CASE COMMENTS AND NOTES

WRITS OF ASSISTANCE IN CANADA

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement.
>
> The Earl of Chatham[1]

In the popular Canadian mythology of Criminal Law, created largely by the old "man's home is his castle" concept and by American television, is the belief that no search can be made without a warrant. Nothing, of course, could be further from the actual state of affairs. Absolutely warrantless searches and seizures are widely permitted by Canadian law, and even in many situations where a search warrant would normally be needed, it has been largely replaced by a powerful tool of law enforcement known as the writ of assistance.

Public ignorance in the matter is odd considering the far-reaching intrusions made by these writs into the privacy of citizens; but considering the usual predilictions of lawyers, it is even more surprising that there is such a dearth of knowledge in the profession. There is only a handful of articles in the learned journals[2] and the standard criminal law texts and casebooks only mention the writ of assistance in passing—if they discuss it at all.

The writ of assistance is, to all intents and purposes, a blanket warrant. It authorizes the holder to search for particular things (eg. controlled drugs or smuggled goods) anywhere and at any time. Four federal statutes authorize or require the issuance of writs of assistance: the Customs Act[3], the Excise Act[4], the Narcotic Control Act[5] and the Food and Drugs Act[6].

Under the Customs Act and the Excise Act, application to the Exchequer Court of Canada[7] is made by the Attorney-General of Canada and the writs are issued to "officers", which include persons employed in the administration of those Acts and include members of the Royal Canadian Mounted Police. Under the Narcotic Control Act and the Food and Drugs Act, the writ is granted upon application by the Minister of National Health and Welfare to the Exchequer Court of Canada. All these writs are issued to members of the R.C.M.P.

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[1] Quoted in Lord Denning, *Freedom Under the Law* (1949) 103.

[2] Only three articles exist to my knowledge: Parker, *The Extraordinary Power to Search and Seize and the Writ of Assistance.* (1963) U.B.C.L. Rev. 688; Trasewick, *Search Warrants and Writs of Assistance,* (1963) 5 Crim. L.Q. 341; Skinner, *Writs of Assistance,* (1963) 21 U.T. Faculty L. Rev. 26. I acknowledge my debt to these authors.

[3] R.S.C. 1952, c. 58.

[4] R.S.C. 1952, c. 99.

[5] S.C. 1960-61, c. 35.

[6] S.C. 1952-53 c. 38 as amended by S.C. 1960-61, c. 37.

[7] Bill C-192, The Federal Court Act, not yet proclaimed as of printing, abolishes the Exchequer Court and replaces it with a new court styled "The Federal Court of Canada".
The Customs Act, Excise Act, Narcotic Control Act and Food and Drugs Act are amended by substituting the name of the new court for that of the old. This change will in no material way affect the application for, and use of, writs of assistance.

No discretion in the matter of issuing these writs exists under the Excise Act, the Narcotic Control Act or the Food and Drugs Act. The wording of the acts is "shall issue" or "shall grant", a writ of assistance. No meaningful descretion exists under the Customs Act which provides that the judge "may grant a writ of assistance". The only function to be performed by the judge is to satisfy himself that the person named in the application is an "officer" within the meaning of the Act.[8]

Once issued, the writ is good for the life of the holder unless he sooner ceases to exercise duties under the act which authorized the granting of the writ. The powers thus conferred are extremely wide. It would perhaps be useful at this point to set out a facsimile of a typical writ of assistance.[9]

IN THE EXCHEQUER COURT OF CANADA

ELIZABETH THE SECOND by the grace of God, of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

To [John Smith]
and to all others whom these presents may concern:

GREETING:

You are hereby authorized and empowered, pursuant to subsection (3) of section 10 of the Narcotics Control Act, aided and assisted by such person as you may require, at any time, to enter any dwelling house and search for narcotics.

Witness the President of our Exchequer Court of Canada at Ottawa, this.....day of.....in the year of our Lord one thousand nine hundred and.....and in the.....year of our Reign.

