary breath testing device*)

«alcootest» Appareil destiné à déceler la présence d'alcool dans le sang d'une personne, qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada.

«analyseur d'haleine» (*breath analysis instrument*)

«analyseur d'haleine» Appareil destiné au prélèvement et à l'analyse de l'air expiré, qui permet de déterminer l'alcoolémie d'une personne et qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada.

«analyste» (*analyst*)

«analyste» Personne désignée comme analyste par le procureur général pour l'application de la présente partie.

«conduire» (*operate*)

«conduire» Dans le cas d'un navire ou d'un aéronef, le piloter.

«contenant» (*container*)

«contenant» Selon le cas :

a) contenant destiné à recueillir, en vue d'une analyse, un échantillon de l'air expiré par une personne, qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada;

b) contenant destiné à recueillir, en vue d'une analyse, un échantillon du sang d'une personne, qui est d'un type approuvé pour l'application de la présente partie par un arrêté du procureur général du Canada.

«technicien» (*technician*)

«technicien» Selon le cas :

a) toute personne reconnue qualifiée par le procureur général pour faire fonctionner un analyseur d'haleine;

b) toute personne reconnue qualifiée par le procureur général pour prélever un échantillon du sang d'une personne pour l'application de la présente partie, ou faisant partie d'une catégorie de personnes reconnues qualifiées à cette fin par le procureur général.

«véhicule» (*vehicle*)

«véhicule» Tout véhicule à moteur, et tout navire, train ou aéronef; la présente définition ne vise toutefois pas les véhicules tirés, mûs ou poussés par la force musculaire.

CHAPITRE II
DÉPISTAGE PRÉLIMINAIRE

Demande d'échantillon

83. (1) L'agent de la paix qui a de bonnes raisons de soupçonner un état alcoolique chez la personne qui conduit un véhicule, ou en a la garde ou le contrôle, peut lui demander :

a) de fournir, dès que cela est matériellement possible, l'échantillon d'haleine qu'il estime nécessaire à une analyse au moyen d'un alcootest;

b) de le suivre, si besoin est, pour que le prélèvement de cet échantillon puisse être effectué.

Mise en garde

(2) Lorsqu'il fait cette demande, l'agent de la paix avertit la personne qu'en cas d'omission ou de refus, il peut l'arrêter et l'emmener à un endroit où un analyseur d'haleine est disponible.

CHAPITRE III
DEMANDE D'ÉCHANTILLONS POUR LA DÉTERMINATION DE L'ALCOOLÉMIE

SECTION I
REFUS DE FOURNIR UN ÉCHANTILLON POUR LE DÉPISTAGE PRÉLIMINAIRE

Demande d'échantillons d'haleine

84. Lorsqu'une personne a été arrêtée pour omission ou refus de fournir un échantillon d'haleine en vue de l'épreuve de l'alcootest, ou pour omission ou refus de suivre l'agent de la paix pour le prélèvement de cet échantillon, l'agent de la paix peut lui demander de fournir, dès que cela est matériellement possible, les échantillons d'haleine nécessaires, de l'avis d'un technicien, à une analyse au moyen d'un analyseur d'haleine.

SECTION II
COMMISSION DU CRIME DE CONDUITE SOUS L'EMPIRE D'UN ÉTAT ALCOOLIQUE

Demande d'échantillons d'haleine

85. (1) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne, au cours des deux heures précédentes, a commis le crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD peut, dès que cela est matériellement possible, demander à cette personne :

a) de fournir, dès que cela est matériellement possible, les échantillons d'haleine nécessaires, de l'avis d'un technicien, à une analyse au moyen d'un analyseur d'haleine;

b) de le suivre, si besoin est, pour le prélèvement des échantillons d'haleine.

Mise en garde

(2) S'il lui demande de le suivre, il l'avertit qu'en cas d'omission ou de refus, il peut l'arrêter et la conduire à un endroit où un analyseur d'haleine est disponible.

Demande d'échantillons de sang

86. (1) L'agent de la paix qui a des motifs raisonnables de croire que, à cause de l'état physique de cette personne, le prélèvement d'échantillons d'haleine serait matériellement impossible ou elle serait incapable de fournir des échantillons d'haleine, peut, dès que cela est matériellement possible, lui demander :

a) de se soumettre, dès que cela est matériellement possible, au prélèvement d'échantillons de son sang pour la détermination de son alcoolémie;

b) de le suivre, si besoin est, pour le prélèvement des échantillons.

Mise en garde

(2) S'il lui demande de le suivre, il l'avertit qu'en cas d'omission ou de refus, il peut l'arrêter et la conduire à un endroit où pourront être effectués les prélèvements de sang.

SECTION III
MISE EN GARDE SUR LES CONSÉQUENCES D'UN REFUS

Mise en garde

87. L'agent de la paix qui demande à une personne de fournir des échantillons d'haleine ou de sang l'avertit que, suivant l'article 59 (omission ou refus de fournir un échantillon d'haleine ou de sang) du projet de code criminel de la CRD, le fait de refuser

ou d'omettre d'obtempérer sans excuse raisonnable constitue un crime.

SECTION IV
RESTRICTIONS QUANT À LA DEMANDE D'ÉCHANTILLONS

Traitement médical

88. Lorsque la personne a été admise à l'hôpital ou est traitée d'urgence par un médecin, l'agent de la paix ne peut lui demander de fournir des échantillons d'haleine ou de subir des prélèvements de sang que si le médecin traitant estime que la formulation de cette demande et le prélèvement des échantillons ne risquent pas de nuire au traitement de cette personne ni aux soins qui lui sont donnés.

SECTION V
DEMANDE D'ÉCHANTILLONS DE SANG APRÈS COMMUNICATION DES RÉSULTATS DES ANALYSES

Communication des résultats

89. (1) Une fois connus les résultats des analyses d'haleine, l'agent de la paix les communique à la personne visée dès que cela est matériellement possible.

Demande d'échantillons de sang

(2) Une fois informée des résultats des analyses d'haleine, la personne détenue peut demander que des échantillons de sang soient prélevés sur elle; l'agent de la paix prend alors les dispositions nécessaires à cet effet.

CHAPITRE IV
MANDAT AUTORISANT DES PRÉLÈVEMENTS DE SANG

SECTION I
DEMANDE DE MANDAT

Demandeur

90. L'agent de la paix peut demander un mandat autorisant le prélèvement d'échantillons de sang sur une personne.

Demande en personne ou par téléphone

91. (1) La demande est présentée en personne. Toutefois, elle peut aussi l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, s'il est matériellement impossible au demandeur de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement et sous serment, de vive voix ou par écrit.

Forme de la demande écrite

(3) La demande présentée par écrit doit l'être selon la formule prescrite.

Compétence, demande en personne

92. (1) La demande présentée en personne est adressée à un juge de paix du district judiciaire où est censé avoir été commis le crime ou de celui où le mandat doit être exécuté.

Compétence, demande par téléphone

(2) La demande faite par téléphone ou à l'aide d'un autre moyen de télécommunication est présentée à un juge de paix désigné par le juge en chef de la Cour criminelle pour exercer cette fonction.

Contenu de la demande

93. La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime faisant l'objet de l'enquête;

d) la personne sur laquelle les échantillons de sang doivent être prélevés;

e) les motifs pour lesquels le demandeur croit que cette personne, au cours des deux heures précédentes, a commis le crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD et a été impliquée dans un accident ayant coûté la vie ou des lésions corporelles à quelque personne;

f) les motifs pour lesquels le demandeur croit qu'un médecin est d'avis à la fois :

(i) que cette personne se trouve, à cause de l'absorption d'alcool, de l'accident ou de tout autre événement lié à l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement d'échantillons de son sang,

(ii) que le prélèvement des échantillons ne risque pas de mettre en danger la vie ou la santé de cette personne;

g) la liste de toutes les demandes de mandat qui, à la connaissance du demandeur, ont déjà été présentées relativement à la même personne et dans le cadre de la même enquête ou d'une enquête connexe, avec la date de chacune d'entre elles, le nom

du juge de paix saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

h) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

SECTION II
DÉLIVRANCE DU MANDAT

Motifs justifiant la délivrance du mandat

94. (1) Le juge de paix saisi d'une demande à cet effet peut décerner un mandat autorisant le prélèvement d'échantillons du sang d'une personne s'il est convaincu qu'il existe des motifs raisonnables de croire :

a) d'une part, que cette personne, au cours des deux heures précédentes, a commis le crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD et a été impliquée dans un accident ayant coûté la vie ou des lésions corporelles à quelque personne;

b) d'autre part, qu'un médecin est d'avis à la fois :

(i) que cette personne se trouve, à cause de l'absorption d'alcool, de l'accident ou de tout autre événement lié à l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement de son sang,

(ii) que le prélèvement des échantillons ne risque pas de mettre en danger la vie ou la santé de cette personne.

Motifs supplémentaires, demande par téléphone

(2) Dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, le juge de paix refuse la délivrance du mandat s'il n'est pas en outre convaincu de l'existence de motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne devant un juge de paix.

Conditions d'exécution

95. Le juge de paix qui décerne un mandat peut y fixer toutes conditions qu'il juge opportunes quant à son exécution.

Forme du mandat

96. Le mandat est rédigé selon la formule prescrite et porte la signature du juge de paix qui le délivre.

Contenu du mandat

97. Le mandat contient les renseignements suivants :

a) le nom du demandeur;

b) le crime faisant l'objet de l'enquête;

c) la personne sur laquelle les échantillons de sang doivent être prélevés;

d) le jour et l'heure où la demande a été présentée;

e) les conditions fixées, le cas échéant, pour l'exécution du mandat;

f) le jour et l'heure où le mandat expire s'il n'est pas exécuté;

g) le jour, l'heure et l'endroit où le mandat est délivré;

h) le nom du juge de paix et son ressort.

SECTION III
EXPIRATION DU MANDAT

Délai de six heures

98. Le mandat autorisant le prélèvement d'échantillons de sang expire six heures après sa délivrance ou au moment de son exécution, si elle a lieu avant cette échéance.

Dépôt du mandat expiré

99. Lorsque le mandat expire sans avoir été exécuté, les raisons pour lesquelles il ne l'a pas été sont notées sur une copie du mandat. Celle-ci est déposée dès que cela est matériellement possible auprès du greffier du district judiciaire où le mandat a été délivré.

SECTION IV
REMISE D'UNE COPIE DU MANDAT

Personne à qui la copie est remise

100. Dès que cela est matériellement possible après l'exécution du mandat, l'agent de la paix remet une copie du mandat à la personne sur qui les échantillons de sang ont été prélevés, à moins que le juge de paix qui a décerné le mandat n'ait prescrit, à titre de condition régissant son exécution, que cette copie soit remise à une autre personne désignée.

CHAPITRE V
PRÉLÈVEMENT, ANALYSE ET REMISE DES ÉCHANTILLONS DE SANG

SECTION I
CHAMP D'APPLICATION

Application du chapitre

101. Le présent chapitre s'applique aux échantillons de sang prélevés en vertu d'un mandat, d'une demande faite suivant l'alinéa 86(1)*a*) (agent de la paix) ou d'une demande faite dans les circonstances décrites au paragraphe 89(2) (personne détenue).

SECTION II
PRÉLÈVEMENT ET ANALYSE DES ÉCHANTILLONS

Conditions du prélèvement

102. (1) Le prélèvement d'échantillons de sang doit satisfaire aux conditions suivantes :

a) il est effectué dès que cela est matériellement possible après la formulation de la demande ou la délivrance du mandat;

b) il est effectué par un médecin ou par un technicien agissant sous la direction d'un médecin;

c) il est effectué de manière telle que la personne soit incommodée le moins possible.

Avis du médecin

(2) Le prélèvement d'échantillons de sang est interdit à moins que le médecin ne soit d'avis, avant le prélèvement de chaque échantillon,

a) que, d'une part, le prélèvement de l'échantillon ne risque pas de mettre en danger la vie ou la santé de la personne;

b) que, d'autre part, dans le cas où l'échantillon est prélevé en vertu d'un mandat, la personne se trouve, à cause de l'absorption d'alcool, de l'accident ou de tout autre événement lié à l'accident, dans un état physique ou psychologique qui ne lui permet pas de consentir au prélèvement de son sang.

Nombre d'échantillons

103. (1) Le prélèvement sur une même personne est limité à deux échantillons de sang distincts.

Quantité prélevée

(2) La quantité de sang prélevée pour chaque échantillon est limitée à celle qui, de l'avis du médecin, permet de diviser l'échantillon en deux parties destinées à des analyses distinctes, pour la détermination de l'alcoolémie de la personne.

Division des échantillons

104. (1) Chacun des échantillons de sang est divisé en deux parties, qui sont placées dans des contenants scellés distincts.

Conservation des échantillons

(2) L'agent de la paix chargé de l'enquête sur le crime relativement auquel le prélèvement a été effectué a la garde des échantillons; il prend les mesures propres à assurer leur protection et leur conservation.

Analyse pour le compte de l'agent de la paix

105. (1) L'agent de la paix peut confier à un analyste une partie de chacun des échantillons de sang pour la détermination de l'alcoolémie.

Échantillon de contrôle

(2) Il garde l'autre partie de chacun des échantillons, afin qu'une analyse puisse être effectuée pour le compte de la personne sur qui les échantillons ont été prélevés.

