

**FEDERAL LAW RELATING
TO
SEARCH AND SEIZURE**

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The purpose of this paper is to present a brief outline of the law relating to the powers of search and seizure in Canada. The power to search is derived from the common law, and the common law power is preserved by section 7 of the *Criminal Code*.¹ There are basically two documents involved in this area of the law; namely, the search warrant and the writ of assistance. The latter document is essentially a blanket search warrant. The law vests considerable power in peace officers with respect to search and seizure, a fact which has led many concerned laymen and practitioners alike to seek reform in the law.²

I. Search Warrants

Sections 443 to 446 of the *Criminal Code* pertain to search warrants. Section 443 sets out the procedure for the issuance of these documents. A justice³ may issue a search warrant to a named person or police officer upon receipt of information under oath which satisfies the justice that there is reasonable ground to believe that there is, in a building, receptacle or place:

1. anything upon or in respect of which any offence against the *Criminal Code* has been or is suspected to have been committed; or
2. anything that will serve as evidence regarding a Code offence; or
3. anything to be used to commit an offence against the person for which a person may be arrested without a warrant.

Section 444 provides that the search warrant must be executed by day which means between 6:00 a.m. and 9:00 p.m., according to the Code's definition of "day". Section 445 states that things not specified in the search warrant may be seized if there is a reasonable belief that those things had been obtained by, or were used in committing, an offence. Section 446 sets out the rules for detention and disposition of articles seized.

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1 R.S.C. 1970, c. C-34.

2 At its annual convention held in Halifax in 1970, the Canadian Bar Association passed a resolution calling for the elimination of the writ of assistance from the four federal Acts which presently allow its issuance and use.

3 S. 2 of the *Criminal Code* defines "justice" as a justice of the peace or a magistrate.

There are three other federal Acts providing for search warrants. Section 134 of the *Customs Act*⁴ is a general section setting out the power of an officer defined by the Act to search a particular building, yard, or other place and seize things subject to customs duties. As under the *Criminal Code*, this must be done during the daytime. Section 133 of the Act is a more specialized section allowing a Customs officer to search a vessel or vehicle if prohibited articles are found therein. Unlike section 134, the officer using section 133 needs no search warrant. Under section 143, a Customs officer may search any person found aboard or upon the vessel or vehicle he is searching.

Section 70 of the *Excise Act*⁵ deals primarily with the power of Excise officers to enter and inspect buildings in which excisable goods are being stored or manufactured. Under section 70(d), an officer may break open or remove any part of the interior of a building to find a concealed still without a search warrant. However, the section is limited only to inspection and not to deprivation of property. Section 71 of the Act allows an Excise officer to break into a building subject to excise if he is refused admittance. He must be accompanied by a peace officer if this occurs at night. Section 72 of the Act stipulates that a search warrant is needed by an officer wishing to search a residence and that the search must be conducted between sunrise and sunset.

Section 10(2) of the *Narcotic Control Act*⁶ states that a search warrant may only be given to an R.C.M.P. officer when he wishes to search a dwelling house suspected to contain narcotics. In all other cases the officer is protected by a writ of assistance, which will be examined in detail later. However, by the wording of section 10(1) of the *Narcotic Control Act*, the officer's writ of assistance could also serve as a search warrant in regards to dwelling houses.

The Canadian courts regard the issuing of a search warrant, not as a ministerial or legal formality, but rather as a function of the judiciary which must be exercised with caution. The headnote of *Willinsky v. Anderson*⁷ reads, in part, as follows:

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

5 R.S.C. 1970, c. E-12.

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

7 (1909), 19 O.L.R. 437.

"... issuing a search warrant is not a mere ministerial but a judicial act of the justice, and the warrant in this case was illegally obtained and might have been quashed by reason of the fact that the information did not disclose facts and circumstances showing the causes of suspicion."

Also the headnote of *Rex v. Solloway and Mills*⁸ states:

"A search warrant based upon an information which is not sufficient to satisfy a reasonable man that there is reasonable ground to believe the existence of what is alleged, will be quashed."

There are a set of basic requirements that must be satisfied before a justice will issue a warrant. A *prima facie* case must be established which would satisfy a reasonable man that a warrant is needed under the Act which authorizes its issuance. The search warrant itself must state the offence either specifically or by strong inference. General warrants are considered invalid. That is, a warrant must not be vague in a matter which involves an individual's property rights. The warrant must give a specific address to be searched. Search warrants for documents pose a difficulty for the police since they must name the specific documents to be searched.

II. Writs of Assistance

Contrasted with the search warrant, the writ of assistance has few restrictions. Its marked lack of safeguards makes the writ of assistance a rather anomalous instrument to be found in a legal system such as Canada's.

The Canadian criminal law provides no speedy remedy to a party injured by the abusive use of the writ of assistance. He must rely on the slow and expensive procedure of suing in tort for trespass. This is in contrast with the rigid restrictions of a search warrant's issuance which provide protection to the citizen against its abuse.

The writ of assistance can be issued and used under the authority of various Acts. A.M. Butler⁹ suggests that the powers of the writ of assistance could be consolidated under one Act to reduce the confusion that presently exists in these areas. He also states that the methods by which they are presently issued perpetuates the myth that search and seizure are entirely under judicial control in Canada. Under section 64(2) of Bill C-172, the Federal Court took over from the Exchequer Court the function of issuing the writs of assistance.¹⁰ Mr. Butler is of the opinion

8 [1930] 3 D.L.R. 770.

