XI. TELEWARRANTS

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Bill C-19[1] incorporates proposed amendments to a wide variety of areas of the criminal law, but the area of search and seizure has been the target of some of the most drastic remedial provisions. Specifically, the abolition of the highly controversial writs of assistance in subclause 255(2) and the introduction of a procedural framework to authorize the issuance of search warrants on the basis of information conveyed over the telephone or via other forms of telecommunication represent significant departures from existing practice.

Telewarrant provisions are found in two separate portions of the Bill. The general principles and procedures applicable to the issuance and execution of telewarrants are found in clause 104, which embodies a proposed extension to section 443, the general warrant provision of the Criminal Code.[2] Telewarrants to authorize the taking of blood samples have been introduced in clause 52 as part of a series of amendments to specific sections of the Criminal Code pertaining to alcohol-related driving offences. This paper will concentrate on the more general telewarrant provisions.

Telephonic search warrants, or telewarrants, have already been adopted in a number of jurisdictions. In Australia, legislation has been tendered authorizing the issuance of search warrants based upon testimony communicated by telephone in certain limited circumstances.[3]

The state of California began to use telewarrants in 1970 and, since that time, telephonic warrant procedures have been introduced in at least five other states.[4] In the federal sphere, the American Federal Rules of Criminal Procedure were amended in 1977 to establish a procedure for the issuance of search warrants based on oral testimony. Under the provisions of Rule 41(c)(2),[5] a warrant may be issued on the basis of an oral statement made by a person not in the physical presence of a federal magistrate. Generally speaking, four prerequisites must be met before

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* Law Reform Commission of Canada. This article does not necessarily reflect the Commission's views.

[1] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[2] R.S.C. 1970, c. C-34, s. 443.

[3] *See* Crimes (Domestic Violence) Amendment Act, 1982 (N.S.W.); Criminal Investigation Bill, 1981 (Cth.); Poisons (Amendment) Bill, 1981 (N.S.W.).

[4] Alaska, Arizona, Montana, New York and Washington. For background on the American experience, *see* Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 THE PROSECUTOR 385 (1974); Beecher, Comment, 21 U.C.L.A. L. REV. 691 (1973).

[5] FED. R. CRIM. P. 41(c)(2).

the warrant may be properly issued. First, the applicant must persuade the magistrate that, having regard to the circumstances, it is reasonable to request that the warrant be issued on the basis of oral testimony. Second, the applicant must state orally facts sufficient to satisfy the probable cause requirement for the issuance of the warrant. Third, the applicant must recite the contents of the warrant in order to satisfy the magistrate that the requirements of certainty and particularity are met. Fourth, the warrant must be returned before the magistrate after the search is made, as required by sub-rule (d),[6] and the transcript of the oral testimony tendered in support of the issuance of the warrant must be signed by the applicant in the presence of the magistrate.

The scheme proposed in Bill C-19 imposes substantially the same requirements on the applicant as do the American provisions. By ensuring compliance with these four criteria, the principles of judiciality and particularity which underlie traditional warrant procedures are preserved. The "judiciality" aspect requires that judicial control be exercised in determining whether there exist reasonable grounds to justify a search of a person's house or premises. The issuance of a search warrant is a judicial function; in carrying out this judicial function, the courts fulfil an important "watch dog" role over the exercise of search and seizure powers. In the context of telewarrants, although the application is presented by means other than by personal appearance before the magistrate, there is no reason to suppose that the procedure would not be subject to the same degree of judicial scrutiny as the traditional documentary procedure. Similarly, the telewarrant provisions maintain standards of particularity. All of the particulars that are required to be presented personally to the magistrate under the traditional procedure would be required to be recited to the issuer over the telephone. On balance "the telewarrant presents no substantial risk of diminution in the standards of judiciality and particularity which presently attach to the issuance of search warrants".[7]

The introduction of procedures to authorize the issuance of telewarrants represents a positive reaction to a growing body of opinion that, except in very limited, exigent circumstances and cases of informed consent, search and seizure powers should only be exercised pursuant to a judicial warrant issued before the event and upon particular information. This view was propounded by the Law Reform Commission of Canada in its report on *Writs of Assistance and Telewarrants*[8] and reiterated in its working paper on *Police Powers — Search and Seizure in Criminal Law Enforcement*.[9] In fact, Bill C-19 reflects the policies

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[6] FED. R. CRIM. P. 41(d).