Présence de drogues

106. Tout échantillon de sang peut faire l'objet d'une analyse visant à déceler la présence de drogues.

SECTION III
DEMANDE DE REMISE D'ÉCHANTILLONS

Demandeur et préavis

107. La personne sur laquelle des échantillons de sang ont été prélevés peut, moyennant un préavis raisonnable au poursuivant, demander la remise d'une partie de chaque échantillon en vue d'une analyse.

Délai et modalités de la demande

108. La demande est présentée par écrit à un juge de paix dans les trois mois qui suivent le jour du prélèvement des échantillons.

Contenu de la demande

109. (1) La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime reproché ou faisant l'objet de l'enquête;

d) la date du prélèvement des échantillons de sang;

e) la nature de l'ordonnance demandée.

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Signification du préavis

110. Un préavis indiquant le lieu, la date et l'heure de l'audition est signifié, avec la demande et l'affidavit, au poursuivant.

Preuve à l'audience

111. Le juge saisi de la demande peut recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit.

Signification de l'affidavit

112. (1) Lorsqu'un affidavit doit être produit en preuve, il est signifié, dans un délai raisonnable avant l'audience, au poursuivant.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit reçu en preuve peut être interrogé sur le contenu de cet affidavit.

Serment

113. Le serment est obligatoire pour tout témoin.

Enregistrement

114. (1) Les témoignages entendus par le juge de paix sont intégralement enregistrés par écrit ou sur support électronique.

Désignation de l'enregistrement

(2) L'enregistrement indique l'heure, le jour et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

Ordonnance de remise

115. Le juge de paix saisi d'une demande à cet effet ordonne la remise d'une partie de chaque échantillon, sous réserve des conditions qu'il estime nécessaires pour en assurer la conservation en vue de son utilisation dans le cadre de quelque procédure.

Forme de l'ordonnance

116. L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge de paix qui la rend.

Contenu de l'ordonnance

117. L'ordonnance contient les renseignements suivants :

a) le nom du demandeur;

b) le crime reproché ou faisant l'objet de l'enquête;

c) la date du prélèvement des échantillons de sang;

d) les conditions imposées par le juge;

e) le lieu et la date où elle est rendue;

f) le nom et le ressort du juge de paix qui la rend.

Dépôt de documents

118. Dès que cela est matériellement possible après l'audition, le juge de paix fait déposer les documents suivants auprès du greffier du district judiciaire où la demande a été présentée :

a) le préavis relatif à la demande;

b) la demande;

c) l'enregistrement des témoignages qu'il a entendus, ou la transcription de cet enregistrement;

d) les autres éléments de preuve qu'il a reçus;

e) l'original de l'ordonnance.

SECTION IV
ABSENCE DE RESPONSABILITÉ PÉNALE

Refus de procéder au prélèvement

119. Ne constitue pas un crime, le fait pour un médecin ou un technicien d'omettre ou de refuser de prélever un échantillon de sang sur une personne, ni le fait, pour un médecin, d'omettre ou de refuser de faire effectuer un tel prélèvement par un technicien placé sous sa direction.

[*Position minoritaire — Certains commissaires ont proposé une version différente du chapitre V.*

*Comme dans la version majoritaire, les paragraphes 102(1) à 104(1) s'appliqueraient aux échantillons de sang prélevés en vertu d'un mandat ou à la suite de la demande présentée soit par l'agent de la paix en application de l'alinéa 86(1)*a), *soit par la personne détenue dans les circonstances décrites au paragraphe 89(2). L'article 119 aurait aussi une portée générale.*

Les dispositions du paragraphe 104(2) à l'article 118 ne seraient en revanche applicables qu'aux échantillons prélevés en vertu d'un mandat ou à la demande de l'agent de la paix. Les échantillons prélevés à la demande de la personne détenue dans les circonstances décrites au paragraphe 89(2) seraient alors assujettis aux dispositions dont le texte suit.

Remise d'un échantillon

119.1 (1) Une partie de chacun des échantillons de sang est remise à la personne sur laquelle ceux-ci ont été prélevés.

Résultats confidentiels

(2) Les résultats de toute analyse ou épreuve effectuée sur cette partie de l'échantillon sont confidentiels et privilégiés, en ce qui concerne la personne sur qui les échantillons ont été prélevés.

Avis de production

(3) Si cette personne entend produire les résultats en preuve dans quelque procédure, elle donne au poursuivant un préavis raisonnable de son intention.

Conservation des échantillons

119.2 (1) L'agent de la paix chargé de l'enquête sur le crime relativement auquel les échantillons de sang ont été prélevés a la garde de l'autre partie de chaque échantillon; il prend les mesures propres à assurer sa protection et sa conservation.

Analyse pour le compte de l'agent de la paix

(2) L'agent de la paix peut confier à un analyste cette partie de chaque échantillon pour faire déterminer l'alcoolémie et faire constater l'éventuelle présence de drogues.

Communication des résultats

(3) L'analyste ou la personne qui a effectué l'analyse ne peut divulguer les résultats de celle-ci à moins que la personne sur laquelle les échantillons ont été prélevés n'ait donné l'avis prévu au paragraphe 119.1(3).

Irrecevabilité de la preuve

119.3 À moins que la personne sur laquelle les échantillons de sang ont été prélevés n'ait donné l'avis prévu au paragraphe 119.1(3), ni le prélèvement d'échantillons ni les résultats de quelque analyse de ceux-ci n'est recevable en preuve dans quelque procédure, et nul ne peut commenter, dans quelque procédure, le prélèvement d'échantillons.]

CHAPITRE VI
RÈGLES DE PREUVE

SECTION I
ABSENCE DE L'ORIGINAL DU MANDAT OBTENU PAR TÉLÉPHONE

Absence de l'original du mandat

120. Dans toute procédure où il importe au tribunal d'être convaincu que le prélèvement d'un échantillon de sang a été autorisé par un mandat décerné à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que le prélèvement n'a pas été autorisé par mandat.

SECTION II
RÉSULTAT DES ANALYSES

Présomptions concernant les analyses d'haleine

121. (1) Dans toute poursuite où une personne est accusée du crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD, les présomptions suivantes s'appliquent lorsque des échantillons de l'air expiré par cette personne ont été prélevés et analysés en conformité avec les conditions énumérées au paragraphe (2) :

a) si les résultats des analyses concordent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au taux déterminé par les analyses;

b) si les résultats des analyses divergent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au plus faible des taux déterminés par les analyses.

Conditions régissant les présomptions

(2) Ces présomptions ne s'appliquent que si les conditions suivantes sont réunies :

a) au moins deux échantillons de l'air expiré par la personne ont été prélevés;

b) les échantillons ont été prélevés à la suite d'une demande présentée par l'agent de la paix en vertu de l'article 84 ou de l'alinéa 85(1)*a*);

c) les échantillons ont été prélevés dès qu'il a été matériellement possible de le faire après le moment où le crime est censé avoir été commis;

d) le premier échantillon a été prélevé dans les deux heures qui ont suivi le moment où le crime est censé avoir été commis;

e) les échantillons ont été prélevés à des intervalles d'au moins quinze minutes;

f) chaque échantillon a été reçu de la personne directement dans un contenant ou un analyseur d'haleine manipulé par un technicien;

g) chaque échantillon a été analysé au moyen d'un analyseur d'haleine manipulé par un technicien.

Inapplicabilité

(3) Le paragraphe (1) ne s'applique pas si l'agent de la paix a omis de communiquer les résultats des analyses à la personne, ou a omis de prendre les dispositions nécessaires pour le prélèvement d'échantillons de sang, en contravention aux dispositions des paragraphes 89(1) et 89(2), respectivement.

Présomptions concernant les analyses de sang

122. (1) Dans toute poursuite où une personne est accusée du crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD, les présomptions suivantes s'appliquent lorsque des échantillons du sang de cette personne ont été prélevés et analysés en conformité avec les conditions énumérées au paragraphe (2) :

a) si les résultats des analyses concordent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au taux déterminé par les analyses;

b) si les résultats des analyses divergent, l'alcoolémie de la personne au moment où le crime est censé avoir été commis est présumée, sauf preuve contraire, correspondre au plus faible des taux déterminés par les analyses.

Conditions régissant les présomptions

(2) Ces présomptions ne s'appliquent que si les conditions suivantes sont réunies :

a) les échantillons de sang ont été prélevés en vertu d'un mandat ou à la suite d'une demande présentée par l'agent de la paix en vertu de l'alinéa 86(1)*a*);

b) deux échantillons du sang de la personne ont été prélevés;

c) les échantillons ont été prélevés dès qu'il a été matériellement possible de le faire après le moment où le crime est censé avoir été commis;

d) le premier échantillon a été prélevé dans les deux heures qui ont suivi le moment où le crime est censé avoir été commis;

e) les échantillons ont été prélevés à des intervalles d'au moins quinze minutes;

f) chaque échantillon a été prélevé par un médecin ou par un technicien agissant sous la direction d'un médecin;

g) au moment du prélèvement de chaque échantillon, la personne qui l'a effectué a divisé l'échantillon en deux parties;

h) les deux parties de chaque échantillon ont été reçues de la personne directement, ou ont été placées directement, dans des contenants scellés;

i) une partie de chaque échantillon a été conservée, afin qu'une analyse puisse être faite par la personne ou pour son compte;

j) un analyste a procédé à l'analyse d'une partie de chaque échantillon placée dans un contenant scellé;

k) le cas échéant, la remise d'une partie de chaque échantillon ordonnée par le juge en vertu de l'article 115 a été dûment effectuée.

SECTION III
FORCE PROBANTE DES CERTIFICATS

Contenu du certificat

123. Dans toute poursuite où une personne est accusée du crime prévu à l'article 58 (conduite sous l'empire d'un état alcoolique) du projet de code criminel de la CRD, chacun des certificats suivants fait foi des faits qui y sont déclarés sans qu'il soit nécessaire de prouver la signature ni la qualité officielle de la personne qui paraît l'avoir signé :

a) le certificat d'un analyste déclarant qu'il a effectué l'analyse d'un échantillon témoin d'un alcool type identifié dans le certificat et destiné à l'utilisation d'un analyseur d'haleine, et que l'échantillon témoin analysé se prêtait bien à l'utilisation d'un analyseur d'haleine;

b) lorsqu'une personne a fourni des échantillons d'haleine à la suite d'une demande présentée par l'agent de la paix en vertu de l'article 84 ou de l'alinéa 85(1)*a*), le certificat d'un technicien contenant à la fois :

(i) la mention que l'analyse de chacun des échantillons a été faite au moyen d'un analyseur d'haleine manipulé par lui et dont il s'est assuré du bon fonctionnement au moyen d'un alcool type identifié dans le certificat comme se prêtant bien à l'utilisation d'un analyseur d'haleine,

(ii) la mention des résultats des analyses ainsi faites,

(iii) la mention, dans le cas où il a lui-même prélevé les échantillons :

(A) du lieu, de la date et de l'heure où chaque échantillon a été prélevé,

(B) que chaque échantillon a été reçu directement de la personne dans un contenant ou dans un analyseur d'haleine manipulé par lui;

c) le certificat d'un analyste déclarant qu'il a fait l'analyse d'une partie de chaque échantillon du sang d'une personne, cette partie ayant été placée dans un contenant scellé et désigné dans le certificat, et indiquant le lieu, la date et l'heure de l'analyse et le résultat de celle-ci;

d) lorsque des échantillons du sang d'une personne ont été prélevés en vertu d'un mandat ou à la suite d'une demande présentée soit par l'agent de la paix en vertu de l'alinéa 86(1)*a*), soit par la personne visée au paragraphe 89(2), le certificat d'un médecin ou d'un technicien contenant à la fois :

(i) la mention qu'il a lui-même prélevé les échantillons,

(ii) la mention du lieu, de la date et de l'heure où chacun des échantillons a été prélevé,

(iii) la mention qu'au moment de chaque prélèvement, il a divisé chaque échantillon en deux parties,

(iv) la mention que les deux parties de chaque échantillon ont été reçues directement de la personne, ou ont été placées directement, dans des contenants scellés et désignés dans le certificat;

e) lorsque des échantillons du sang d'une personne ont été prélevés par un technicien en vertu d'un mandat ou à la suite d'une demande présentée soit par l'agent de la paix en vertu de l'alinéa 86(1)*a*), soit par la personne visée au paragraphe 89(2), le certificat du médecin attestant que le technicien a agi sous sa direction;

f) lorsque des échantillons du sang d'une personne ont été prélevés en vertu d'un mandat ou à la suite d'une demande présentée soit par l'agent de la paix en vertu de l'alinéa 86(1)*a*), soit par la personne visée au paragraphe 89(2), le certificat du médecin déclarant qu'avant le prélèvement de chaque échantillon, il était d'avis que ce prélèvement ne risquait pas de mettre en danger la vie ou la santé de cette personne;

g) lorsque des échantillons du sang d'une personne ont été prélevés en vertu d'un mandat, le certificat du médecin déclarant qu'avant le prélèvement de chaque échantillon, il était d'avis que la personne était incapable de consentir au prélèvement de son sang à cause de son état physique ou psychologique résultant de l'absorption d'alcool, de l'accident en rapport avec lequel le mandat a été décerné, ou de tout événement résultant de l'accident ou lié à celui-ci.

Avis de production du certificat

124. (1) Aucun certificat ne peut être reçu en preuve dans une procédure à moins que la partie qui a l'intention de le produire n'ait, au préalable, donné à l'autre partie un préavis raisonnable de son intention, accompagné d'une copie du certificat.

Contre-interrogatoire sur le certificat

(2) La partie contre qui est produit un certificat peut, avec l'autorisation du tribunal, exiger la présence du médecin, de l'analyste ou du technicien, selon le cas, afin de le contre-interroger.

