CHAPTER 3

Investigatory Powers

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1. INTRODUCTION

This chapter is divided into two parts. The first part reviews some of the most important powers of search and seizure given to the authorities by statute and common law. It is important that lawyers know the limits of these powers, since both as defence and Crown counsel they will be called upon to give advice in the course of an investigation. Defence counsel may initiate proceedings to review a warrant, both as the investigation proceeds and later if charges are laid, by challenging the admissibility of evidence that was obtained by the police. Crown counsel will not only be asked to advise the police as the investigation proceeds and respond to applications by defence counsel, but after charges are laid will have to assess the strength of the Crown's case, taking into account the admissibility of evidence obtained through search warrants or intercepted communications.

The second part, "Investigation and Questioning of Suspects", discusses the questioning of suspects and the obtaining of evidence from suspects by other means. The focus of this part of the chapter is on the limits, which are mostly imposed by the common law and the *Canadian Charter of Rights and Freedoms*,[2] on the power of the police to obtain incriminating evidence from a suspect or accused person through the participation of the person in the investigatory process. Again, the focus of this part is on the lawyer's role in giving advice to the client. With the proclamation of the *Charter* in 1982 and its guarantee to access to counsel in many circumstances, the lawyer's advisory role in this part of the investigation has become more important. Often lawyers are called upon to give advice on very short notice, advice which could have profound effects on the course of later proceedings.

PART I: Search and Seizure

2. INTRODUCTION TO PART I

The *Criminal Code*[3] and other federal statutes give the police and other government investigators certain powers of investigation through search and seizure. As well, the common law authorizes search and seizure in certain circumstances. However, the exercise of all of these powers is circumscribed by section 8 of the *Charter*, which provides that everyone has the right "to be secure against unreasonable search or seizure". The lawyer, whether defence counsel or Crown counsel, will most often be consulted when the investigators resort to statutory powers of search and seizure. Accordingly, the principal focus of this section is on those powers, and in particular the use of the search warrant obtained under section 487 of the *Code*. This section is applicable to all federal statutes, even those that may contain other powers of search and seizure.[4]

3. SEARCH AND SEIZURE GENERALLY

Before embarking on an analysis of the various powers of search and seizure in Canada, consideration should be given to the meaning of the phrase "unreasonable search and seizure" in section 8 of the *Charter*. In *R.* v. *Collins*[5] Mr. Justice Lamer stated that a search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search is carried out is reasonable. Thus, the reasonableness of a particular search requires consideration of these three questions. The issues raised by these questions will be discussed as they arise in the course of this chapter. A word should be said here, however, about the requirement that a reasonable search must be authorized by law. Every illegality, however minor or technical and

peripheral or remote, does not of necessity render a search unreasonable.[6] Where the illegality is one of substance (for example, where a search is conducted pursuant to a fundamentally invalid warrant) then even objectively reasonable good faith cannot transform an illegal search into a reasonable one.[7]

With the proclamation of the *Charter*, the manner in which evidence is obtained has assumed increased importance. Previously, except for very limited circumstances (wiretap evidence and confessions), the manner in which evidence was obtained was of little practical importance for the conduct of the prosecution or the defence. This, however, is no longer the case. Subsection 24(2) of the *Charter* now provides that evidence may be inadmissible if it is obtained in violation of the *Charter*, if to admit the evidence would bring the administration of justice into disrepute. Thus, the manner in which evidence is obtained during the investigation of the offence can be of supreme importance to both Crown counsel called upon to advise the police and defence counsel who has been retained to advise a person who may be a target of the investigation.

4. SEARCH WARRANTS

4.1 General

In *Hunter* v. *Southam Inc.*,[8] the Supreme Court of Canada considered the impact of section 8 of the *Charter* for the first time. The court gave a broad and liberal interpretation to section 8, and in particular concluded that the following two principles emerged from it:

- The section guarantees a broad and general right to be secure from unreasonable search and seizure which goes beyond mere protection of property, and goes at least as far as protecting an individual's reasonable expectation of privacy.[9]
- The prevention of unjustified searches can only be accomplished by a system of prior authorization from a person able to act in an entirely neutral and impartial manner where feasible.

A system of prior authorization will in most cases refer to the requirement of a search warrant and the corollary that a warrantless search is presumptively unreasonable. Counsel therefore must be familiar with the most common search warrant provisions. According to *Hunter* v. *Southam Inc.*, however, for most search warrant provisions to be valid, it must be established under oath that there are reasonable grounds to believe that an offence has been committed, and that there is evidence to be found at the place to be searched before the warrant is issued by a judicial officer. While there are certain exceptional search powers which permit a search in anticipation of the commission of an offence, those powers are not extensively considered in this chapter.[10]

4.2 The Issuance of Search Warrants

Most search warrants are now issued pursuant to subsection 487(1) of the *Code*. This section meets the constitutional standard of reasonableness mandated by section 8 of the *Charter*,[11] and thus the issue for counsel will be whether the police, in obtaining the warrant, have complied with the provisions of the section. A search warrant under section 487 is usually issued by a justice of the peace, but will on occasion be issued by a judge of the Ontario Court of Justice. In most cases, the warrant will be issued only upon the personal attendance of the informant (usually a police officer) before the justice. At that time, the informant will swear to the truth of material contained in an affidavit, which is referred to in the *Code* as an information, to obtain a search warrant. The *Code* prescribes a form (Form 1) for the information. However, care must be taken in filling out this form since it does not clearly provide for the recording of reasonable grounds to believe that an offence has been committed upon or in respect of the things sought to be the target of the search (paragraph 487(1)(a)), that those things will afford evidence with respect to the commission of an offence (paragraph 487(1)(b)); that there are reasonable grounds to believe is intended to be used for the purpose of committing an offence against the person (paragraph 487(1)(c)) or that any offence-related property will be located (paragraph 487(1)(c. 1)). In order to comply fully with the provisions of section 487 and ensure that section 8 of the *Charter* is not violated, it is important that the information fully set out the grounds for believing that the items sought will, for example, afford evidence of the commission of the offence, and the grounds for believing that an offence has been committed. The officer will also present to

the justice a draft copy of the warrant in Form 5.[12] If the justice is satisfied that the warrant will issue, the warrant will be signed and returned to the officer, who will then be charged with executing the warrant according to its terms.