.....
Registrar

Issued pursuant to an order made by the Honorable Mr. Justice.....
of the Exchequer Court of Canada on the.....day of....A.D. 19...

.....
Registrar

It can be readily seen that the power to search and seize is limited only by the classes of articles for which the officer may search. Three of the four acts authorizing the issue of writs of assistance also require that "reasonable grounds" exist for making the search; but, curiously, this requirement does not appear on the writ itself.[10]

It is important to remember that even these "safeguards" may be illusory without good faith on the part of officers exercising search and seizure power under a writ of assistance, because in Canada the "fruits" of illegal searches are freely admissible in evidence so long as they are relevant to the charge.[11] Because of this, nothing really prevents an officer from making an illegal search, save his own scruples or machinery set up by the police themselves.

HISTORY OF THE WRIT OF ASSISTANCE

The writ of assistance grew out of the procedures of the Court of Chancery. Where ordinary equitable remedies for the recovery of

[8] *In re Writs of Assistance* [1965] 2 Ex. Ct. R.646.

[9] This facsimilie was constructed by amending the previous form in light of the decision *In re Writs of Assistance, id.*

[10] But it used to before 1965.

[11] *Kuruma* v. *The Queen* [1955] A.C. 197; *A.G. for Quebec* v. Begin [1955] S.C.R. 593. Contrast the American position, see *Mapp* v. *Ohio* 367 U.S. 643 (1961).

land or chattels failed, a writ of assistance might be issued which entitled the Sheriff to forcibly enter, if needs be, and seize the land or goods. In civil procedure, the writ of assistance has now been replaced by the writ of possession, but it is still used occasionally for the "recovery and preservation" of chattels.[12]

Very early on, during the time of Charles II, the writ of assistance was dusted off and transformed into a device for making warrantless searches in revenue cases, in "an act for preventing frauds and regulating abuses in His Majesty's Customs" 13 & 14 Ch. II. c.11, s.5 (2), (1662):

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

The use of these writs became very common in the attempts by the Crown to stamp out smuggling both in Britain and in the colonies—which explains how the writ of assistance arrived in Canada.

"Over-zealous" use of writs of assistance by Crown officials in the Thirteen Colonies is credited by historians with helping to foment the American Revolution. In *Paxton's Case* in 1761, James Otis made his famous plea that writs of assistance were[13]

> the worst instrument of arbitrary power, the most destructive of English liberty, and to the fundamental principles of law that was ever found in an English law book [since they placed] the liberty of every man in the hands of every petty officer.

His plea was not successful but it became one of the battle-cries of the American Revolution. Needless to say, the American Constitution prohibits writs of assistance in the Fourth Amendment.

In contrast, Canada seems to have embraced the writ and it has here far outdistanced its English parent in the scope of its application. English acts passed subsequent to the act of 1662 specifically authorized colonial courts to issue writs of assistance. The writ is first found in the statute law of what is now Canada in a New Brunswick statute of 1846[14] and a *Province* of Canada statute of 1847[15]. Both of these merely import the provisions of then current English provisions in the "act to regulate the trade of British possessions abroad" 8 & 9 Vic. c. 93 s. LXX, which traces (though not without difficulty) back to the statute 13 & 14 Ch.II c.11. A Province of Canada act of 1865[16] extended the writ of assistance to excise. This was also done in England.[17]

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[12] See *Wyman* v. *Knight* [1888] 39 Ch. D. 165, *In re Klingelhoefer's Will Trusts* reported in *The Times* March 19, 1955. Lord Atkin's *Encyclopaedia of Forms and Precedents* still includes the writ of assistance, Vol. 9 at 200.

[13] 1 Quincy (Mass.) 51. An account of the case appears in Bowen, *John Adams and the American Revolution*, c. 13 (1950). See later judicial references to the case in *Boyd* v. *U.S.* 116 U.S. 616(1885) and *Stanford* v. *Texas* 379 U.S. 476 (1965).

[14] 9 Vic., c. 31.

[15] 10 & 11 Vic., c. 31.