PARTIE V

LA SURVEILLANCE ÉLECTRONIQUE

CHAPITRE PREMIER
DÉFINITIONS

Définitions

125. Les définitions qui suivent s'appliquent à la présente partie.

«avocat» (*solicitor*)

«avocat» Dans la province de Québec, le notaire est assimilé à l'avocat.

«clause d'interception d'application générale» (*general interception clause*)

«clause d'interception d'application générale» Clause d'un mandat qui autorise l'interception des communications privées de personnes qui ne sont pas identifiées individuellement ou l'interception de communications privées dans des lieux indéterminés.

«communication privée» (*private communication*)

«communication privée» Toute communication orale ou télécommunication faite dans des circonstances telles que l'un ou l'autre des interlocuteurs peut raisonnablement présumer qu'elle ne sera pas interceptée par une personne qui n'est pas partie à la communication, même si l'un ou l'autre soupçonne qu'elle est interceptée.

«désigné par les autorités fédérales» (*federally designated*)

«désigné par les autorités fédérales» Désigné par le solliciteur général du Canada pour la présentation des demandes de mandat visées par la présente partie ou pour l'interception de communications privées en vertu d'un mandat.

«désigné par les autorités provinciales» (*provincially designated*)

«désigné par les autorités provinciales» Désigné par le ministre provincial pour la présentation des demandes de mandat visées par la présente partie ou pour l'interception des communications privées en vertu d'un mandat.

«dispositif de surveillance» (*surveillance device*)

«dispositif de surveillance» Tout dispositif ou appareil susceptible d'être utilisé pour intercepter une communication privée.

«intercepter» et «interception» (*intercept*)

«intercepter» et «interception» Relativement à une communication privée, le fait, notamment, d'écouter ou d'enregistrer le contenu, la substance ou le sens de la communication, ou d'en prendre volontairement connaissance.

«ministre provincial» (*provincial minister*)

«ministre provincial» Dans la province de Québec, le ministre de la Sécurité publique et, dans toute autre province, le solliciteur général ou, à défaut, le procureur général de la province.

CHAPITRE II
INTERCEPTION SANS MANDAT

Consentement de toutes les parties

126. Tout agent de la paix ou toute personne agissant pour le compte d'un agent de la paix peut, au moyen d'un dispositif de surveillance, intercepter sans mandat toute communication privée si toutes les parties à la communication y consentent.

Protection de la vie ou de la sécurité

127. Tout agent de la paix peut, sans mandat, utiliser un dispositif de surveillance pour écouter, mais non pour enregistrer, une communication privée à laquelle est partie un agent de la paix ou une personne agissant pour le compte de celui-ci, s'il est raisonnable de croire que la vie ou la sécurité de cet agent ou de cette personne peut être en danger.

CHAPITRE III
MANDAT AUTORISANT L'INTERCEPTION DE COMMUNICATIONS PRIVÉES

SECTION I
RÈGLES GÉNÉRALES SUR LES MANDATS

1. Demande de mandat

Demandeur fédéral

128. (1) Tout agent désigné personnellement et par écrit par les autorités fédérales peut demander un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance, si le crime faisant l'objet de l'enquête peut donner lieu à des poursuites engagées à la demande des autorités fédérales et conduites par le procureur général du Canada ou en son nom.

Demandeur provincial

(2) Tout agent désigné personnellement et par écrit par les autorités provinciales peut demander, dans la province où il a été désigné, un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance, si l'interception doit avoir lieu dans la province en question et que le crime faisant l'objet de l'enquête puisse donner lieu à des poursuites engagées à la demande des autorités provinciales et conduites par le procureur général de la province ou en son nom.

Mode de présentation

129. (1) La demande est présentée unilatéralement, en personne et à huis clos, de vive voix ou par écrit.

Forme de la demande écrite

(2) La demande présentée par écrit doit l'être selon la formule prescrite.

Compétence

130. La demande est présentée à un juge de la province où la communication privée doit être interceptée.

Présentation de la demande

131. (1) La demande est présentée par le demandeur; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu

(2) Elle contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime faisant l'objet de l'enquête, avec les faits et les circonstances, ainsi que leur gravité;

d) le genre de communication privée que l'on se propose d'intercepter;

e) une description générale des moyens devant être utilisés pour l'interception;

f) le nom de toutes les personnes dont on veut intercepter les communications privées ou, s'il est impossible de connaître leur nom, la description d'autres caractéristiques permettant de les identifier individuellement; si cela est également impossible, la catégorie dont font partie ces personnes non identifiées;

g) les lieux, s'ils sont déterminés, où serait effectuée l'interception;

h) le cas échéant, le fait que des communications privilégiées sont susceptibles d'être interceptées;

i) les motifs donnant lieu de croire que l'interception pourrait faire avancer l'enquête sur le crime;

j) la période pour laquelle le mandat est demandé;

k) les autres méthodes d'investigation qui ont été essayées et ont échoué; si aucune autre méthode n'a été essayée, les raisons pour lesquelles aucune autre méthode ne paraît avoir de chances de succès, ou pour lesquelles, étant donné l'urgence de l'affaire, il est matériellement impossible d'avoir recours à une autre méthode;

l) la liste de toutes les demandes de mandat déjà présentées relativement au même crime et aux mêmes personnes ou à la même catégorie de personnes, avec la date de chacune d'entre

elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

m) dans le cas où l'autorisation d'effectuer une entrée clandestine est demandée en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance :

(i) les raisons pour lesquelles, d'une part, cette entrée est nécessaire et, d'autre part, les méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offrent peu de chances de succès,

(ii) le lieu où serait effectuée cette entrée;

n) lorsque le demandeur souhaite obtenir une ordonnance d'aide en vertu de l'article 139, la nature de l'aide requise.

Règles de procédure

132. Les articles 10 et 11 s'appliquent à la demande de mandat visée par la présente section.

2. Délivrance du mandat

Motifs justifiant la délivrance du mandat

133. (1) Le juge saisi d'une demande à cet effet peut décerner un mandat autorisant l'interception d'une communication privée au moyen d'un dispositif de surveillance, s'il est convaincu, à la fois :

a) qu'il existe des motifs raisonnables de croire :

(i) d'une part, qu'on a commis un crime punissable d'une peine d'emprisonnement de plus de deux ans, ou une entente, tentative, instigation ou tentative d'instigation relativement à un tel crime,

(ii) d'autre part, que l'interception fera avancer l'enquête sur le crime en question;

b) que d'autres méthodes d'investigation ont été essayées et ont échoué, qu'aucune autre méthode n'a de chances de succès ou que l'urgence est telle qu'il est matériellement impossible de recourir à quelque autre méthode;

c) que l'octroi de cette autorisation servirait au mieux l'administration de la justice, compte tenu de la gravité des faits et des circonstances du crime faisant l'objet de l'enquête.

Enquête secrète

(2) Le juge ne doit pas refuser la délivrance du mandat pour le seul motif qu'un agent de la paix ou une personne agissant pour le compte d'un agent de la paix sera partie à la communication.

Bureau d'un avocat

134. Dans le cas où le mandat demandé concerne l'interception de communications privées au bureau d'un avocat, ou à tout

endroit qui sert ordinairement à l'avocat pour la tenue de consultations avec des clients, le juge en refuse la délivrance s'il n'est pas en outre convaincu qu'il existe des motifs raisonnables de croire que l'avocat, l'un de ses associés, une personne ayant des liens avec lui ou l'un de ses employés :

a) soit participe à la perpétration du crime faisant l'objet de l'enquête ou est sur le point d'y participer;

b) soit est la victime du crime faisant l'objet de l'enquête et a lui-même demandé l'interception.

Domicile d'un avocat

135. Dans le cas où le mandat demandé concerne l'interception de communications privées au domicile d'un avocat, le juge en refuse la délivrance s'il n'est pas en outre convaincu qu'il existe des motifs raisonnables de croire que l'avocat ou une personne qui habite à son domicile :

a) soit participe à la perpétration du crime faisant l'objet de l'enquête ou est sur le point d'y participer;

b) soit est la victime du crime faisant l'objet de l'enquête et a lui-même demandé l'interception.

Lieux indéterminés

136. Dans le cas où le mandat demandé concerne l'interception de communications privées dans des lieux indéterminés, le juge en refuse la délivrance à moins que la personne dont les communications privées doivent être interceptées ne soit identifiée dans le mandat.

Personnes non identifiées

137. Dans le cas où le mandat demandé concerne l'interception de communications privées de personnes qui ne peuvent être individuellement identifiées, le juge en refuse la délivrance à moins que les lieux où les communications doivent être interceptées ne soient déterminés dans le mandat.

Entrée clandestine

138. Sur requête du demandeur, le juge peut, dans le mandat, autoriser l'entrée clandestine dans un lieu quelconque, en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, s'il est convaincu qu'il existe des motifs raisonnables de croire que le recours à des méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offre peu de chances de succès.

Ordonnance d'aide

139. (1) Le juge qui décerne un mandat peut, sur requête du demandeur, ordonner à toute personne qui fournit un service de

communication ou de télécommunication, au propriétaire du lieu où un dispositif de surveillance doit être installé, ou à toute personne qui administre ce lieu ou s'en occupe, d'apporter son aide; il précise la nature de celle-ci dans l'ordonnance.

Indemnisation

(2) L'ordonnance peut prévoir l'indemnisation raisonnable de la personne dont l'aide est ainsi requise.

Forme de l'ordonnance

(3) L'ordonnance est rédigée selon la formule prescrite et porte la signature du juge qui l'a rendue.

Contenu

(4) Elle est adressée à une personne ou à un organisme nommément désigné et contient les renseignements suivants :

a) le nom du demandeur;

b) la nature de l'aide requise;

c) le lieu et la date où l'ordonnance est rendue;

d) le nom et le ressort du juge.

Mise en garde

(5) L'ordonnance met en garde la personne ou l'organisme que le fait de ne pas s'y conformer constitue un crime visé à l'alinéa 121*b*) (transgression d'une ordonnance judiciaire) du projet de code criminel de la CRD.

Atténuation du caractère attentatoire

140. Le juge qui décerne un mandat peut y insérer l'une ou plusieurs des clauses suivantes :

a) l'interception doit en tout temps faire l'objet d'une surveillance humaine;

b) autant qu'il est raisonnablement possible, seules les communications des personnes individuellement identifiées dans le mandat ou visées par une clause d'interception d'application générale seront interceptées;

c) dans le cas où des communications privées doivent être interceptées à un téléphone que le public peut utiliser, l'interception fera l'objet d'une surveillance humaine en tout temps et, sauf impossibilité matérielle, l'appareil fera l'objet d'une surveillance visuelle en tout temps;

d) des mesures raisonnables seront prises pour éviter l'interception de communications entre des personnes dont les communications sont confidentielles ou privilégiées, selon les précisions données par le juge à cet égard, le cas échéant;

e) l'interception prendra fin lorsqu'aura été atteint le but de l'enquête énoncé dans la demande de mandat;

f) dans le cas où des communications privées sur une ligne à plusieurs abonnés doivent être interceptées, l'interception fera en tout temps l'objet d'une surveillance humaine;

g) le cas échéant, l'entrée clandestine autorisée dans un lieu devra ou ne devra pas être faite par certains moyens;

h) le juge devra être périodiquement informé de l'identité de toute personne dont les communications privées sont interceptées sans qu'elle soit individuellement identifiée dans le mandat,

i) le juge devra être périodiquement informé des lieux qui ne sont pas déterminés dans le mandat mais où des communications privées sont interceptées;

j) toute demande visant le renouvellement ou la modification du mandat, ou la délivrance d'un mandat distinct ayant trait à la même enquête, devra être présentée au juge qui a décerné le mandat initial;

k) toute autre clause que le juge estime opportune en vue de limiter le plus possible l'interception de communications privées ne présentant aucun intérêt pour l'avancement de l'enquête.

Forme du mandat

141. Le mandat est rédigé selon la formule prescrite et porte la signature du juge qui le délivre.

Contenu

142. Le mandat contient les renseignements suivants :

a) le nom du demandeur;

b) le crime faisant l'objet de l'enquête;

c) le genre de communication privée susceptible d'être interceptée;

d) une description générale des moyens qui pourront être utilisés pour réaliser l'interception;

e) la désignation la plus précise possible des personnes ou des catégories de personnes dont les communications privées pourront être interceptées;

f) les lieux, s'ils sont déterminés, où des communications pourront être interceptées;

g) les lieux où l'entrée clandestine est autorisée;

h) les clauses particulières insérées par le juge;

i) la date où le mandat expire;

j) le lieu et la date où le mandat est délivré;

k) le nom du juge et son ressort.

Date d'expiration

143. Le juge fixe dans le mandat une date d'expiration qui n'est pas postérieure de plus de soixante jours à la date de délivrance.

3. Renouvellement du mandat

Demandeur

144. Le demandeur initial, de même que tout autre agent désigné par les mêmes autorités, peut demander le renouvellement du mandat.

Mode de présentation

145. (1) La demande est présentée unilatéralement, en personne et à huis clos, de vive voix ou par écrit.

Forme de la demande écrite

(2) La demande présentée par écrit doit l'être selon la formule prescrite.

Délai de présentation

146. La demande de renouvellement du mandat est présentée avant l'expiration de celui-ci, à un juge de la province où il a été décerné.

