Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

writs of assistance and telewarrants

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REPORT

ON

WRITS OF ASSISTANCE
AND
TELEWARRANTS

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The Honourable Mark MacGuigan, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this report, with our recommendations on the studies undertaken by the Commission on writs of assistance and search warrants issued by telephone or other means of telecommunication.

Yours respectfully,

Francis C. Muldoon, Q.C.
President

Réjean F. Paul, Q.C.
Vice-President

Louise Lemelin, Q.C.
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Alan D. Reid,
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Preface

The Commission has recently issued its Working Paper 30, entitled *Police Powers: Search and Seizure in Criminal Law Enforcement*. In that Working Paper the Commission proposed that the powers of search and seizure conferred for the investigation of offences against the *Criminal Code* and other federal statutes be subjected to a thorough-going consolidation, rationalization and reform.

This Report concerns only two of the approximately fifty recommendations which previously appeared in our Working Paper. The first is a recommendation that writs of assistance be forthwith abolished. The second is a related, but independent, recommendation which would permit search warrants to be obtained by telephone or other means of telecommunication in circumstances where a personal appearance before a justice would be impracticable.

The Commission will later be publishing the whole of its final recommendations on police powers of search and seizure in criminal-law enforcement. In the interim, however, the Commission believes that it can make a useful, and perhaps timely, contribution to law reform by commending to Parliament both of these recommendations for immediate implementation.

Their implementation would, in both cases, be relatively straightforward. To abolish writs of assistance, amendments would be required to the *Narcotic Control Act*, the *Food and Drugs Act*, the *Customs Act* and the *Excise Act*. To provide for applications to be made and search warrants to be issued by telephone or other means of telecommunication, amendments would be required to Part XIII of the *Criminal Code*.

Although our Report includes a legislative draft of the procedures proposed for obtaining a telewarrant, we do not, in this

Report tender a legislative draft of the amendments necessary to abolish writs of assistance. We have avoided that format, not because of its difficulties, but because it might obscure our larger purpose. Briefly, we intend to recommend, in a forthcoming Report to Parliament, that all police powers of search and seizure in criminal-law enforcement be organized within, and governed by, a comprehensive regime of standards and procedures. In the shorter term, however, we believe that few of our recommendations on police powers of search and seizure could be so easily implemented, and to such salutary effect, as the abolition of writs of assistance and the provision of procedures for the issuance of search warrants by telephone or other means of telecommunication.

PART ONE:

WRITS OF ASSISTANCE

1. Introduction

> And it shall be lawful to or for any Person or Persons, authorized by a 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.[1]

The *Act of Frauds* of 1662 brought with it a most confusing and controversial instrument of search and seizure — the writ of assistance.

The writ of assistance was a confusing instrument because it conferred upon a mere ministerial commission the trappings of a judicial search warrant. In essence, however, the 1662 writ of assistance was not a species of search warrant; nor, moreover, was it a species of prerogative writ, in the nature of prohibition or habeas corpus; nor, finally, was it a species of any then-known writ of assistance, such as those pertaining to the duties of sheriffs to assist in the recovery of debts or the levying of execution.[2] Rather, it was an ingenious adaptation of an obscure common-law doctrine — Coke's "secret in law" — "that upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act."[3]

Briefly put, the 1662 customs writ was intended as a formal confirmation of a ministerial commission[4] to exercise a statutory power of search and seizure, and for that purpose to commandeer whatever assistance was deemed necessary. But it was neither a judicial search warrant[5] nor a judicial writ of either the prerogative or discretionary variety.[6] Despite the fact that the customs writ carried the seal of the Court of Exchequer, its issuance was a matter of ministerial rather than judicial discretion.[7] Indeed, the presence of the Exchequer Court's seal signified nothing more than the fact of its

issuance, in the same manner that court seals were affixed to documents of process for commencement of lawsuits.[8]

The writ was to prove, moreover, a most controversial legal instrument. Resistance to the writ, and to the customs regime that it supported, was a vital part of the sequence of events that culminated in the American Revolution.[9] Such indeed was the intensity of American hostility to the writ of assistance that their constitution was ultimately to provide that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

What the writ represented, then as now, was an executive rather than judicial instrument for the enforcement of customs legislation. Writs of assistance were issued to those who enforced the customs, signifying their commission to exercise statutory powers of entry, search and seizure in relation to prohibited and uncustomed goods. Such contraband could thus be sought out by writ-holding customs agents, unimpeded by prior judicial restraints upon their discretion.

Writs of assistance were required to carry the seal of the Court of Exchequer, but once issued, the Court of Exchequer had no jurisdiction to control the circumstances of their use. It was above all this feature which distinguished the statutory writ of assistance from its common-law counterpart, the search warrant. Where the search warrant itself constituted a specific grant of authority to conduct a specific search, the writ of assistance signified a general grant of authority, valid for the life of the monarch in whose name it had been issued, to conduct a generality of searches.