[16] 27 & 28 Vic., c. 3.

[17] Customs and Excise Act. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, s. 296(1).

Up to this point, the writs of assistance were always issued to customs and excise officers and provided (a) that searches could only be carried out during the day-time, (b) the officer acting under the writ had to be accompanied by a peace officer, and (c) the writ only remained in force during the lifetime of the sovereign—or later, until twelve months after the demise of the Crown.[18]

It was after Confederation that the form and scope of the writ evolved into its present uniquely Canadian form. The "daylight hours" requirement has been dropped as has the requirement that writ-holders be accompanied by a peace officer—indeed writs of assistance in Canada are issued, as often as not, to policemen. More seriously, the use of writs of assistance has been extended into a whole new field, i.e. the control of traffic in illicit drugs.

Let us next examine the Canadian statutes which authorize or require the issuance of writs of assistance.

CUSTOMS ACT

The Customs Act may be *the* classic example of obscure draftsmanship. Writs of assistance are issued under s. 143 to customs "officers" which means persons "employed in the administration or enforcement of the Act and includes any member of the R.C.M.P." s.2 (1) (n). Section 137 provides that, acting under the authority of a writ of assistance, such officer:

> ...or any other person employed for that purpose with the concurrence of the Governor General in Council expressed either by special order or appointment or by general regulation, may enter, at any time in the day or night, into any building or other place...and may search for and seize and secure any goods which he has reasonable grounds to believe are liable to forfeiture under this Act, and in case of necessity may break open any doors and any chests or other packages for that purpose.

This seems fairly straight forward (except that one might question whether or not "building" includes a dwelling house[19]) but the Act also provides in s. 130 that:

> (1) Every officer and person who is employed under the authority of any Act relating to the collection of the revenue, or under the direction of any officer, shall be deemed and taken to be duly employed for the prevention of smuggling and for the enforcement of this Act in every respect, whether such officer or person is or is not the holder of a writ of assistance.
> (2) In every suit or information, the averment that such person was so duly employed is *prima facie* proof thereof.

Thus, in effect, *every* Customs officer, which (reading ss. 2(1) (n) and 130 together) includes all members of the R.C.M.P., is the holder of a writ of assistance. Moreover in view of certain other provisions of the Act, namely ss. 131 to 134, the only occasion in which a writ of assistance would be needed is in a search of buildings after dark. Section 132 creates a probably unique search and seizure procedure:

> (1) Any officer, having first made oath before a justice of the peace that he has reasonable cause to suspect that goods liable to forfeiture are in any particular building ...or other place...may with such assistance as is necessary, enter therein at any time between sunrise and sunset; but if the foors are fastened, admission shall first be demanded, and the purpose for which entry is required declared, when if admission is not given, the officer may forcibly enter.

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[18] 10 & 11 Vic., c. 31.

[19] It probably does. See *R.* v. *Kostachuk* [1930] 2 W.W.R. 464.

(2) After entry is made, the officer may search the premises and seize all goods that he has reasonable grounds to believe are subject to forfeiture.
(3) Such acts may be done by an officer without oath or the assistance of a justice of the peace, in places where no justice of the peace can be found within five miles at the time of search.

The officer must, therefore, appear before a Justice of the Peace but need not obtain a search warrant! Having regard to the authority to search "at any time in the day or night" conferred writ-holders under s. 137, and the provision of s. 130 which says that an officer does not need a writ, there is no real reason why he need go through even the rudimentary steps outlined in s. 132. The situation is, to say the least, unclear. To the best of my knowledge no case has ajudicated the question.

Under this Act the officer must have "reasonable grounds" for making the search. This may be the only safeguard the citizen has considering the over-abundance of search and seizure powers provided by the Act. Note that this requirement is new and was not included in the acts of colonial times.