Présentation de la demande

147. (1) La demande est présentée par le demandeur; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu

(2) Elle contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime faisant l'objet de l'enquête;

d) les raisons invoquées à l'appui de la demande;

e) tous les détails, y compris la date et l'heure, des interceptions effectuées ou tentées en vertu du mandat;

f) tout renseignement obtenu grâce à une interception effectuée en vertu du mandat;

g) la liste de toutes les demandes de renouvellement du mandat déjà présentées, avec la date de chacune d'entre elles, le nom du juge saisi, et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas;

h) le fait que le mandat à renouveler comporte ou non une clause d'interception d'application générale;

i) le cas échéant, la mention qu'une demande de modification est présentée, conjointement avec la demande de renouvellement, afin d'ajouter de nouvelles personnes dont les communications privées pourraient être interceptées, ou de nouveaux

lieux où des communications privées pourraient être interceptées;

j) la période pour laquelle le renouvellement est demandé;

k) si le demandeur veut faire renouveler le mandat pour une période de plus de trente jours, les motifs donnant lieu de croire que ce délai s'impose.

Règles de procédure

148. Les articles 10 et 11 s'appliquent à la demande de renouvellement de mandat.

Motifs de renouvellement

149. Si le juge saisi de la demande est convaincu que les motifs sur lesquels reposait la délivrance du mandat existent toujours, il peut renouveler le mandat en y apposant un visa à cet effet, revêtu de sa signature, et indiquant le lieu et la date du renouvellement.

Clause d'interception d'application générale

150. Le mandat comportant une clause d'interception d'application générale ne peut être renouvelé à moins d'être modifié, suivant les formalités prévues, de façon que soient désignés précisément les personnes ou les lieux qui étaient visés par la clause d'interception d'application générale et qui sont connus au moment de la demande de renouvellement.

Nouvelle date d'expiration

151. (1) Le mandat expire trente jours après la date du renouvellement.

Extension de la période de renouvellement

(2) Le juge peut toutefois renouveler le mandat pour une période de plus de trente jours, mais d'au plus soixante jours à compter de la date du renouvellement, s'il est convaincu qu'il faudra sans doute plus de trente jours pour terminer l'enquête et qu'il serait matériellement impossible au demandeur de chercher à obtenir un autre renouvellement.

4. Modification du mandat

Demandeur

152. Le demandeur initial, de même que tout autre agent désigné par les mêmes autorités, peut demander la modification du mandat.

Mode de présentation

153. (1) La demande est présentée unilatéralement, en personne et à huis clos, de vive voix ou par écrit.

Forme de la demande écrite

(2) La demande présentée par écrit doit l'être selon la formule prescrite.

Délai de présentation

154. La demande de modification du mandat est présentée, avant l'expiration de celui-ci, à un juge de la province où il a été décerné.

Présentation de la demande

155. (1) La demande est présentée par le demandeur; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu

(2) Elle contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime faisant l'objet de l'enquête;

d) les modifications demandées;

e) les motifs invoqués à l'appui de la demande;

f) tous les détails, y compris la date et l'heure, des interceptions effectuées ou tentées en vertu du mandat;

g) tout renseignement obtenu grâce à une interception effectuée en vertu du mandat;

h) la liste de toutes les demandes de modification du mandat déjà présentées, avec la date de chacune d'entre elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas.

Règles de procédure

156. Les articles 10 et 11 s'appliquent à la demande de modification du mandat.

Motifs justifiant la modification et nature de celle-ci

157. Le juge saisi d'une demande à cet effet peut apporter au mandat les modifications suivantes, s'il est convaincu que la modification demandée est liée à l'enquête sur le crime auquel le mandat a trait :

a) description plus exacte, lorsque c'est possible, des personnes individuellement identifiées dont les communications privées peuvent être interceptées en vertu du mandat;

b) mention de l'identité de personnes antérieurement visées par une clause d'interception d'application générale mais identifiées par la suite, dont les communications privées pourraient être interceptées en vertu du mandat;

c) mention de lieux antérieurement visés par une clause d'interception d'application générale mais déterminés par la suite,

où des communications privées pourraient être interceptées en vertu du mandat;

d) adjonction de nouvelles personnes dont les communications privées pourraient être interceptées ou de nouveaux lieux où des communications privées pourraient être interceptées, à la condition que le juge soit en outre convaincu de l'existence de motifs justifiant la délivrance d'un mandat à l'égard de ces personnes ou de ces lieux;

e) radiation de personnes dont les communications privées auraient pu être interceptées, ou de lieux où l'interception était autorisée;

f) autorisation d'effectuer une entrée clandestine dans un lieu en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, à la condition que le juge soit en outre convaincu de l'existence de motifs raisonnables de croire que les méthodes d'installation, de réparation ou d'enlèvement moins attentatoires à l'intimité de la vie privée offrent peu de chances de succès;

g) modification des moyens pouvant être utilisés pour l'interception;

h) modification des clauses particulières ajoutées au mandat;

i) adjonction de toute clause susceptible d'être insérée par le juge qui décerne un mandat.

Forme de la modification

158. Le juge peut modifier le mandat en y apposant un visa à cet effet, revêtu de sa signature, ou en signant un avenant qu'il joint au mandat, et en indiquant le lieu et la date de la modification.

Ordonnance d'aide

159. Le juge saisi d'une demande de modification peut, sur requête du demandeur, rendre une ordonnance d'aide conformément à l'article 139.

SECTION II
DÉLIVRANCE DU MANDAT EN CAS D'URGENCE

Motifs justifiant la délivrance en cas d'urgence

160. (1) Le juge désigné par le juge en chef de la Cour criminelle pour entendre des demandes de mandat en cas d'urgence dans la province où une communication doit être interceptée, et saisi d'une demande à cet effet, peut délivrer un mandat autorisant l'interception de cette communication privée au moyen d'un dispositif de surveillance, s'il est convaincu, d'une part, que la

délivrance du mandat est justifiée et, d'autre part, qu'il existe des motifs raisonnables de croire que le mandat doit être obtenu d'urgence et que cela serait impossible, avec toute la diligence raisonnable, en vertu de la section I.

Motifs supplémentaires, demande par téléphone

(2) Le juge peut également délivrer un mandat demandé par téléphone ou à l'aide d'un autre moyen de télécommunication s'il est en outre convaincu qu'il existe des motifs raisonnables de croire qu'il est matériellement impossible au demandeur de se présenter en personne.

Demandeur fédéral

161. (1) La demande peut être présentée par tout agent de la paix désigné par écrit par les autorités fédérales si le crime faisant l'objet de l'enquête peut donner lieu à des poursuites engagées à la demande des autorités fédérales et conduites par le procureur général du Canada ou en son nom.

Demandeur provincial

(2) La demande peut être présentée dans une province par tout agent de la paix désigné par écrit par les autorités de cette province si l'interception de la communication privée doit y avoir lieu et que le crime faisant l'objet de l'enquête puisse donner lieu à des poursuites engagées à la demande des autorités provinciales et conduites par le procureur général de la province ou en son nom.

Demande en personne ou par téléphone

162. (1) La demande est présentée en personne. Elle peut toutefois l'être par téléphone ou à l'aide d'un autre moyen de télécommunication, s'il est matériellement impossible au demandeur de se présenter en personne.

Mode de présentation

(2) La demande est présentée unilatéralement et à huis clos, de vive voix et sous serment.

Renseignements supplémentaires

163. Outre les renseignements prévus au paragraphe 131(2), la demande indique à la fois :

a) l'heure et la date où elle est présentée;

b) les motifs donnant lieu de croire que le mandat doit être obtenu d'urgence et que cela serait impossible, avec toute la diligence raisonnable, en vertu de la section I;

c) dans le cas d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, les circonstances en raison desquelles il est matériellement impossible au demandeur de se présenter en personne.

Règles de procédure

164. Les articles 10 à 12 s'appliquent à la demande de mandat visée par la présente section et les articles 134 à 142 s'appliquent à la délivrance du mandat.

Expiration

165. (1) Le juge indique sur le mandat une date et une heure d'expiration, postérieures d'au plus trente-six heures à l'heure de la délivrance.

Renouvellement ou modification

(2) Le mandat ne peut être ni renouvelé ni modifié.

CHAPITRE IV
CONFIDENTIALITÉ

Documents confidentiels

166. Sont confidentielles les pièces suivantes :

a) le mandat;

b) l'ordonnance de prolongation du délai de notification d'une interception ou d'une entrée clandestine;

c) la demande de délivrance, de renouvellement ou de modification du mandat, la demande de prolongation du délai de notification d'une interception ou d'une entrée clandestine, ou encore l'enregistrement de la demande et sa transcription;

d) tout élément de preuve ou témoignage reçu lors de l'audition de la demande, de même que la transcription de tout témoignage;

e) l'ordonnance d'aide rendue conformément à l'article 139;

f) l'ordonnance visant à rendre inintelligibles certains renseignements.

Ordonnance aux fins de rendre inintelligible un renseignement

167. (1) Le juge peut, sur requête du demandeur présentée au moment de la demande de délivrance, de renouvellement ou de modification du mandat, ou de la demande visant à obtenir une ordonnance de prolongation du délai de notification d'une interception ou d'une entrée clandestine, rendre ou faire rendre inintelligible tout renseignement figurant sur une pièce confidentielle.

Motifs justifiant l'ordonnance

(2) Le juge peut rendre ou faire rendre inintelligibles les renseignements en cause s'il est convaincu que leur divulgation aurait l'une ou l'autre des conséquences suivantes :

a) elle mettrait en péril la sécurité de quelque personne;

b) elle nuirait à une enquête policière en cours;

c) elle mettrait au jour certains procédés de la criminalistique qu'il y aurait lieu de garder secrets;

d) elle causerait un préjudice grave à des personnes innocentes.

Forme et contenu de l'ordonnance

168. L'ordonnance visant à rendre inintelligibles certains renseignements est rédigée selon la formule prescrite, est revêtue de la signature du juge qui la rend et contient les renseignements suivants :

a) le nom du demandeur;

b) les renseignements qui doivent être rendus inintelligibles;

c) le lieu et la date où elle est rendue;

d) le nom du juge et son ressort.

Copie du document

169. (1) Lorsqu'un renseignement doit être rendu inintelligible, le document sur lequel il figure est reproduit.

Renseignement rendu inintelligible sur la copie

(2) Le renseignement est rendu inintelligible sur la copie du document et demeure intact sur l'original.

Paquet scellé

170. (1) Dès qu'il a statué sur la demande de délivrance, de renouvellement ou de modification du mandat, ou la demande visant à obtenir une ordonnance de prolongation du délai de notification d'une interception ou d'une entrée clandestine, le juge place dans un paquet scellé les pièces suivantes :

a) l'original de toutes les pièces confidentielles;

b) la copie des pièces sur laquelle un renseignement a été rendu inintelligible.

Garde du paquet

(2) Ce paquet est gardé par le tribunal, en un lieu prescrit par le juge et auquel le public n'a pas accès.

Copie

171. Le demandeur peut garder une copie de toutes les pièces contenues dans le paquet scellé.

Interdiction

172. Il est interdit à quiconque d'ouvrir le paquet scellé ou d'en enlever le contenu, sauf suivant les directives d'un juge.

Autre procédure

173. Le juge peut faire ouvrir le paquet scellé et en examiner le contenu s'il estime que cela est nécessaire pour statuer sur toute autre demande dont il est saisi.

Ouverture du paquet aux fins de transcription

174. Le juge peut faire ouvrir le paquet scellé et en faire retirer le contenu pour faire préparer une transcription des enregistrements sonores qui s'y trouvent.

CHAPITRE V
INTERCEPTION ET ENTRÉE CLANDESTINE

Personnes pouvant effectuer l'interception

175. L'interception d'une communication privée, lorsqu'elle est autorisée par un mandat, peut être effectuée par :

a) toute personne désignée par les autorités fédérales, si le mandat a été décerné à un demandeur désigné par les autorités fédérales;

b) toute personne désignée par les autorités provinciales, si le mandat a été décerné à un demandeur désigné par les autorités provinciales;

c) toute personne qui est partie à la communication.

Réparation et indemnisation

176. Si des biens ont été endommagés par suite d'une entrée effectuée en vue de l'installation, de la réparation ou de l'enlèvement d'un dispositif de surveillance, l'Administration ou l'organisme dont un employé ou un mandataire a causé les dommages prend rapidement les mesures raisonnables pour effectuer les réparations requises et, après que l'avis d'entrée a été donné, indemnise le propriétaire de tout dommage non réparé.

CHAPITRE VI
NOTIFICATION DE L'INTERCEPTION ET DE L'ENTRÉE CLANDESTINE

SECTION I
AVIS

Avis écrit

177. Le solliciteur général du Canada ou le ministre provincial au nom duquel la demande de mandat a été présentée transmet un avis écrit :

a) à toute personne qui a fait l'objet d'une interception effectuée en vertu du mandat, à moins qu'elle n'ait déjà été informée qu'on se propose de produire la preuve de l'interception;

b) à toute personne occupant le lieu où une entrée clandestine a été effectuée en vertu du mandat.

Délai

178. Cet avis est donné dans les quatre-vingt-dix jours suivant l'expiration du mandat.

Contenu de l'avis d'interception

179. (1) L'avis d'interception indique la date de celle-ci et est accompagné d'une copie du mandat.

Contenu de l'avis d'entrée clandestine

(2) L'avis d'entrée clandestine indique le lieu où l'entrée a été effectuée et la date de celle-ci; il est accompagné d'une copie du mandat.

Signification

180. (1) La signification de l'avis et la preuve de cette signification se font en conformité avec les règlements pris par le gouverneur en conseil à ce sujet.