Assessed against contemporary Canadian search and seizure legislation, the *Act of Frauds* was perhaps less remarkable for the powers it conferred than for those it constrained. First, the only permissible objects of writ-assisted search and seizure pursuant to the *Act of Frauds* were prohibited *and* uncustomed goods.[10] Second, the person who undertook a customs search was authorized to resort to force only if he was a designated customs officer, the proof of which was a writ of assistance issued by the Court of Exchequer. Third, resort to force was permitted only in the event of resistance being offered to the entry, search or seizure. Fourth, the customs agent was obliged to restrict his searches to daylight hours; and fifth, the agent was obliged to take with him a constable or other known officer in order to prevent any breach of the peace which might be entailed in the search.[11]

Last, there was a further and singularly stringent constraint upon the mode of search and seizure authorized by the *Act of Frauds*, as indeed upon search and seizure in general. This constraint was not to be found in the *Act of Frauds* itself, but in the common-law doctrine of "justification by the event".[12] It was not enough that there be "probable cause" to suspect the presence of prohibited and uncustomed goods.[13] If the search failed to disclose contraband answering to this double-barrelled description, the informant was personally liable for damages in trespass to the person whose premises were searched. Since the customs officer conducting a writ-assisted search would be acting on his own information, he would be liable in his capacity as informant should his search prove unsuccessful.

Notwithstanding these constraints upon writ-assisted search of private premises, the customs search of 1662 was notably unfettered by the one constraint valued above all others by the common law — prior judicial authorization on particular information. As elaborated by Hale in his *History of the Pleas of the Crown*, the appropriate common-law procedure for securing access to private premises, then confined to seeking out stolen goods, was by means of a search warrant.[14] However, the common-law courts were prepared to countenance this kind of interference with private property rights only upon warrants granted by a justice of the peace, and only upon sworn information as to the suspected whereabouts of the goods and the grounds for that suspicion.[15] But these common-law requirements of judiciality and particularity were altogether absent from the statutory regime provided for customs search.[16]

There was in consequence no occasion for importing into writ-assisted search and seizure anything in the nature of prior *judicial* authorization upon particular information. Apparently, however, resort to the writ of assistance — from at least 1710, and possibly earlier — was governed by *administrative* regulations,[17] analogous in almost all respects to the judicial constraints which governed the issuance and execution of search warrants.

The Customs Commissioners had a definite interest in overseeing the enforcement practices of their subordinates, if not to protect themselves from the possibly doubtful rigours of the doctrine of justification by the event, then simply because it was expedient that the Board not be embarrassed by overzealousness on the part of its officers, particularly in matters touching private property rights.

Predictably, the stringency of the Commissioners' directives varied between London and the outports, but their general object was to overlay writs of assistance with an administrative equivalent to the judiciality and particularity of search warrants. Thus, in 1710, London customs officers were instructed not to search residential premises without first obtaining the Board's permission.[18] In 1719, certain protections were accorded by statute to writ-assisted customs seizures, provided the officer had acted "upon the Information of one or more credible Person or Persons".[19] In order to assure themselves of this statutory protection, the Customs Commissioners established administrative procedures for ensuring that writ searches were reliably informed by particular information as to the character, description and whereabouts of the contraband. Hence, for example, Henry Crouch's *Complete Guide to the Officers of His Majesty's Customs in the Outports*, published in 1732, in which customs officers were enjoined not to enter private premises "without a particular Information from one or more credible Persons, in writing if possible, giving an Account of the Species or Package of the Goods, when and where run, or where concealed...."[20] By 1817, it was a requirement of general application, both in London and elsewhere, that each instance of writ use be conditioned upon prior, particular information sworn before a magistrate.[21] Although these approximations to the search warrant's standards of judiciality and particularity formed no part of the statutory or common-law regime governing writs of assistance, they were no less a constraint for being administratively, rather than legally, prescribed.

That the 1662 writ of assistance has occasioned both confusion and controversy is evident. However, that it should have been perceived as a device "interposed by the Legislature through a tender regard to the liberty of the subject"[22] was not entirely fair. Even the statutory conditions to which the writ was subject were far from being inconsequential: there were narrow limits upon the permissible objects of seizure (prohibited *and* uncustomed goods); upon the circumstances justifying resort to force (only in the event of resistance to a writ-holder); upon the time of search (daylight hours only); and upon the unaided powers of the customs officer (*viz.* the obligatory attendance of a constable or other local officer).

But in addition to these statutory conditions, the writ of assistance was hedged with constraints both administrative and judicial. By administrative directive, what began as a statutory licence for a generality of customs searches was converted into as

event-specific and particular an instrument of search and seizure as a search warrant. And, of course, over and above departmental insistence upon credible information before the event, there was a powerful stimulus to reliably informed customs search in the common-law doctrine of justification by the event. In aggregate, the English writ of assistance has been so constrained by statutory conditions, administrative regulations, and common-law doctrine as to be an improbable source of controversy.