EXCISE ACT

The provisions of the Excise Act are similar in many ways to those in the Customs Act except that Excise officers are not all given plenary search powers as in s. 130 of the Customs Act. Instead, the Act, provides (s. 79) that a writ of assistance issued to a "superior officer" may be "delegated" or loaned to any excise collector.[20] The ordinary search powers are quite wide in this Act as well (see sections 70 and 71). For those cases where these powers are insufficient, issue of writs of assistance is authorized by s. 78. The powers under such a writ are spelled out in s. 76:

(1) Under authority of a writ of assistance, any officer or any person employed for that purpose with the concurrence of the Governor in Council expressed either by special order or appointment, or by general regulation, may enter in the night time, if accompanied by a peace officer, and in the day time without being so accompanied, any building or other place, and may search for, seize and secure any goods or things liable to forfeiture under this Act, and in the case of necessity, may break open any entrance or other doors, walls, floors, windows, or gates and any chests or other packages for that purpose.
(2) Any officer having a writ of assistance, may arrest and detain any person whom he detects in the commission of any offence declared by this Act to be an indictable offence.

Note the addition of an arrest power, the deletion of the "reasonable grounds" requirement, and the curious clause which provides that the writ-holder must be accompanied by a peace officer when searching at night.

NARCOTIC CONTROL ACT

Section 10(3) of the Narcotic Control Act requires the issuance of writs of assistance:

A judge of the Exchequer Court of Canada shall, upon application by the Minister, issue a Writ of Assistance authorizing and empowering the person named therein, aided and assisted by such person as the person named therein may require, at any time, to enter any dwelling house and search for narcotics.

At least the function of writs of assistance is clearer under this Act than under the Customs Act and the Excise Act. Under the Nar-

[20] Delegation must be express. See *R. ex rel Kelly* v. *Hobinsky* [1929] 1 W.W.R. 313.

cotics Control Act, an officer may without warrant or writ search any premises which are not a dwelling house, and any person in such premises, and seize any narcotics (as defined in the Act) he finds. The office of the writ of assistance is therefore to enable searches of dwelling houses *and persons* found therein without obtaining a search warrant. This is made clear by the words of s. 10(1):

> A peace officer may at any time;
> (a) without a warrant enter and search any place other than a dwelling house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed:
> (b) search any person found in such place; and
> (c) seize and take away any narcotic found in such place, anything in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence.

Section 10(4) elaborates on the search power:

> For the purpose of exercising his authority under this section, a peace officer may, with such assistance as he deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

THE FOOD AND DRUGS ACT

The Food and Drugs Act closely resembles the Narcotic Control Act in its search and seizure provisions. Section 36 of this Act repeats (by substituting "controlled drug" for "narcotic" and making other minor changes) the provisions of s. 10 of the Narcotic Control Act. The application procedure is the same and the search powers (both with and without warrants or writs) are the same.

THE USE OF WRITS OF ASSISTANCE IN CANADA TODAY

I was unable, despite numerous enquiries, to discover exactly how many writs of assistance are in force in Canada today. I was however, able to obtain information relative to the use of writs of assistance by the Royal Canadian Mounted Police.[21]

As of August 13, 1970 members of the R.C.M.P. held a total of 1.360 writs of assistance. The breakdown was as follows:

Customs Act	452
Excise Act	452
Narcotic Control Act	228
Food and Drugs Act	228
TOTAL	1360

Note that the figures are for 1970. In 1962, it was disclosed that force members held 2,047 writs of assistance[22]—remember that this is before the advent of the "drug culture", a development which, by the force's own admission, has caused an increase in the number of drug writs. The reason for the disparity in the figures is unexplained.

A force member holding a Customs writ also holds an Excise writ

[21] The bulk of this information was obtained from correspondence between Mr. Philip Ketchum, Member of the Council, Alberta section of the Canadian Bar Association, and W.G. Pritchett, Supt. "K" Division of of the R.C.M.P.

[22] Disclosed by the then Minister of Justice in response to a question in Parliament. See the *Vancouver Sun*, March 8, 1962, p. 48.

and narcotics squad officers always hold both Narcotic Control and Food and Drugs writs.