Signification impossible

(2) Lorsque la signification de l'avis s'avère impossible, un agent de la paix au courant des faits remet à la cour un affidavit où sont exposées les raisons pour lesquelles l'avis n'a pas été signifié et les tentatives faites en vue de retrouver l'intéressé.

SECTION II
DEMANDE DE PROLONGATION DU DÉLAI DE NOTIFICATION

Pouvoir de prolonger le délai

181. (1) Le juge saisi d'une demande à cet effet peut ordonner la prolongation du délai de notification d'une interception ou d'une entrée clandestine s'il est convaincu :

a) d'une part, que l'enquête sur le crime auquel le mandat a trait, ou une enquête ultérieure sur un autre crime visé au sous-alinéa 133(1)*a*)(i), entreprise par suite de la première enquête, est toujours en cours;

b) d'autre part, que cela servirait au mieux l'administration de la justice.

Prolongations successives

(2) Le juge peut accorder plus d'une prolongation, la durée totale des prolongations ne devant toutefois pas dépasser trois ans.

Demandeur

182. La demande de prolongation peut être présentée par le solliciteur général du Canada ou par le ministre provincial tenu de donner l'avis d'interception ou d'entrée clandestine.

Mode de présentation

183. (1) La demande est présentée à un juge unilatéralement, en personne et à huis clos, de vive voix ou par écrit, avant l'expiration du délai de quatre-vingt-dix jours ou de la prolongation accordée, le cas échéant; son contenu est attesté par l'affidavit d'un agent de la paix.

Contenu de l'affidavit

(2) L'affidavit contient les renseignements suivants :

a) les faits invoqués à l'appui de la demande;

b) la liste de toutes les demandes de prolongation du délai de notification déjà présentées relativement au même mandat, avec la date de chacune d'entre elles, le nom du juge saisi et l'indication qu'elle a été retirée, rejetée ou accueillie, selon le cas.

CHAPITRE VII
DEMANDE DE DÉTAILS SUR L'INTERCEPTION

Demandeur et préavis

184. L'accusé qui apprend qu'une communication privée à laquelle il était partie a été interceptée au moyen d'un dispositif de surveillance peut demander par écrit à un juge, avec préavis de deux jours francs au poursuivant, d'ordonner à ce dernier de lui fournir les détails de la communication privée interceptée.

Contenu de la demande

185. (1) La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle doit être présentée;

c) le crime reproché au demandeur;

d) la nature de l'ordonnance demandée;

e) les motifs invoqués à l'appui de la demande.

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Préavis

186. Un préavis indiquant le lieu, la date et l'heure de l'audition est signifié au poursuivant avec la demande et l'affidavit.

Preuve à l'audience

187. Le juge saisi de la demande peut recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit.

Signification de l'affidavit

188. (1) Lorsqu'un affidavit doit être produit en preuve, il est signifié au poursuivant dans un délai raisonnable avant l'audition de la demande.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit produit en preuve peut être interrogé sur le contenu de celui-ci.

Serment

189. Le serment est obligatoire pour tout témoin.

Enregistrement

190. (1) Les témoignages entendus par le juge sont intégralement enregistrés par écrit ou sur support électronique.

Désignation de l'enregistrement

(2) L'enregistrement indique l'heure, la date et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

Ordonnance de divulgation de détails

191. Le juge saisi d'une demande à cet effet peut ordonner au poursuivant de divulguer, sur la communication privée interceptée, les détails qui peuvent être obtenus avec une diligence raisonnable, s'il est convaincu qu'ils présentent un lien avec le crime reproché au demandeur et que celui-ci en a besoin pour présenter une défense pleine et entière.

Forme de l'ordonnance

192. L'ordonnance est rédigée selon la formule prescrite et porte la signature du juge qui la rend.

Contenu

193. L'ordonnance contient les renseignements suivants :

a) le nom du demandeur;

b) le crime reproché au demandeur;

c) la décision du juge;

d) le lieu et la date où elle est rendue;

e) le nom et le ressort du juge.

CHAPITRE VIII
FORMALITÉS DE LA PRÉSENTATION EN PREUVE ET DE L'OBTENTION DE RENSEIGNEMENTS SUPPLÉMENTAIRES

SECTION I
PRÉAVIS DE L'INTENTION DE PRODUIRE EN PREUVE

Préavis

194. (1) Le poursuivant qui entend produire la preuve d'une communication privée interceptée au moyen d'un dispositif de surveillance donne à l'accusé un préavis raisonnable de cette intention.

Contenu

(2) Ce préavis contient les éléments suivants :

a) la transcription de toute communication privée qui sera produite sous forme d'enregistrement, ou une déclaration donnant les détails complets de toute communication privée qui sera produite par un témoin;

b) le lieu, la date et l'heure de la communication privée, et le nom de tous les interlocuteurs, s'il est connu;

c) dans le cas où la communication privée a été interceptée en vertu d'un mandat, une copie du mandat et des pièces afférentes à toute demande de délivrance, de renouvellement ou de modification du mandat.

SECTION II
DEMANDE DE DÉTAILS COMPLÉMENTAIRES

Demandeur et préavis

195. L'accusé à qui a été notifiée l'intention du poursuivant de produire la preuve d'une communication privée interceptée peut demander par écrit à un juge, avec préavis de deux jours francs au poursuivant, des détails complémentaires sur cette communication.

Ordonnance

196. Le juge saisi d'une demande à cet effet et convaincu que cela est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière peut ordonner que des détails complémentaires soient fournis à l'accusé.

Règles de procédure

197. Les dispositions des articles 185 à 190, 192 et 193 s'appliquent à cette demande.

SECTION III
DEMANDE DE MISE AU JOUR DE RENSEIGNEMENTS RENDUS ININTELLIGIBLES

Demandeur

198. L'accusé à qui a été notifiée l'intention du poursuivant de produire la preuve d'une communication privée interceptée peut demander par écrit une ordonnance afin que soient mis au jour des renseignements rendus inintelligibles dans les pièces qui accompagnaient le préavis.

Mode de présentation

199. La demande est présentée en personne au juge, avec préavis de deux jours francs au poursuivant.

Audition de la demande

200. Au moment de l'audition de la demande, le juge examine les pièces contenues dans le paquet scellé, en présence de l'accusé et du poursuivant, mais sans permettre à l'accusé de les examiner.

Divulgation des renseignements

201. Le juge saisi d'une demande à cet effet et convaincu que l'accusé a besoin, pour présenter une défense pleine et entière, de renseignements rendus inintelligibles dans quelque pièce qui lui a été remise relativement au mandat, peut ordonner la divulgation de ces renseignements à l'accusé.

Règles de procédure

202. Les dispositions des articles 185 à 190, 192 et 193 s'appliquent à cette demande.

Appel

203. Appel peut être interjeté de la décision du juge, devant un juge de la cour d'appel.

CHAPITRE IX
RÈGLES DE PREUVE

Preuve sous forme d'affidavit

204. La preuve des faits suivants peut être présentée sous la forme d'un affidavit :

a) le lieu, la date et l'heure où une communication privée a été interceptée;

b) les moyens par lesquels une communication privée a été interceptée;

c) tous les faits relatifs à la garde de l'enregistrement d'une communication privée interceptée;

d) la signification du préavis de l'intention de produire la preuve d'une communication privée.

Qualité du demandeur

205. Lorsque la qualité d'agent désigné ou d'agent de la paix désigné d'une personne est énoncée dans le mandat, elle est présumée établie, sauf preuve contraire.

Absence de l'original du mandat

206. Dans toute procédure où il importe au tribunal d'être convaincu que l'interception d'une communication privée a été autorisée par un mandat délivré à la suite d'une demande présentée par téléphone ou à l'aide d'un autre moyen de télécommunication, l'absence de l'original du mandat est, sauf preuve contraire, la preuve que l'interception n'a pas été autorisée par mandat.

CHAPITRE X
RAPPORTS ANNUELS

Rapports fédéral et provinciaux

207. (1) Le solliciteur général du Canada et chaque ministre provincial établissent, dès que possible après la fin de chaque année, un rapport relatif à la surveillance électronique effectuée en leur nom au cours de l'année.

Dépôt au Parlement

(2) Le solliciteur général du Canada fait déposer sans retard son rapport au Parlement.

Publication

(3) Chaque ministre provincial publie sans retard le rapport ou fait en sorte que le public puisse y avoir accès par quelque autre moyen.

Contenu des rapports annuels

208. Les rapports annuels contiennent les indications suivantes :

a) le nombre de demandes de mandats, de renouvellements et de modifications, dans des listes distinctes;

b) le nombre de mandats, de renouvellements et de modifications qui ont été accordés ou refusés, ou encore accordés suivant des conditions établies par le juge;

c) le nombre de personnes identifiées dans des mandats qui ont été poursuivies par le procureur général du Canada ou de la province, par suite d'interceptions effectuées en vertu de mandats, relativement :

(i) à un crime spécifié dans le mandat,

(ii) à un crime visé au sous-alinéa 133(1)*a*)(i) qui n'était pas spécifié dans le mandat,

(iii) à un crime autre que ceux qui sont visés au sous-alinéa 133(1)*a*)(i);

d) le nombre de personnes non identifiées dans un mandat et qui, par suite de renseignements obtenus grâce à l'interception de communications privées effectuée en vertu de mandats, ont été poursuivies par le procureur général du Canada ou de la province relativement :

(i) à un crime spécifié dans un mandat,

(ii) à un crime visé au sous-alinéa 133(1)*a*)(i) qui n'était pas spécifié dans un mandat,

(iii) à un crime autre que ceux qui sont visés au sous-alinéa 133(1)*a*)(i);

e) la durée moyenne de validité des mandats et des renouvellements de mandats qui ont été accordés;

f) le nombre de mandats qui, une fois renouvelés, ont été valides pendant les périodes suivantes :

(i) de soixante à cent dix-neuf jours,

(ii) de cent vingt à cent soixante-dix-neuf jours,

(iii) de cent quatre-vingts à deux cent trente-neuf jours,

(iv) deux cent quarante jours ou plus;

g) les crimes spécifiés dans les mandats, ainsi que le nombre de mandats, de renouvellements et de modifications accordés pour chaque crime;

h) la description de tous les genres de lieux spécifiés dans les mandats et le nombre de mandats accordés pour chaque genre de lieu;

i) une description sommaire des méthodes d'interception spécifiées dans les mandats;

j) le nombre de personnes arrêtées par suite des renseignements obtenus grâce à l'interception de communications privées en vertu d'un mandat;

k) le nombre d'avis d'interception ou d'entrée clandestine qui ont été donnés;

l) le nombre de poursuites pénales engagées par le procureur général du Canada ou de la province, dans lesquelles des communications privées interceptées en vertu d'un mandat ont été

produites en preuve, et le nombre de poursuites qui ont entraîné la condamnation de l'accusé;

m) le nombre d'enquêtes au cours desquelles des renseignements obtenus par suite de l'interception de communications privées en vertu d'un mandat ont été utilisés, bien que les communications privées n'aient été produites en preuve dans aucune poursuite pénale;

n) le nombre de poursuites engagées contre des fonctionnaires ou préposés de Sa Majesté, en vertu de l'article 66 (interception des communications privées), de l'article 67 (installation d'appareils d'interception) ou de l'article 68 (communication) du projet de code criminel de la CRD;

o) une évaluation d'ensemble de l'importance de l'interception des communications privées pour le dépistage, la prévention et la poursuite des crimes au Canada ou dans la province.

PARTIE VI

LA DISPOSITION DES CHOSES SAISIES

CHAPITRE PREMIER
CHAMP D'APPLICATION

Application

209. (1) La présente partie s'applique aux choses saisissables saisies sous le régime de la partie II (*Les fouilles, les perquisitions et les saisies*) ainsi qu'aux choses saisissables extraites du corps d'une personne et saisies sous le régime de la partie III (*La recherche d'indices sur les personnes*).

Exception

(2) Lorsqu'une chose saisie ou les renseignements y contenus font l'objet d'une opposition fondée sur un privilège, il en est disposé en conformité avec les dispositions de la partie VII (*Les privilèges en matière de saisie*).

CHAPITRE II
OBLIGATIONS DE L'AGENT DE LA PAIX PRATIQUANT UNE SAISIE

SECTION I
INVENTAIRE DES CHOSES SAISIES

Préparation de l'inventaire

210. (1) Au moment de la saisie ou dès que cela est matériellement possible après celle-ci, l'agent de la paix :

a) dresse et signe un inventaire décrivant toutes les choses saisies avec une précision raisonnable;

b) offre une copie de l'inventaire à toute personne apparemment en possession des choses saisies au moment de la saisie et lui en remet une copie si elle en fait la demande.

Renseignements copiés

(2) Si l'agent de la paix réalise une copie de quelque renseignement contenu dans une chose saisie, il en fait mention dans l'inventaire.

Affichage de l'inventaire

(3) Si personne ne semble être en possession des choses saisies, l'agent de la paix peut afficher une copie de l'inventaire sur le lieu de la saisie.

Personnes ayant un droit de propriété ou ayant droit à la possession

(4) L'agent de la paix qui effectue une saisie offre, si cela est matériellement possible, une copie de l'inventaire à toute autre personne qui lui paraît avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, et lui en remet une copie si elle en fait la demande.