[7] LAW REFORM COMMISSION OF CANADA, WRITS OF ASSISTANCE AND TELEWARRANTS, REPORT 19, at 82 (1983).

[8] *Id.*

[9] LAW REFORM COMMISSION OF CANADA, POLICE POWERS — SEARCH AND SEIZURE IN CRIMINAL LAW ENFORCEMENT, WORKING PAPER 30 (1984).

underlying the Law Reform Commission's recommendations and adopts, with a few significant changes, its overall telewarrant scheme.

A preference for a regime of judicially regulated powers of search and seizure has also been expressed by the Supreme Court of the United States:

> It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities.[10]

The telewarrant provisions of Bill C-19 acknowledge the difficulties faced by law enforcement authorities in gaining access to judicial officers and securing search warrants. Compounding the practical and administrative problems in obtaining warrants in ordinary circumstances are those instances where the circumstances are not sufficiently urgent to justify a warrantless search and no grounds exist for arrest, yet by leaving the scene to seek a traditional warrant, the investigating officer would risk losing items or information relevant to the prosecution of an offence. The rigidity which arises from the requirement that an application for a search warrant be presented personally before a magistrate often places the police in the difficult position of deciding whether to conduct an unlawful search or forego the search altogether. If, as a rule, judicially authorized search warrants are to be used in all but exceptional cases to effect searches and seizures, the warrant provision of the Criminal Code must be adapted and simplified by making it administratively easier to obtain warrants. It is precisely this role which the telewarrant procedures contained in Bill C-19 were intended to fulfil.

Under proposed section 443.1 of Bill C-19, where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a judge to make an application for a search warrant, the officer may submit an information on oath by telephone or other means of telecommunication to a provincial court judge. Viewed in context, the telewarrant provisions are not designed to accommodate law enforcement officers purely as a matter of convenience. Nor is the issuance of a warrant based on oral testimony to be limited to a narrow range of urgent circumstances. Rather, under the provisions of Bill C-19, the telewarrant procedure would be available in all cases where time constraints or the distances involved make it impossible or impractical for the applicant to appear personally before a judge.

In order to satisfy the requirements of this proposed section, the oral information submitted by the applicant must establish to the issuer's

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[10] Trupiano v. United States, 68 S. Ct. 1229, at 1232 (1948), quoted with approval in Chimel v. State of California, 89 S. Ct. 2034, at 2037 (1969).

satisfaction that the circumstances are such that a personal appearance would be impracticable and that, therefore, the constraints of traditional documentary warrant procedure may properly be dispensed with.[11] The information tendered by the applicant is to be recorded verbatim by the judge who, as soon as practicable, is to file the record or transcript with the clerk of the court in the territorial division in which the warrant is to be executed.[12] Presumably, the information may be recorded manually but in most cases it is contemplated that the record will be made by electronic means, then transcribed and certified by the issuer.

Proposed subsection 443.1(4) prescribes the contents of the information and, in effect, ensures that all of the same criteria are met as are required to support the issuance of a regular search warrant under section 443 of the Criminal Code. A statement of the indictable offence alleged, the place or premises to be searched, and a list of the items sought must be included along with a statement of the applicant's grounds for believing that the items sought will be found in the place proposed to be searched. The "reasonable grounds" test which must be satisfied and the degree of particularity required would be subjected to the same standards of scrutiny as apply to applications for search warrants by traditional means.

Proposed subsection 443.1(5) empowers a judge to issue a search warrant upon being satisfied that the requirements of subsection (4) have been met, that reasonable grounds exist for dispensing with a personally presented written information, and that reasonable grounds exist to support the issuance of the warrant. The formal requirements which must be complied with by the applicant and the issuing judge are set out in the next subsection. Basically, if the judge is satisfied that the warrant should be issued, he will complete and sign the original warrant and authorize the peace officer to record the appropriate details on a duplicate. The officer would then be free to carry out the search.