Let us examine a bit more closely the use of writs of assistance by the R.C.M.P. in Alberta in 1969.

USE OF WRITS OF ASSISTANCE BY
"K" DIVISION (ALBERTA) R.C.M.P. 1969

WRITS IN FORCE (1970)

	PROVINCE	EDMONTON
Customs Act	8	2
Excise Act	8	2
Narcotic Control Act	17	7
Food and Drugs Act	17	7
TOTAL	50 (held by 25 officers)	18 (held by 9 officers)

TOTAL OFFICERS IN "K" DIVISION 1107

SEARCHES UNDER WRITS OF ASSISTANCE IN ALBERTA (1969)

Customs Act	84
Excise Act	30
Narcotic Control Act	139
Food and Drug Act	82
TOTAL	285

SEARCHES UNDER WRITS OF ASSISTANCE IN EDMONTON (1969)

Customs Act	9
Excise Act	13
Narcotic Control Act	80
Food and Drug Act	18
TOTAL	120

The small number of officers holding writs of assistance does not give a true indication of their use. It is important to remember that Excise writs may be susceptible to transfer or delegation. More importantly, the use of writs of assistance is not confined to operations by the R.C.M.P. Local and provincial police forces are not issued writs of assistance, but this handicap is got around by more or less permanently attaching R.C.M.P. officers, who hold writs, to the local police. The Mountie is then taken along on all raids so that his writ may be employed. I was told that this is why drug raids are often described in the press as "joint raids" by local police and the R.C.M.P. I was able to talk with an R.C.M.P. officer who "spends all his time at the City Police station". He was quite frank about his function,

describing himself as a "walking search warrant". His view of the writ of assistance was that it was a matter of convenience—the police were able to avoid the "bother" of applying for a search warrant.

Officially, the R.C.M.P. view the writ of assistance as an essential tool in their arsenal. They state that because of "distance and unavailability of officers of the court", time wasted in obtaining a search warrant would allow the culprits to abscond. The force also claims to exercise "strict control" over those who possess writs. Only members having proven "ability, maturity and experience" are issued writs. In addition, they have established procedures for ensuring that the writs are not misused. Officers are required to have reasonable and probable grounds for making a search. Where no evidence is produced the officer is required to swear out an Affidavit stating his reasonable and probable grounds. The R.C.M.P. also state that the Affidavit is never sworn to by another member of the force and that in this way they "strive to apply a control outside the force, *identical to the control requirements in the Criminal Code*". [italics added] They also state that no disciplinary action had ever had to be taken against any officer for failure to establish the reasonable and probable grounds.[23]

Judicial review of writs of assistance is almost non-existent. For this reason, most of the writers on the subject have delved into the cases on search warrants, but because totally different considerations apply, most of the search warrant cases are totally irrelevant to the questions raised by the issue and use of writs of assistance.

There are a few cases dealing with the validity of writs of assistance *per se*. The writs were, needless to say, upheld as being authorized by the statute.[24] Most of the other cases deal with the question of delegation under the Excise Act. These have held that the delegation must be expressely made for each search lest the writ become a "mere piece of office equipment."[25]

The dearth of cases is understandable if one remembers that there is no descretion in the issue of writs of assistance, and, even more importantly, that illegally obtained evidence is freely admissible in Canada. Thus it would not avail an accused of anything to prove that the search and seizure, which produced the illicit goods or drugs, was illegal.

Where the issue of legality would have a bearing, and where some of the search warrant and even warrantless search cases could have some applicability, is in the case of a civil action against the officers making a search. Assault or trespass actions may lie against peace officers making searches if the search is unlawful.[26]

Similar standards are to be applied to the conduct of the officers making a search, whether the search is under a warrant, writ or otherwise.[27] First, there is some authority for saying that the "at any time" provision is not to be taken too literally. Thus where a constable was authorized to search for liquor "at any time", 2 a.m. on a Sunday

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[23] The policy outline was contained in the correspondence between Mr. Ketchum and Supt. Pritchett, *supra*, n. 21.