SECTION II
REMISE DES CHOSES SAISIES PAR L'AGENT DE LA PAIX

Personne ayant droit à la possession

211. (1) L'agent de la paix peut, avant de présenter le procès-verbal de saisie à un juge de paix, remettre la chose saisie à la personne qui lui paraît avoir droit à sa possession si, à la connaissance de l'agent de la paix, la possession n'est pas contestée et que la chose ne soit plus nécessaire ni utile aux fins de quelque enquête ou procédure.

Récépissé

(2) L'agent de la paix obtient un récépissé pour toute chose saisie qu'il remet.

SECTION III
PROCÈS-VERBAL DE SAISIE

Établissement d'un procès-verbal

212. (1) L'agent de la paix dresse un procès-verbal relativement à toute chose saisie et non remise.

Contenu

(2) Ce procès-verbal contient les renseignements suivants :

a) le lieu, la date et l'heure de la saisie;

b) le nom de l'agent de la paix qui a effectué la saisie ainsi que le nom de la force policière ou autre organisme pour lequel l'agent de la paix a agi;

c) le nom de toute personne à qui une copie de l'inventaire a été remise;

d) le cas échéant, les raisons pour lesquelles des choses non mentionnées dans un mandat de fouille ou de perquisition ont été saisies au cours de l'exécution de celui-ci ou les raisons pour lesquelles des choses ont été saisies sans mandat;

e) le nom des personnes qui, à la connaissance de l'agent, peuvent avoir un droit de propriété sur quelque chose saisie ou avoir droit à sa possession;

f) le cas échéant, les raisons pour lesquelles un mandat visant plusieurs choses saisissables n'a pas été exécuté à l'égard de certaines d'entre elles.

Inventaire et récépissé

(3) L'agent de la paix joint au procès-verbal l'inventaire des choses saisies et le récépissé relatif aux choses qui ont été remises.

Présentation

213. (1) Le procès-verbal de saisie est présenté, dès que cela est matériellement possible après la saisie, à un juge de paix du district judiciaire où celle-ci a été effectuée.

Réception et dépôt

(2) Le juge de paix qui reçoit le procès-verbal de saisie le fait déposer auprès du greffier du district judiciaire où la saisie a été effectuée.

CHAPITRE III
GARDE ET DISPOSITION DES CHOSES SAISIES

SECTION I
RÈGLES GÉNÉRALES RÉGISSANT LES ORDONNANCES

1. Présentation de la demande

Présentation de la demande

214. Toute demande d'ordonnance est adressée par écrit à un juge de paix du district judiciaire où le procès-verbal de saisie a été déposé, de celui où la chose saisie a été placée sous garde ou de celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

Contenu de la demande

215. (1) La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime reproché ou faisant l'objet de l'enquête;

d) la description de la chose saisie visée par la demande;

e) la date de la saisie;

f) le nom du gardien;

g) la nature de l'ordonnance demandée;

h) les motifs invoqués à l'appui de la demande;

i) tout renseignement supplémentaire exigé par la présente partie à l'égard de la demande.

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Préavis

216. Un préavis indiquant le lieu, la date et l'heure de l'audition est signifié, avec la demande et l'affidavit, à toutes les parties auxquelles ce préavis doit être donné.

Transmission du dossier

217. Si la demande est présentée dans un district judiciaire autre que celui où le procès-verbal de saisie a été déposé, le greffier du district judiciaire où le procès-verbal de saisie a été déposé transmet, sur requête écrite du demandeur, le procès-verbal et toutes les pièces y afférentes au greffier du district où la demande doit être entendue.

2. Audition de la demande

Pouvoir du juge de paix

218. Le juge de paix saisi de la demande ou habilité à rendre une ordonnance d'office peut prendre les mesures suivantes s'il l'estime opportun :

a) faire comparaître personnellement le gardien et l'interroger;

b) examiner toute chose saisie et à cette fin en exiger la production;

c) recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit.

Signification de l'affidavit

219. (1) Lorsqu'un affidavit doit être produit en preuve, il est signifié, dans un délai raisonnable avant l'audition, à toutes les parties à qui a été notifiée la demande.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit reçu en preuve peut être interrogé sur le contenu de cet affidavit.

Serment

220. Le serment est obligatoire pour tout témoin.

Enregistrement

221. (1) Les témoignages entendus par le juge de paix sont intégralement enregistrés par écrit ou sur support électronique.

Désignation de l'enregistrement

(2) L'enregistrement indique l'heure, le jour et un sommaire de son contenu.

Certification de la transcription

(3) L'heure, la date et l'exactitude de toute transcription de l'enregistrement doivent être certifiées.

3. Délivrance de l'ordonnance

Forme de l'ordonnance

222. L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge de paix qui la rend.

Contenu de l'ordonnance

223. L'ordonnance contient les renseignements suivants :

a) le nom du demandeur, le cas échéant;

b) le crime reproché ou faisant l'objet de l'enquête;

c) une description de la chose saisie faisant l'objet de l'ordonnance;

d) la date de la saisie;

e) le nom du gardien;

f) la décision du juge de paix et les conditions dont elle est assortie;

g) le lieu et la date où elle est rendue;

h) le nom et le ressort du juge de paix qui la rend;

i) tout renseignement additionnel exigé par la présente partie à l'égard de l'ordonnance.

4. Dépôt de documents

Demande et pièces y afférentes

224. (1) Dès que cela est matériellement possible après l'audition, le juge de paix fait déposer auprès du greffier du district judiciaire où le procès-verbal de saisie a été déposé les documents suivants :

a) le préavis relatif à la demande;

b) la demande;

c) l'enregistrement des témoignages qu'il a entendus, ou la transcription de cet enregistrement;

d) les autres éléments de preuve qu'il a reçus;

e) l'original de l'ordonnance rendue, le cas échéant.

Renvoi de documents

(2) Lorsque le procès-verbal de saisie et les pièces connexes avaient été transmis, en vue de l'audition de la demande, par le greffier du district judiciaire où ils avaient été déposés, le juge de paix les renvoie après l'audition.

5. Renvoi de la demande

Ordonnance de renvoi

225. (1) Lorsqu'une demande a été déposée et notifiée, le juge de paix qui en est saisi peut, sur demande distincte, soit en ordonner le renvoi et l'audition dans un autre district judiciaire, soit ordonner la présentation d'une nouvelle demande dans un autre district judiciaire, s'il est convaincu que cela servirait au mieux l'administration de la justice, compte tenu de l'intérêt des témoins et des parties.

Autre district judiciaire

(2) Cet autre district judiciaire doit être celui où le procès-verbal de saisie a été déposé, celui où la chose a été placée sous garde ou celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

Demande de renvoi

226. La demande de renvoi peut être faite par toute personne à qui la demande principale a été notifiée.

Préavis

227. La demande de renvoi est notifiée au moyen d'un préavis de trois jours francs aux personnes suivantes :

a) la personne qui a présenté la demande principale;

b) toute autre personne à qui a été notifiée la demande principale.

Renseignements supplémentaires

228. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande de renvoi indique les motifs pour lesquels le demandeur estime que le renvoi de la demande principale servirait au mieux l'administration de la justice, compte tenu de l'intérêt des témoins et des parties.

Transmission du dossier

229. Le juge de paix qui ordonne que la demande principale soit renvoyée ou présentée dans un autre district judiciaire fait transmettre le dossier au greffier de ce district judiciaire.

SECTION II
MESURES DE PROTECTION ET DE CONSERVATION

Gardien

230. Les choses saisies et non remises par l'agent de la paix sont placées sous sa garde. Il lui incombe de prendre des mesures pour en assurer la protection et la conservation.

Chose saisie confiée à un tiers

231. Le gardien peut confier une chose saisie à toute personne, notamment au saisi, aux conditions raisonnablement nécessaires pour en assurer la protection et la conservation.

Ordonnance sur demande

232. Le juge de paix saisi d'une demande à cet effet peut rendre une ordonnance en vue de la protection et de la conservation de toute chose saisie, et peut notamment remplacer le gardien ou nommer des gardiens supplémentaires.

Demandeur

233. La demande peut être présentée par l'agent de la paix, l'accusé, le poursuivant ou toute personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Préavis

234. Le demandeur donne un préavis de trois jours francs à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix saisi de la demande.

Renseignements supplémentaires

235. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique :

a) la qualité du demandeur, à savoir s'il s'agit de l'agent de la paix, de l'accusé, du poursuivant ou d'une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession;

b) la nature du droit invoqué si le demandeur est une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Ordonnance rendue d'office

236. (1) Le juge de paix qui reçoit un procès-verbal de saisie peut, d'office, rendre une ordonnance en vue de la protection et de la conservation de toute chose saisie visée par le procès-verbal, et peut notamment remplacer le gardien ou nommer des gardiens supplémentaires.

Préavis

(2) Le juge de paix qui envisage de rendre une ordonnance d'office avise de son intention, trois jours francs avant l'audience tenue pour trancher la question, le poursuivant de même que toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Renseignements supplémentaires

237. Outre les renseignements exigés par les alinéas 223*a*) à *h*), l'ordonnance indique, le cas échéant, le nom du remplaçant du gardien ou des gardiens supplémentaires.

SECTION III
ANALYSE OU EXAMEN

Analyse par l'agent de la paix

238. L'agent de la paix peut faire examiner ou analyser toute chose saisie et le gardien est tenu de la lui remettre à cette fin.

Ordonnance de remise

239. Le juge de paix saisi d'une demande à cet effet et convaincu que cela est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière peut ordonner qu'une chose saisie soit remise à celui-ci en vue d'une analyse ou d'un examen. Le juge de paix assortit l'ordonnance des conditions qu'il estime nécessaires pour assurer la protection et la conservation de la chose.

Demande de remise

240. La demande est présentée par l'accusé avec préavis de trois jours francs au poursuivant.

SECTION IV
ACCÈS AUX CHOSES SAISIES

Demande d'accès

241. (1) La personne ayant un intérêt dans une chose saisie peut demander au gardien l'autorisation d'examiner la chose à l'endroit où elle est gardée.

Pouvoir du gardien

(2) Le gardien peut donner cette autorisation, aux conditions qu'il juge nécessaires à la protection et à la conservation de la chose saisie, s'il estime que :

a) d'une part, la personne a effectivement un intérêt dans la chose saisie;

b) d'autre part, l'autorisation ne nuira pas à quelque enquête policière en cours, ne constituera pas une menace pour la sécurité de quelque personne, ne portera atteinte à aucun droit de propriété sur la chose saisie ni au droit à sa possession, ni ne mettra en jeu la protection et la conservation de la chose.

Copies

242. (1) La personne ayant un intérêt dans un renseignement contenu dans une chose saisie et susceptible d'être reproduit peut

demander au gardien de lui remettre des copies de ce renseignement.

Pouvoir du gardien

(2) Le gardien peut fournir les copies, sur paiement des droits prescrits, lorsque les conditions suivantes sont réunies :

a) il estime que la personne a effectivement un intérêt dans le renseignement;

b) il estime que la fourniture des copies ne nuira pas à quelque enquête policière en cours, ne constituera pas une menace pour la sécurité de quelque personne, ne portera atteinte à aucun droit de propriété sur la chose saisie ni au droit à sa possession, ni ne mettra en jeu la protection et la conservation de la chose;

c) il est en mesure de fournir les copies demandées.

Ordonnance relative à l'accès

243. (1) Le juge de paix saisi d'une demande à cet effet et convaincu qu'une personne devrait être autorisée à examiner la chose saisie ou devrait obtenir des copies des renseignements y contenus peut ordonner au gardien d'autoriser le demandeur à examiner la chose ou de lui fournir les copies demandées. Le juge de paix assortit l'ordonnance des conditions nécessaires pour assurer la protection et la conservation de la chose.

Dispense de paiement des droits

(2) Le juge de paix saisi d'une demande à cet effet peut ordonner que le demandeur soit dispensé de l'obligation d'acquitter les droits prévus s'il est convaincu que le paiement des droits causerait un préjudice grave au demandeur ou serait inéquitable dans les circonstances.

Demande d'accès, de copies ou de dispense de paiement des droits

244. La demande peut être présentée par toute personne à qui l'autorisation d'examiner la chose saisie ou l'obtention de copies des renseignements y contenus a été refusée, ou par toute personne à qui le paiement des droits relatifs à l'obtention des copies causerait un préjudice grave ou envers qui le paiement de tels droits serait inéquitable dans les circonstances.

Préavis

245. La demande est notifiée au moyen d'un préavis de trois jours francs au poursuivant.

Renseignements supplémentaires

246. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique la nature de l'intérêt du demandeur dans la chose saisie.

SECTION V
CHOSES PÉRISSABLES

Ordonnance sur demande

247. Le juge de paix saisi d'une demande à cet effet et convaincu qu'une chose saisie est périssable ou susceptible de se déprécier rapidement peut ordonner :

a) soit la remise de la chose saisie à son possesseur légitime, à certaines conditions, le cas échéant, si le droit à la possession de la chose n'est pas contesté;

b) soit la vente de la chose saisie, suivant les modalités qu'il fixe, si le droit à la possession de la chose est contesté.

Demandeur

248. La demande peut être présentée par l'agent de la paix, l'accusé, le poursuivant ou toute personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Préavis

249. Le demandeur donne un préavis d'un jour franc à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix.

Renseignements supplémentaires

250. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique :

a) la qualité du demandeur, à savoir s'il s'agit de l'agent de la paix, de l'accusé, du poursuivant ou d'une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession;

b) la nature du droit invoqué si le demandeur est une personne qui prétend avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Ordonnance rendue d'office

251. (1) Le juge de paix qui reçoit le procès-verbal de saisie et qui est convaincu qu'une chose saisie est périssable ou susceptible de se déprécier rapidement peut, d'office, ordonner :

a) soit la remise de la chose saisie à son possesseur légitime, à certaines conditions, le cas échéant, si le droit à la possession n'est pas contesté;

b) soit la vente de la chose saisie, suivant les modalités qu'il fixe, si le droit à la possession de la chose est contesté.