9 26 U. of T. Fac. Law Rev. 77, *The Extraordinary Powers of Search and Seizure: Writs of Assistance*.

10 Bill C-172 was passed by the House of Commons on October 29, 1970.

that the Exchequer Court (now the Federal Court) acts only as a rubber stamp and that the issuing of writs of assistance is essentially a ministerial matter.

The writ of assistance is a blanket search warrant. It allows the holder to search for particular objects anywhere and at any time. The four federal statutes which permit their issuance and govern their use are the *Customs Act*, *Excise Act*, *Narcotic Control Act*, and the *Food and Drugs Act*.¹¹

The issuance procedure for the *Customs Act*¹² and the *Excise Act*¹³ are the same. The Attorney-General of Canada applies to the Federal Court of Canada and writs are issued to the proper officers named by the Act, including R.C.M.P. officers. The proper official to make application to the Federal Court of Canada under the *Narcotic Control*¹⁴ and the *Food and Drugs Act*¹⁵ is the Minister of National Health and Welfare.

Do these four Acts provide for any judicial discretion to be exercised in the issuance of writs of assistance? The answer, with the exception of the *Customs Act*, is no. The *Customs Act* states that the Federal Court "may grant" writs when they are applied for, while the other three Acts say that the Court "shall grant" them. Except for the *Excise Act*, reasonable grounds must exist before the writ may be issued. It is interesting to note, however, that since 1965, these Acts do not state what constitutes reasonable grounds.

An unused writ lasts for the lifetime of the holder, or until such time as he is no longer an officer.

The excessive use of the writ was one of the grievances in the Thirteen Colonies that helped spark the American Revolution. The Fourth Amendment of the United States Constitution prohibits the writ of assistance in that country.

By section 139 of the *Customs Act*, an officer may search and seize prohibited objects at any time by a writ of assistance and may break open any doors and any chests or other packages if he has reasonable grounds to believe the Act is being contravened.

Under section 76(1) of the *Excise Act*, similar powers are vested in the proper officers. However, an Excise officer must

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

12 S. 145.

13 S. 78.

14 S. 10(3)

15 S. 37(3)

be accompanied by a peace officer if a search is conducted in the night. Section 79 of the Act allows a superior officer or collector to delegate the power to use the writ to another officer.

Section 10(1) of the *Narcotic Control Act* allows an R.C.M.P. officer to use his writ to search any place, including a dwelling house and any person therein, for narcotics without having to obtain a search warrant. Section 10(4) of the Act provides "breaking-open" powers similar to those in the *Customs Act*.

Section 37(3) of the *Food and Drugs Act* allows an R.C.M.P. officer to use his writ of assistance to search for controlled drugs in a dwelling house at any time.

Local police and provincial police are not issued writs of assistance but this difficulty is easily circumvented when they wish to make a search for narcotics and drugs, but do not wish to go through the difficulty of obtaining a search warrant, by having the nearest R.C.M.P. officer with a writ of assistance accompany them on the "raid".

Perhaps the reasons for the small amount of Canadian litigation on writs of assistance is that there is really no judicial discretion for their issuance and that the statutes requiring reasonable grounds to exist before their use do not define these grounds.

There have, however, been a few cases concerning writs of assistance. One such case was that of *R. V. Plummer*¹⁶, where the Court stated that the provision allowing use of the writs "at any time" was not to be construed literally. In that case, the Manitoba Court of Appeal said that 2 a.m. on Sunday was not a fit time to conduct a search by use of a writ of assistance.

Furthermore, the Alberta Court of Appeal in *Ho Quong et al. v. Cuddy*¹⁷ said that an officer must first ask for peaceable entry before he may employ force to gain entry to a dwelling under his writ of assistance. The officer must also show his writ or search warrant if so requested by the occupant of the dwelling, automobile or other object being searched.¹⁸ If force does become necessary, then only so much force as is required to gain entry may be used.¹⁹

16 [1929] 3 W.W.R. 518 (Man.C.A.)

17 (1914), 7 W.W.R. 797 (Alta. C.A.)

18 *Ibid.*, See also: *Todd v. Cabe*, [1876] 1 Ex. R. 352.

19 *Ho Quong et al. v. Cuddy*, *supra*, n. 17.

As can be seen, therefore, from the above summary, the state of the law in Canada with respect to search and seizure is most unsatisfactory. The safeguards build into the system of issuing search warrants are destroyed and rendered meaningless by the blanket powers conferred upon peace officers with respect to the use of writs of assistance. The fact that illegally obtained evidence is admissible in our courts of law only underscores the dangers which are inherent in such writs and encourages peace officers to use them on occasions when their use was not intended by the legislation under which they were given to the peace officer. The fact that the individual may have a civil remedy against the peace officer is small comfort to such a person. Certainly some expanded power must be given to the police to act when the interests and the safety of the public so dictate, but to confer such authority upon the police, when the overriding interest of the public is not threatened, is to invite abuse of those powers and to destroy respect for the system of justice.