Not so, of course, in the American colonies of the 1760s and 1770s, where vigorous exception was taken to the writ of assistance and the customs regime it was perceived to exemplify.[23] Nor has the writ been without controversy in its several Canadian adaptations. As in pre-revolutionary America, the controversy in Canada has had principally to do with the perception of the writ as a species of general warrant. However, unlike the American challenge in 1761, the challenge to Canadian writs of assistance has stemmed from concerns about their propriety rather than their legality. Indeed, until very recently,[24] their legality was presumably unassailable in the presence of the four Canadian statutes which provide for their issuance and use.[25]

Rather, the issue in Canada has been as to the propriety of exempting the writ-assisted search from the requirements of judiciality and particularity upon which search warrants are issued. Briefly put, the writ's opponents object that its use is unfettered by the imperatives of prior judicial authorization upon particularly sworn information, and that, in consequence, its reach extends to an indeterminate generality of searches. The writ's proponents acknowledge its exceptional purview, but argue that such an instrument of search and seizure is required to cope with the exigencies of contemporary drug, customs and excise enforcement. Moreover, so its proponents argue, the exemption of writ-assisted searches from judicial controls is fully compensated by the stringency of the administrative procedures which govern the writs' issuance and use — procedures which, in aggregate, ensure that the writ of assistance is at least as closely regulated administratively as the search warrant is regulated judicially.

With the proclamation of the *Canadian Charter of Rights and Freedoms* on April 17, 1982, the Canadian controversy over writs of assistance has shifted to new ground. The issue is no longer merely one of proprieties: what is now also directly in issue is the very

legality of writs of assistance, in the face of the *Charter's* injunction against unreasonable search or seizure.

The Commission would resolve these issues concerning the legalities and proprieties of writs of assistance by urging their immediate abolition. Our recommendation proceeds from reasons both principled and pragmatic. As a matter of principle, the Commission asserts that there is no justification for the exemption of writ-assisted searches from the imperatives of judiciality and particularity. As a practical matter, the Commission also asserts that the writ of assistance is an unnecessary instrument of search and seizure.

In order to appreciate fully the Commission's reasons for these assertions, it is first necessary to appreciate something more of the writ's juridical character and its history in Canadian law enforcement.

2. The Writ as a Licence to Search without Warrant

The status of the writ of assistance has been much obscured over the three hundred years of its existence, with the writ tending, almost from its inception, to be seen as a species of search warrant. They were, however, distinct instruments and must be understood as such if the full significance of the writ is properly to be appreciated.

The distinction between writ and warrant has chiefly to do with their relative admixtures of judicial and ministerial jurisdiction. Where the issuance of a search warrant is principally an exercise of judicial jurisdiction, and only incidentally a ministerial act, the writ of assistance was and remains an exclusively ministerial instrument. In short, the writ was nothing so much as a certificate of identification, attesting to the capacity of its bearer to exercise the search powers conferred by the *Act of Frauds*. As such, it was exclusively a ministerial or executive instrument which "authorized", in the now

obsolete sense of "vouching for", the holder's identity as an agent of the Crown.

Although the seal of the Court of Exchequer, the judicial arm of the King's revenue protection and collection apparatus, was required to be affixed to the writ, the document was in practice prepared and sealed by an administrative official within the Court of Exchequer. This official, known as the King's remembrancer, was charged with responsibility for collecting debts due to the sovereign, and for that purpose was entitled to the use of the seal of the Exchequer Court. However, the responsibility of the Court of Exchequer, or more properly, of the King's remembrancer within the Court of Exchequer, may be likened to that of a contemporary court registrar in the issue of writs for the commencement of civil suits: the function in both cases is purely administrative. Upon application to the appropriate administrative officer, and upon his being satisfied that the writ conformed to the requirements prescribed for it, the writ would be issued and authenticated with the seal of the issuing court — all without the interposition of a judicial officer acting in a judicial capacity. The issuance of the writ of assistance was thus in no sense an exercise of the judicial jurisdiction of the Court of Exchequer. It was rather a purely administrative act.

By contrast, the issuance of a search warrant, then as now, is an exercise of partly judicial and partly ministerial jurisdiction.[26] In substance, the search warrant represents a grant of authority to interfere with property rights in circumstances which would otherwise constitute a trespass. Although the seventeenth century justice of the peace, whose responsibility it was to issue search warrants, performed a *mélange* of police, prosecutorial and judicial functions, it was in his judicial capacity that jurisdiction to issue search warrants was conferred upon him. Thus, what was required of him was an independent judicial assessment of the form, the substance and the probative value of the information tendered to him. Unless the information before him were adequate in these respects, he was said to be without jurisdiction to perform his responsibility in a judicial manner. Once his jurisdiction had been thus established, the justice had then a judicial discretion as to whether and in what form the warrant should issue. Thereafter, his jurisdiction having been established and he having determined to exercise it, the justice performed the purely administrative or ministerial act of causing the warrant to issue, by affixing to the document his signature, together with a declaration of his office.