Préavis

(2) Le juge de paix qui envisage de rendre une ordonnance d'office avise de son intention, un jour franc avant l'audience

tenue pour trancher la question, le poursuivant de même que toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession.

Produit de la vente

252. Le produit de la vente de la chose saisie est déposé par le gardien à un compte portant intérêt suivant les conditions fixées par le juge de paix.

SECTION VI
CHOSES DANGEREUSES

Obligation de l'agent de la paix

253. Lorsqu'il estime qu'une chose saisie présente un danger grave pour la santé ou la sécurité publiques, l'agent de la paix la place ou la fait placer en lieu sûr dès que cela est matériellement possible.

Ordonnance

254. Le juge de paix saisi d'une demande à cet effet et convaincu qu'une chose saisie présente un danger grave pour la santé ou la sécurité publiques peut ordonner qu'elle soit détruite ou qu'il en soit disposé autrement. Il peut assortir l'ordonnance des conditions qu'il juge propres à supprimer ou à atténuer le danger.

Demandeur et préavis

255. La demande est présentée par l'agent de la paix avec préavis raisonnable à toute personne pouvant selon lui avoir un droit sur la chose saisie ainsi qu'à toute personne désignée par le juge de paix saisi de la demande.

Préparation du rapport

256. (1) Un rapport confirmant l'exécution de l'ordonnance et faisant état de la façon dont la chose saisie a été détruite ou dont il en a été disposé est présenté, dès que cela est matériellement possible, à un juge de paix du district judiciaire où l'ordonnance a été rendue.

Dépôt

(2) Le juge de paix fait déposer le rapport auprès du greffier du district judiciaire où le procès-verbal de saisie a été déposé.

SECTION VII
CHOSES PRÉSENTANT UN DANGER IMMINENT ET GRAVE

Pouvoir de l'agent de la paix

257. L'agent de la paix qui croit, pour des motifs raisonnables, qu'une chose saisie présente un danger imminent et grave pour la santé ou la sécurité publiques peut la détruire ou en disposer autrement.

Avis et rapport

258. Après avoir détruit la chose ou en avoir disposé, l'agent de la paix :

a) d'une part, transmet un avis au saisi et à toute autre personne qui lui paraît avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession;

b) d'autre part, rédige un rapport contenant une description de la chose saisie, les motifs pour lesquels elle a été détruite ou il en a été disposé, ainsi que la façon dont l'opération a été effectuée.

Présentation du rapport

259. (1) Le rapport est présenté, dès que cela est matériellement possible, à un juge de paix du district judiciaire où le procès-verbal de saisie a été déposé.

Dépôt

(2) Le rapport est déposé avec le procès-verbal de saisie.

SECTION VIII
ORDONNANCE DE RESTITUTION

Restitution

260. Le juge de paix saisi d'une demande à cet effet ordonne la restitution au demandeur de toute chose saisie ou du produit de la vente de celle-ci s'il est convaincu que les conditions suivantes sont réunies :

a) le droit à la possession de la chose ou du produit de la vente n'est pas contesté;

b) la possession du demandeur serait légitime;

c) la loi ne prévoit pas la confiscation de la chose ni du produit de la vente;

d) la rétention de la chose ou du produit de la vente n'est pas nécessaire ni utile aux fins de quelque enquête ou procédure.

Demandeur

261. La demande peut être présentée par toute personne qui prétend avoir un droit de propriété sur la chose saisie ou le produit de la vente, ou avoir droit à sa possession.

Préavis

262. Le demandeur donne un préavis de huit jours francs au poursuivant, à l'accusé, à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix.

Renseignements supplémentaires

263. Outre les renseignements exigés par les alinéas 215(1)*a)* à *h*), la demande indique la nature du droit du demandeur sur la chose saisie.

Conditions

264. Le juge de paix peut assortir l'ordonnance de restitution des conditions qu'il estime nécessaires pour assurer la protection et la conservation de la chose saisie aux fins de quelque enquête ou procédure; il peut notamment exiger du demandeur qu'il remette la chose à la demande de la cour.

Effet de l'ordonnance de restitution

265. L'ordonnance de restitution ne porte atteinte à aucun droit de propriété sur la chose saisie ou le produit de la vente de celle-ci, ni au droit à la possession de l'un ou de l'autre.

SECTION IX
REPRODUCTION DES CHOSES SAISIES

Photographie

266. (1) L'agent de la paix peut faire photographier toute chose saisie.

Admissibilité

(2) La photographie d'une chose saisie, accompagnée du certificat décrit au paragraphe 268(1), est admissible en preuve pour identifier la chose et a, à cette fin et sauf preuve contraire, la même force probante que la chose.

Renseignement copié

267. (1) L'agent de la paix peut faire faire une copie de tout renseignement contenu dans une chose saisie.

Admissibilité

(2) La copie du renseignement, accompagnée du certificat décrit au paragraphe 268(1), est admissible en preuve et a, sauf preuve contraire, la même force probante que le renseignement.

Certificat

268. (1) Est admissible en preuve et, sauf preuve contraire, fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y apparaît, le certificat attestant ce qui suit :

a) le signataire a fait la copie ou pris la photographie en vertu des dispositions de la présente section;

b) le signataire est un agent de la paix ou a agi sous la direction d'un agent de la paix;

c) selon le cas, la copie est conforme ou la photographie représente bien la chose saisie.

Affidavit de l'agent de la paix

(2) Est admissible en preuve et, sauf preuve contraire, fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y apparaît ni la qualité officielle du signataire, l'affidavit de l'agent de la paix attestant ce qui suit :

a) il a saisi une chose qui a été placée sous sa garde au moment de la saisie jusqu'à ce qu'une copie des renseignements y contenus soit faite ou qu'une photographie en soit prise;

b) ni la chose ni les renseignements n'ont été modifiés avant que la copie soit faite ou que la photographie soit prise.

Interrogatoire sur le certificat

(3) La cour peut ordonner à la personne qui paraît avoir signé un certificat ou un affidavit de se présenter devant elle pour être interrogée ou contre-interrogée sur le contenu du certificat ou de l'affidavit.

Préavis de production d'une copie ou d'une photographie

269. À moins que la cour n'en décide autrement, les copies, photographies, certificats ou affidavits ne sont admissibles en preuve que si, avant les procédures, le poursuivant a donné à l'accusé un préavis raisonnable de son intention de les produire, accompagné d'une copie du document.

SECTION X
FIN DE LA RÉTENTION ET DISPOSITION

1. Durée légale de la rétention

Règle générale

270. La chose saisie, de même que le produit de la vente de celle-ci, peut être placée sous garde pendant quatre-vingt-dix jours à compter de la date de la saisie.

Prolongation

271. La rétention de la chose saisie ou du produit de la vente peut être prolongée :

a) soit, dans les quatre-vingt-dix jours qui suivent la saisie, dans l'un des cas suivants :

(i) des procédures dans lesquelles la production en preuve de la chose saisie peut être nécessaire, ou qui peuvent entraîner la confiscation de la chose ou du produit de la vente en conformité avec la loi, ont été engagées,

(ii) une demande de prolongation de la durée de la rétention a été présentée;

b) soit, avant l'expiration d'une période de rétention prolongée, lorsque des procédures ont été intentées ou une autre demande de prolongation a été présentée.

Rétention après la conclusion des procédures

272. La chose saisie, de même que le produit de la vente de celle-ci, peut être placée sous garde pour une durée maximale de trente jours après la conclusion de toutes les procédures à l'égard desquelles elle était retenue.

2. Demande de prolongation de la rétention

Demande du poursuivant

273. (1) À la demande du poursuivant, le juge de paix peut ordonner la prolongation de la rétention pour des périodes supplémentaires ne dépassant pas quatre-vingt-dix jours chacune, s'il est convaincu que la rétention de la chose saisie ou du produit de la vente de celle-ci doit être prolongée, eu égard à la complexité de l'enquête.

Demande d'un tiers

(2) À la demande d'une personne ayant un intérêt dans une chose saisie, le juge de paix peut ordonner la prolongation de la rétention pour des périodes supplémentaires ne dépassant pas quatre-vingt-dix jours chacune, s'il est convaincu que la rétention de la chose est nécessaire pour en assurer la conservation aux fins de preuve.

Préavis

274. Le demandeur donne un préavis de trois jours francs à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou le produit de la vente de celle-ci, ou avoir droit à la possession de l'un ou de l'autre. Il le donne aussi au poursuivant de même qu'à toute autre personne désignée par le juge de paix.

3. Remise des choses saisies

Pouvoir du poursuivant

275. Le poursuivant peut faire remettre la chose saisie ou le produit de la vente de celle-ci à la personne qui paraît avoir droit à sa possession si les conditions suivantes sont réunies :

a) la période de rétention autorisée est expirée, ou encore la chose ou le produit de la vente n'est plus utile;

b) à la connaissance du poursuivant, le droit à la possession de la chose ou du produit de la vente n'est pas contesté;

c) la loi ne prévoit pas la confiscation de la chose saisie ni du produit de la vente.

Avis

276. Le poursuivant qui entend faire remettre la chose saisie ou le produit de la vente en avise par écrit le gardien et dépose une copie de l'avis auprès du greffier du district judiciaire où le procès-verbal de saisie a été déposé.

Remise

277. Le gardien remet la chose saisie ou le produit de la vente dès que cela est matériellement possible après réception de l'avis.

4. Ordonnance de disposition

Obligation du poursuivant

278. Lorsque le poursuivant ne fait pas remettre une chose saisie ni le produit de la vente de celle-ci à l'expiration de la période de rétention autorisée, ou lorsque la chose ou le produit de la vente n'est plus utile, il demande, dès que cela est matériellement possible, une ordonnance de disposition.

Préavis

279. Le poursuivant donne un préavis de huit jours francs au gardien, à l'accusé, à toute personne qui, à sa connaissance, pourrait avoir un droit de propriété sur la chose saisie ou le produit de la vente, ou avoir droit à sa possession, de même qu'à toute autre personne désignée par le juge de paix.

Renseignements supplémentaires

280. Outre les renseignements exigés par les alinéas 215(1)*a*) à *h*), la demande indique :

a) que la période de rétention autorisée est expirée, ou que la chose saisie ou le produit de la vente n'est plus utile;

b) le cas échéant, la date à laquelle expirait la période de rétention autorisée;

c) le cas échéant, que la loi prévoit la confiscation de la chose saisie ou du produit de la vente.

Pouvoir du juge de paix

281. Le juge de paix ordonne qu'il soit disposé de la chose ou du produit de la vente de l'une des façons suivantes :

a) la chose ou le produit de la vente est rendu à son possesseur légitime si le droit à la possession n'est pas contesté;

b) si le droit à la possession de la chose ou du produit de la vente est contesté mais qu'aucune procédure civile n'ait été intentée à cet égard, la chose ou le produit de la vente est remis au saisi s'il peut légitimement en avoir la possession;

c) la chose ou le produit de la vente est placé sous la garde du tribunal devant lequel ont été intentées des procédures civiles relativement au droit à la possession de la chose ou du produit de la vente;

d) la chose ou le produit de la vente est confisqué au profit de Sa Majesté pour qu'il en soit disposé selon les directives du procureur général dans l'un ou l'autre des cas suivants :

(i) l'identité du propriétaire ou possesseur légitime de la chose ou du produit de la vente est inconnue et personne ne s'en prétend le propriétaire ou le possesseur légitime,

(ii) le droit à la possession de la chose ou du produit de la vente est contesté mais aucune procédure civile n'a été intentée à cet égard, et le saisi ne peut légitimement en avoir la possession,

(iii) la loi prévoit la confiscation de la chose saisie ou du produit de la vente,

(iv) le propriétaire ou possesseur légitime de la chose ou du produit de la vente est introuvable.

Chose de valeur négligeable

282. Si la chose saisie est de valeur négligeable, le juge de paix peut ordonner qu'elle soit détruite ou qu'il en soit disposé autrement.

CHAPITRE IV
APPELS

Droit d'appel

283. Toute personne lésée par une décision rendue en vertu de l'article 232 (protection et conservation), des paragraphes 236(1) (protection et conservation), 243(1) (accès à la chose saisie; copies) ou 243(2) (dispense de paiement des droits), des articles 254 (choses dangereuses) ou 260 (restitution), ou de l'alinéa 281*d*)

(confiscation) à l'égard d'une chose saisie peut en appeler à une juridiction d'appel dans les trente jours qui suivent la date de la décision.

Garde après ordonnance ou pendant l'appel

284. Il n'est disposé d'aucune chose saisie, ni du produit de la vente de celle-ci, dans les trente jours qui suivent une ordonnance rendue en vertu d'une disposition mentionnée à l'article 283, ni pendant l'appel attaquant cette ordonnance, à moins que toutes les personnes lésées ne renoncent à leur droit d'appel par écrit ou que la chose saisie ne présente un danger imminent ou grave pour la santé ou la sécurité publiques.

PARTIE VII

LES PRIVILÈGES EN MATIÈRE DE SAISIE

CHAPITRE PREMIER
CHAMP D'APPLICATION

Application

285. La présente partie s'applique dès lors qu'une chose saisie conformément à la partie II (*Les fouilles, les perquisitions et les saisies*) ou les renseignements y contenus font l'objet d'une opposition fondée sur un privilège.