[24] See *R.* v. *Kostachuk* [1930] 2 W.W.R. 464.

[25] *R. ex rel Kelly* v. *Hobinsky* [1929] 1 W.W.R. 313 at 319 per Simpson C.C.J.

[26] *Re Yoner* (1964) 7 C.R.N.S. 239.

[27] *White* v. *Beckham* (1893) 26 N.S.R. 50.

was not the proper time to make a search.[28] However, a warrant or other authorization is not bad on its face because it specifies "at any time".[29]

Next, if the place to be searched is a dwelling house, the peace officers must "demand entrance or signify the cause of their coming" before proceeding to enter forcibly.[30] In addition the officers must have their warrant or writ with them and be prepared to show it on demand.[31]

In making entry and searching, peace officers are protected only in so far as they use no more force than is necessary.[32]

These are considerations to be followed in the actual making of the search. The difficult question is in deciding whether or not the search was valid *ab initio.* Did the police have any right to begin searching at all? In the case of search warrants, the question is resolved by requiring officers to have reasonable and probable grounds for making the search and by requiring them to swear to their belief before a magistrate.[33] In the case of writs of assistance, the line between legal and illegal is not nearly so clear. There is a note of an unreported case, *R.* v. *Yarema,* a Manitoba case from November 1924, in the report of *R. ex rel Kelly* v. *Hobinsky.*[34] In *Yarema,* a police constable, acting under a writ of assistance, entered the accused's premises. Yarema resisted the intrusion and was charged with assaulting a police officer. He was acquitted because, no goods being found, the entrance was unlawful and Yarema was justified in taking steps to prevent the trespass.

In *Fleming* v. *Spracklin*[35] a *warrantless* search was carried out by an officer under the Ontario Temperance Act,[36] which provided for searches analogous to those authorized by writs of assistance. Searches could be made where the officer "believes that liquor intended for sale... is contained in any vehicle on a public highway or elsewhere." The zealous officer, who had conducted a search of all the boats along a waterfront, admitted that he did not "believe that liquor intended for sale" was aboard a certain vessel. He was sued in trespass by the owner of the boat. The action succeeded because the Act did not include boats in "vehicles upon a public highway or elsewhere", but also because the defendant had no lawful authority for boarding and searching.

It may be, therefore, that a search under a writ of assistance would be held unlawful, and render the officers liable as tort feasors, where the officers had no "reasonable belief" that controlled drugs, narcotics or smuggled goods were to be found. This "reasonable belief" test is stronger than the "belief" test in *Fleming's Case* so that *Fleming* should be applicable to the use of drug writs and customs writs.

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[28] *Id.*

[29] *R.* v. *Plummer* [1929] 3 W.W.R. 518.

[30] *Ho Quong et al.* v. *Cuddy* (1914) 7 W.W.R. 797, *Wah Kie* v. *Cuddy (No. 2)* (1914) 20 D.L.R. 357, *Lannock* v. *Browne* (1819) 2 B. & Ald. 592, *R ex rel Kelly* v. *Hobinsky, supra.*

[31] *Todd* v. *Cabe* [1876] 1 Ex. D. 352, *Ho Quong* v. *Cuddy, supra, Wah Kie* v. *Cuddy (No. 2), supra.*

[32] *Penton* v. *Browne* 1 Keb. 698, *Ho Quong* v. *Cuddy, supra, Wah Kie* v. *Cuddy (No. 2), supra.*

[33] Criminal Code ss. 429-432.

[34] [1929] 1 W.W.R. 313.

[35] (1921) 50 O.L.R. 289.

[36] 6 Geo. 5, c. 30, s. 70(2).

It would not, however, apply to the Excise Act because Excise officers do not even require a "belief" (see ss. 76 and 78). Under the Customs Act, of course, officers may not even require a writ but they would probably be held to at least the same minimal standards which apply to holders of writs of assistance.