Proposed subsections 443.1(7) and 443.1(8) apply to the execution of the warrant. Basically, they require the officer executing a search to provide, as soon as practicable, a facsimile of the warrant to any person present and ostensibly in control of the searched premises and to affix such facsimile to a suitably prominent place in or on the premises.

Under proposed subsection 443.1(9), a peace officer to whom a warrant has been issued is required to file a written report with the clerk of the court as soon as practicable but, in any event, within a period not exceeding seven days from the date of issuance. This report is to include information about the time and date of execution, a statement of the items seized pursuant to the warrant, the location where they are being held and a similar statement regarding any items seized that were not mentioned in the warrant. Regarding the latter items, the officer is required to include

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[11] *See* para. 443.1(4)(a), as proposed in Bill C-19, cl. 104.

[12] Sub. 443.1(2), as proposed in Bill C-19, cl. 104.

in the report a statement of his grounds for believing that they had been obtained by, or used in, the commission of an offence. The provisions of subsection (9) incorporate two significant departures from existing practice. First, in contrast to existing subsection 443.1 of the Criminal Code, the officer is not required to physically bring the seized items before a judge. Rather, accountability to a judicial officer is preserved by the filing of a report specifying the details of the seizure and incorporating lists of seized items. Second, unlike conventional search warrants, telewarrants would be subject to a seven-day period during which time they must be executed and a report filed. This provision is reasonable considering that, if a warrant issued by telephone cannot be executed within this time frame, it is unlikely that the circumstances are such that it is impracticable for the officer to personally appear before the judge to apply for a conventional warrant. It makes little sense to issue a telewarrant based upon the urgency of the situation while, at the same time, allowing the officer to whom it was issued an unlimited time within which to conduct the search.

After the report is filed with the clerk, the clerk is required to bring it, along with the information on oath and the warrant, before a judge to be dealt with in the same manner as a regular returned warrant.[13]

An oral search warrant issued under the proposed scheme would not be subject to challenge by reason only that the particular circumstances did not make it reasonable to dispense with a written information tendered personally to the issuer.[14] The propriety of the judge's decision that, in the circumstances, a written affidavit could reasonably be dispensed with does not affect the fundamental question of whether there were reasonable grounds to issue the warrant.

Proposed subsection 443.1(12) reinforces the importance placed on the preservation and availability of the original warrant and information. The subsection provides, in effect, that the absence of either the original warrant or the record of the application for the warrant would, unless there was evidence to the contrary, be proof that the search and seizure were not authorized by warrant.

While the telewarrant provisions of Bill C-19 have not been hailed by law enforcement authorities as wholly satisfactory replacements for writs of assistance,[15] procedures to facilitate the issuance of search warrants on the basis of oral testimony communicated by telephone or other electronic means offer two distinct advantages over traditional warrant procedures. First, they abbreviate the procedure by eliminating travel time and the need to prepare a written application prior to contacting a judge. Second, a telewarrant can be obtained from any

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[13] Sub. 443.1(10), as proposed in Bill C-19, cl. 104.

[14] Sub. 443.1(11), as proposed in Bill C-19, cl. 104.

[15] Hall, *MacGuigan Plans End of Search Writs*, The Citizen, 19 Aug. 1983, at 10, col. 3, final ed.

location provided the applicant has access to a working telephone. This permits the officer to stay in or near the place to be searched and aids in safeguarding or preserving potential evidence.

More important, however, the telewarrant provisions of Bill C-19 would stand as a statutory acknowledgement of the widely accepted principle that, in all but the most exceptional circumstances, search and seizure powers should be exercised only pursuant to a judicially authorized warrant. By adapting search warrant procedures to keep pace with available telecommunications technology and by easing some of the administrative difficulties inherent in traditional warrant procedures, the telewarrant provisions of Bill C-19 will encourage the use of search warrants by making them more accessible.