CHAPITRE II
OBLIGATIONS DE L'AGENT DE LA PAIX PRATIQUANT UNE SAISIE

Inventaire et procès-verbal

286. Les articles 210 (inventaire des choses saisies), 212 (préparation du procès-verbal) et 213 (présentation du procès-verbal) s'appliquent à la saisie d'une chose faisant l'objet d'une opposition fondée sur un privilège.

CHAPITRE III
DEMANDE D'AUDIENCE SUR L'EXISTENCE DU PRIVILÈGE

SECTION I
PRÉSENTATION DE LA DEMANDE

Demandeur

287. Le poursuivant, de même que toute personne invoquant un privilège à l'égard d'une chose saisie ou des renseignements y contenus, peut demander qu'il soit statué sur l'existence du privilège.

Mode de présentation

288. La demande est présentée par écrit, dans les quatorze jours qui suivent la date de la saisie, à un juge du district judiciaire où le procès-verbal de saisie a été déposé, dans celui où la chose a

été placée sous garde ou dans celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

Contenu de la demande

289. (1) La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime reproché ou faisant l'objet de l'enquête;

d) la description de la chose saisie visée par la demande;

e) la date de la saisie;

f) le nom du gardien;

g) les motifs invoqués à l'appui de la demande;

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Préavis

290. (1) La demande est notifiée au moyen d'un préavis de cinq jours francs au gardien et, selon le cas :

a) soit au poursuivant, si le privilège est invoqué par le demandeur;

b) soit à la personne invoquant le privilège, si le demandeur est le poursuivant.

Contenu et signification

(2) Le préavis, qui indique le lieu, la date et l'heure où la demande sera entendue, est signifié avec la demande et l'affidavit.

Production du paquet ou des renseignements

291. (1) Sur réception du préavis, le gardien produit le paquet scellé visé à l'alinéa 53(2)*b*) (opposition d'un privilège au cours d'une fouille ou d'une perquisition) ou les renseignements contenus dans la chose saisie à la date et à l'heure indiquées dans le préavis.

Demande du gardien

(2) Lorsqu'il est matériellement impossible de produire le paquet scellé ou les renseignements contenus dans la chose saisie, le gardien demande à un juge du district judiciaire où la saisie a été effectuée de donner des instructions sur les mesures à prendre pour permettre l'examen de la chose ou des renseignements.

Règles de procédure

292. Les articles 217 (transmission du dossier) et 225 à 229 (renvoi de la demande) s'appliquent à toute demande faite en vertu de la présente section.

SECTION II
AUDITION DE LA DEMANDE

Attributions du juge

293. Le juge saisi d'une demande à cet effet statue sur l'existence du privilège invoqué à l'égard de la chose saisie ou des renseignements y contenus. Il le fait à huis clos, dans les trente jours qui suivent la date de la saisie.

Pouvoirs conférés au juge

294. Le juge peut prendre les mesures suivantes à l'audience :

a) faire comparaître personnellement le gardien et l'interroger;

b) recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit;

c) examiner la chose ou les renseignements, ou en exiger la production à cette fin, s'il le juge nécessaire pour statuer sur l'existence du privilège.

Règles de procédure

295. Les articles 219 à 221 (preuve à l'audience) et 224 (dépôt de documents) s'appliquent à toute audience tenue en vertu de la présente section.

Décision et motifs

296. Le juge motive sa décision sans révéler les détails des renseignements ou de la chose à l'égard desquels le privilège est invoqué.

Existence du privilège

297. (1) Le juge qui conclut à l'existence du privilège ordonne :

a) soit le placement sous scellés de la chose et sa remise par le gardien au saisi;

b) soit la remise de la chose à la disposition du saisi par le gardien et, en attendant, l'adoption des mesures que le juge estime nécessaires pour que la chose ou les renseignements y contenus ne soient pas examinés ni altérés.

Inexistence du privilège

(2) Le juge qui conclut à l'inexistence du privilège ordonne au gardien de remettre la chose à l'agent de la paix qui a pratiqué la saisie ou à toute autre personne désignée par le poursuivant, ou sous la responsabilité de l'un ou de l'autre, sous réserve des conditions que le juge estime nécessaires; il est disposé de la chose en conformité avec les dispositions des chapitres III et IV de la partie VI (*La disposition des choses saisies*).

Forme de l'ordonnance

298. (1) L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge qui la rend.

Contenu

(2) L'ordonnance contient les renseignements suivants :

a) le nom du demandeur;

b) le crime reproché ou faisant l'objet de l'enquête;

c) une description de la chose saisie faisant l'objet de l'ordonnance;

d) la date de la saisie;

e) le nom du gardien;

f) la décision du juge et les conditions dont elle est assortie;

g) le lieu et la date où elle est rendue;

h) le nom et le ressort du juge.

Effet de la décision

299. Lorsque la chose saisie ou les renseignements y contenus sont jugés privilégiés, ils demeurent privilégiés et inadmissibles en preuve, à moins que la personne invoquant le privilège n'y consente ou que le privilège ne soit autrement perdu.

SECTION III
DISPOSITION EN L'ABSENCE DE DEMANDE

Remise à l'agent de la paix

300. (1) Si, dans les quatorze jours qui suivent la saisie d'une chose à l'égard de laquelle un privilège est invoqué, aucune demande visant à ce qu'il soit statué sur l'existence du privilège n'a été notifiée au gardien, ce dernier remet la chose à l'agent de la paix qui a pratiqué la saisie ou lui en confie la responsabilité.

Disposition de la chose

(2) Il est disposé de la chose en conformité avec les dispositions des chapitres III et IV de la partie VI (*La disposition des choses saisies*).

CHAPITRE IV
EXAMEN DE L'INFORMATION

Demandeur

301. La personne qui invoque un privilège à l'égard d'une chose saisie ou des renseignements y contenus peut demander une ordonnance lui permettant d'examiner la chose ou les renseignements et de faire une copie de ceux-ci.

Mode de présentation

302. La demande est présentée par écrit, unilatéralement et à huis clos, à un juge du district judiciaire où le procès-verbal de saisie a été déposé, de celui où la chose a été placée sous garde ou de celui où a été portée l'accusation en rapport avec laquelle la chose est retenue.

Contenu de la demande

303. (1) La demande contient les renseignements suivants :

a) le nom du demandeur;

b) le lieu et la date où elle est présentée;

c) le crime reproché ou faisant l'objet de l'enquête;

d) la description de la chose saisie visée par la demande;

e) la date de la saisie;

f) le nom du gardien;

g) la nature de l'ordonnance demandée;

h) les motifs invoqués à l'appui de la demande;

Affidavit

(2) Le contenu de la demande est attesté par un affidavit.

Transmission du dossier

304. L'article 217 (transmission du dossier) s'applique à toute demande faite en vertu du présent chapitre.

Pouvoirs conférés au juge

305. (1) Le juge saisi de la demande peut :

a) faire comparaître personnellement le gardien et l'interroger;

b) interroger le demandeur;

c) recevoir tout élément de preuve ou témoignage, notamment sous la forme d'un affidavit;

d) examiner la chose ou les renseignements, ou en exiger la production à cette fin, s'il le juge nécessaire.

Interrogatoire du souscripteur

(2) Le souscripteur d'un affidavit produit en preuve peut être interrogé.

Règles de procédure

306. Les articles 220 (témoignage sous serment), 221 (enregistrement des témoignages) et 224 (dépôt de documents) s'appliquent à toute audience tenue en vertu du présent chapitre.

Ordonnance

307. Le juge saisi d'une demande à cet effet peut, s'il est convaincu de la suffisance des motifs invoqués à l'appui de celle-ci, rendre une ordonnance autorisant le demandeur à examiner la chose ou les renseignements y contenus, et à faire une copie de ceux-ci, en sa présence ou celle du gardien. Le juge assortit

l'ordonnance des conditions nécessaires pour assurer la protection et la conservation de la chose.

Mesures à prendre

308. Si la chose saisie avait été placée sous scellés, le juge précise dans l'ordonnance qu'elle doit être scellée à nouveau sans être endommagée ni altérée.

Forme de l'ordonnance

309. L'ordonnance est rédigée suivant la formule prescrite et porte la signature du juge qui la rend.

Contenu de l'ordonnance

310. L'ordonnance contient les renseignements suivants :

a) le nom du demandeur;

b) le crime reproché ou faisant l'objet de l'enquête;

c) une description de la chose saisie faisant l'objet de l'ordonnance;

d) la date de la saisie;

e) le nom du gardien;

f) la décision du juge et les conditions dont elle est assortie;

g) le lieu et la date où elle est rendue;

h) le nom et le ressort du juge.

CHAPITRE V
APPELS

Droit d'appel

311. Toute personne lésée par une décision rendue en vertu de l'article 293 (détermination de l'existence du privilège) peut en appeler à une juridiction d'appel dans les trente jours qui suivent la date de la décision.

Garde après décision ou pendant l'appel

312. La chose saisie demeure en possession du gardien, sans que personne y touche ou l'examine, pendant les trente jours qui suivent la décision sur la question du privilège ou pendant l'appel attaquant cette décision, à moins que toutes les personnes lésées ne renoncent à leur droit d'appel par écrit.

ANNEXE

Collaborateurs spéciaux

Conseil consultatif de juges

M[me] la juge Claire Barrette-Joncas,
Cour supérieure du Québec

M. le juge Stephen Borins,*
Cour de district de l'Ontario

M. le juge James C. Cavanagh,
Cour du Banc de la Reine de l'Alberta

M. le juge William A. Craig,
Cour d'appel de la Colombie-Britannique

M. le juge Charles L. Dubin,
Cour d'appel de l'Ontario

M. le juge Jean B. Falardeau,
Cour des sessions de la paix du Québec

M. le juge Bernard Grenier,
Cour des sessions de la paix du Québec

M. le juge Doane Hallett,
Cour suprême de la Nouvelle-Écosse, Division 1[re] instance

M. le juge Malachi C. Jones,
Cour suprême de la Nouvelle-Écosse, Division d'appel

M. le juge Fred Kaufman,
Cour d'appel du Québec

M. le juge Louis-Philippe Landry,
Cour supérieure du Québec

M. le juge Patrick J. LeSage,*
Cour de district de l'Ontario

M. le juge Angus L. Macdonald,
Cour suprême de la Nouvelle-Écosse, Division d'appel

M. le juge Jean-Pierre Plouffe,*
Cour provinciale du Québec

M. le juge Melvin L. Rothman,
Cour d'appel du Québec

M. le juge André Saint-Cyr,
Tribunal de la jeunesse du Québec

M. le juge Roger E. Salhany,*
Cour de district de l'Ontario

* Les titres et qualités des personnes dont le nom est marqué d'un astérisque ont changé depuis la rédaction du présent rapport.

M. le juge William A. Stevenson,*
Cour d'appel de l'Alberta

M. le juge Calvin F. Tallis,
Cour d'appel de la Saskatchewan

M. le juge André Trotier,
Cour supérieure du Québec

Représentants des gouvernements provinciaux et fédéral

Colombie-Britannique
M^e^ Hal Yacowar

Alberta
M^e^ Michael Watson

Saskatchewan
M^e^ Carol Snell

Manitoba
M^e^ John Guy, c.r.

Ontario
M^e^ Denise Bellamy
M^e^ Jeff Casey
M^e^ Howard Morton, c.r.

Québec
M^e^ Rémi Bouchard*
M^e^ Jean-François Dionne*
M^e^ Daniel Grégoire

Nouveau-Brunswick
M^e^ Eugene Westhaver, c.r.

Nouvelle-Écosse
M^e^ Gordon S. Gale, c.r.

Île-du-Prince-Édouard
M^e^ Richard Hubley

Terre-Neuve
M^e^ Colin Flynn

Ministère fédéral de la Justice
M^e^ Richard Mosley
M^e^ Daniel Préfontaine, c.r.
M^e^ Ed A. Tollefson, c.r.

* Les titres et qualités des personnes dont le nom est marqué d'un astérisque ont changé depuis la rédaction du présent rapport.

Association du Barreau canadien

M^e G. Greg Brodsky, c.r.,
Winnipeg

M^e Serge Ménard,
Bâtonnier du Québec

M^e Richard C. Peck, c.r.,
Vancouver

M^e Joel E. Pink, c.r.,
Halifax

M^e Marc Rosenberg,
Toronto

M^e Donald J. Sorochan,
Vancouver

Association canadienne des chefs de police

M. Greg Cohoon,
Police de Moncton

M. Thomas G. Flanagan, chef adjoint,*
Police d'Ottawa

M. Robert E. Hamilton, chef,*
Police régionale d'Hamilton-Wentworth

M^e Guy Lafrance,
Communauté urbaine de Montréal

M. John Lindsay, sergent d'État-major,*
Police municipale d'Edmonton

M. Collin Millar, chef,
Police régionale d'Hamilton-Wentworth

M. Herbert Stephen, chef,
Police de Winnipeg

Association canadienne des professeurs de droit

M. le professeur Bruce Archibald,
Dalhousie University

M. le professeur Pierre Béliveau,
Université de Montréal

M^me la professeure Christine Boyle,
Dalhousie University

M. le professeur Eric Colvin,
University of Saskatchewan

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* Les titres et qualités des personnes dont le nom est marqué d'un astérisque ont changé depuis la rédaction du présent rapport.

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M. le juge Edward J. Houston,
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M. le juge Gérard V. La Forest
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(à la retraite)