THE FUTURE OF THE WRIT OF ASSISTANCE

From time to time opposition has been raised to the use of writs of assistance. Civil liberties associations universally condemn them. G.E. Parker in his article on "Writs of Assistance" in the *U.B.C. Law Review*[37] has suggested that writs of assistance should be treated as cautiously as search warrants which is, to my mind, only a roundabout way of saying that they should be abolished. For his part, E.W. Trasewick, writing in the *Criminal Law Quarterly*[38] has suggested the statutes requiring the issue of writs should be made clearer—specifying how, where and why writs of assistance are to be issued. J.M. Skinner, in the Faculty of Law Review[39], advocates abolishing the writ of assistance, and also pleads for adoption of the American "exclusionary rule" in regard to illegally obtained evidence—which strikes me as a somewhat vain hope. Most recently, the Canadian Bar Association, at its 1970 convention in Halifax, passed the following resolution:[40]

> WHEREAS certain Statutes of Canada namely, the Narcotics Control Act, the Customs Act, the Excise Act and the Food and Drug [sic] Act, contain provisions for Writs of Assistance and general search warrants whereby peace officers can be authorized to conduct general searches of persons or places (including dwelling places) during day or night and
> WHEREAS such provisions place unreasonable and unnecessary power in the hands of any holder of such Writ at the expense of individual liberty and privacy
> THEREFORE BE IT RESOLVED that the Canadian Bar Association recommends that the said statutes be amended be deleting therefrom any provision which gives peace officers powers of entry, search and seizure in dwelling places beyond the powers presently contained in the Criminal Code.

On the other hand, both the R.C.M.P. and the Ouimet Committee feel that the areas in which writs of assistance are granted involve ". . . matters of vital public interest, namely the protection of the revenue and the suppression of the traffic in narcotic drugs..."[41] and that therefore, they ought to be maintained.

What, if anything, should be done in the matter of writs of assistance? At the very least, the statutory provisions providing for searches, and for the use of these writs, should be clarified. These statutes, especially the Customs Act and the Excise Act, are so widely drawn and loosely worded, (if not down right incomprehensible) that in certain cases it is difficult to say what powers exist, who may use them, and in what circumstances they may be exercised. Surely legislation which provides such a sweeping power of search and seizure should state clearly and unambiguously exactly what powers are conferred. The present set-up allows little, if any, recourse in the event of capricious or vexatious searches.

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[37] Parker, *supra*, n. 2.

[38] Trasewick, *supra*, n. 2.

[39] Skinner, *supra*, n. 2.

[40] *Canadian Bar Bulletin* Sept. 1970.

[41] *Report of the Canadian Committee on Corrections* (1969) at 67.

Even if changes of this sort were made, we might well ask whether it would not be better to eliminate writs of assistance entirely. In the area of searches, as in many others, a balance must be struck between individual liberty on the one hand and the security of society on the other. In this case, the scales are weighted too heavily toward the latter. We should not forget that other states have contrived to get along without writs of assistance[42] . One of the most cherished principles of democratic states has been the freedom of citizens from arbitrary searches, seizures and arrests. The integrity of the individual is supposedly the *raison d'etre* of the democratic system.

We should not be comforted too much by reassurances that the writ of assistance is not used "excessively". Whether it is or not, the potential for abuse in anything which places unrestricted powers in the hands of a man and then calls upon him to be the sole regulator of those powers, is simply too great. It may have been in the past that we could rely on the *bona fides* of the police; it may be that "charges of [police abuse of search and seizure powers] are of the rarest occurrence",[43] but there is no assurance that this will continue to be the case. There has been, in Canada, a tendency to be rather smug about the events in other parts of the world. We blithely assume that "it can't happen here". The fact is that it can. The recent events in Quebec and the imposition of the War Measures Act and its offspring have probably destroyed forever the old Canadian myth that we were somehow innately less violent, more reasoned and more tolerant than other men.

The use of writs of assistance is objectionable on another ground. As the use of drugs, especially among young people, continues to rise, (as it will) the use of writs of assistance by police will inexorably increase. This increased use of writs of assistance can only hasten the alarming decline in respect for the police and the rule of law. Stories of police mis-use of search powers are widely circulated among the young and have a profound effect. One such story is told by an accused presently awaiting trial[44] on a charge of cultivating cannabis. He has asserted in the press and before the Commission of Enquiry into the Non-Medical Use of Drugs that ten police officers, acting under a writ of assistance, burst into the house he occupied with several other people. The police were in plain clothes and refused all requests to identify themselves, produce a warrant or writ of assistance or explain the object of their search. They were joined by other officers and proceeded to ransack the house. Contents of drawers were spilled on the floor, all the clothes in the closets were thrown on the floor and the contents of several ashtrays emptied on them. Fixtures were broken and posters torn from the walls. The man has launched a suit against the officers involved.[45]

Such stories may be false. It may be that police power has not been

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[42] This is not to suggest that warrantless searches do not exist elsewhere. Of late the Americans, in particular, have become rather adept at circumventing their constitutional prohibition on arbitrary searches with "stop and frisk", "John Doe warrants", "no knock," etc.

[43] *R.* v. *McDonald* (1932) C.C.C. 56 at 63, per Harvey, C.J.A.

[44] The charge was withdrawn by the Crown on March 2, 1971—the date set for trial. No reasons for the withdrawal were given.

[45] From a brief presented to the "Committee of Enquiry into the Non-Medical Use of Drugs" by Mr. Allan Stein. See The Edmonton Journal Friday, Nov. 20., 1970, at 67.

abused. Or, it may be, as Lord Camden, L.C.J. observed so long ago in striking down the general warrant, that:[46]

> It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State... or such warrants could never have passed for lawful till this time.

We do not have in Canada, nor are we likely to get, an "exclusionary rule" i.e. a rule forbidding the production in evidence of the fruits of illegal searches.[47] This may or may not be a good thing, but in its absence surely the least we can do is insist on judicial review and control of the powers of search and seizure. Judicial authority should *always* be a condition precedent to the entry and search of people's homes.

—John Faulkner*

[46] *Entick* v. *Carrington* (1765) 2 Wils K.B. 275 at 292.

[47] See however, the *Report of the Canadian Committee on Corrections* at 74.

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PANACEA FOR A JUDGMENT

There is a growing tendency by Canadian jurists to flesh out their reasons for judgment by listing a long collection of cases.

Some recent examples can be seen in the following:[1]

(1) In *Barwick* v. *Targon*[2], Moorhouse, J. at the end of his judgment says this:[3]

> Amongst the cases I have considered are the following:...

Then he lists twenty-three cases.

He concludes his judgment with these words, after which he lists an additional seven cases:[4]

> The following Western cases have been considered:...

(2) In *Reid* v. *Wilson et al. and two other actions*[5], Lacourciere, J. in his reasons for judgment says:[6]

> I have been referred to and considered many authorities, and particularly the following:...

He then lists twenty-five cases and two torts textbooks (giving the page references in same).

(3) Riley, J. in *Anders et al.* v. *Sim*[7] uses the same technique. He says:[8]

[1] This is not an attempt to make an exhaustive compilation of such instances. No doubt there have been instances in the past. See, for example, *Goodman* v. *Wedlock* (1905) 6 O.W.R. 777 at 780 where Britton, J. at the conclusion of his reasons for judgment says, "I have considered the cases of..." and then lists six cases. However he does go on to say that he feels that his decision is within the principle of those cases.

[2] [1969] 1 O.R. 1.

[3] *Id.* at 6.

[4] *Id.*

[5] [1970] 2. O.R. 760.

[6] *Id.* at 767, 768.

[7] (1970) 11 D.L.R. (3d) 366.

[8] *Id.* at 370. In *Reliance Cordage Co. Ltd.* v. *Hetterly* (1969) 5 D.L.R. (3d) 297 at 311, Bence, C.J.Q.B. says: "Other cases to which I have been referred on this point are..." He then mentions thirty-one cases without any comment whatsoever about them.