Exceptionally, a warrant may issue without the personal attendance before the justice of the peace. Where it is impracticable for the officer to attend before the justice, section 487.1 sets out a procedure for obtaining the warrant (a so-called "telewarrant") by telephone. Perhaps the most common instance where resort is made to subsection 487.1 is in obtaining a warrant under section 256 of the *Code*, which authorizes a physician to take blood samples from a person who has been involved in a motor vehicle accident where the person is unable to consent to the taking of the blood and, *inter alia*, there are reasonable grounds to believe that the person has committed an offence of impaired driving or "over 80" contrary to section 253 of the *Code*. Since the blood samples must be obtained within three hours of the time when the offence was believed to have been committed, it may not be practicable for the officer to personally attend before the justice. The *Code* allows for telewarrants where the police seek a "general warrant" under section 487.01, a "DNA warrant" under section 487.05, or a "bodily impression warrant" under section 487.091.

4.3 The Minimum Requirements for Issuing a Warrant

In giving advice to the police or a client, it is important that counsel be familiar with the minimum requirements laid down by the case law for the issuance of a search warrant. The most important principle is that the information must disclose sufficient facts to permit the justice of the peace to make a determination that the warrant should issue. In other words, it is not enough that the police officer swears that there are grounds to issue a warrant. Those grounds must be set out so that a judicial determination can be made. Below is a brief description of the material which must, as a minimum, be contained in the information to obtain the warrant. Crown counsel, in advising the police at first instance, will want to ensure that this material is contained in the information. Defence counsel, who has subsequently been consulted by a person who was the target of the search, will want to obtain the information sworn by the police officer from the office of the court services manager for the Ontario Court of Justice and then carefully scrutinize it to determine compliance with these minimum standards. If the information does not meet these requirements, then, as discussed below, counsel may be able to advise the client as to further steps which should be taken.

1) The Offence

In the absence of any description of an offence in an information, any warrant based on it is invalid.[13] Since the ultimate object of the description of the offence is to permit the executing officers and anyone else concerned to easily ascertain the nature of the offence alleged[14] and not to charge a person with an offence, the degree of precision that will be demanded in the indictment once charges are laid, is not required.[15] Thus, nothing obliges the informant even to name any particular person as having committed the offence. Obviously, however, the name of the accused should be disclosed if known. The more information that can be included to identify the offence, the less likely that the warrant will be open to challenge. Thus, if possible, the section number of the offence should be included, the victim identified, and the circumstances of the offence — manner of commission of the offence, date and place — specified with as much precision as possible.[16]

2) The Items to be Seized

A warrant is not to be issued to conduct a fishing expedition. It is important that the information set out with some particularity the items that the officers believe are on the premises and that they wish to seize. Having said this, it must be recognized that obtaining a warrant is only a step in the investigation, and the officers often will not know precisely what items will be present. Especially in the more complex commercial cases, the officers, as a result of their investigation and their experience, will at most be able to identify different categories of documents which they expect will be on the targeted premises. The test appears to be whether the description is sufficient to permit the officers executing the warrant to identify the objects and link them to the offence described in the warrant.[17] It is not for the justice to review the

entire investigation and dictate a list of specific items to be seized. Precision is not crucial, especially where documents are concerned, as long as there is a summary of categories listed.[18] Of course the items sought must be related to the alleged offence[19] and the information should make the connection clear. On the other hand, where the connection is obvious, if unstated, the information will be found to be sufficient.

An ordinary search warrant under section 487 is not available to seize intangibles such as bank accounts. However, amendments to the *Code* enacting Part XII.2 "Proceeds of Crime" set out special powers for obtaining special warrants and the making of restraint orders.[20] Some aspects of the "proceeds of crime" legislation are reviewed below.

In addition to the normal search warrant issued under section 487, the *Code* has been amended to allow for the issuing of warrants to permit the use of other investigative techniques. These amendments include section 487.01, which provides for the issuance of a so-called "general warrant" to use a specified device or investigative technique or procedure, the use of which would otherwise constitute an unreasonable search or seizure. Thus, a warrant might be obtained under section 487.01 to use highly powered optical equipment, to conduct a so-called "perimeter search", to allow for the marking of property, to enter on premises to make copies, to take body measurements, to inspect body markings, hand-washings, *etc*. Section 487.01 also provides a power to issue a warrant for surreptitious video surveillance. The scheme for such surveillance is similar to the wiretap provisions of Part VI of the *Code*. Another provision, section 492.1, allows for issuance of a warrant to install a tracking device, while section 492.2 allows for a warrant permitting the use of a dialed number recorder, a device which can record the telephone number or the location of the telephone from which a telephone call originates.

A recent amendment to section 487 of the *Code* provides expressly for the searching of computer systems and the seizure of electronic data.[21] Previously, this kind of search has been conducted under the "general warrant" authority found in section 487.01 of the *Code*.

The *Code* allows for the issuance of a warrant to seize bodily substances for the purpose of forensic DNA analysis. These new warrant provisions apply only to "designated offences" as defined in section 487.04, which include, *inter alia*, the offences of murder, sexual assault, and robbery. Where a designated offence has been committed, the warrant can authorize the seizure of hair samples, buccal swabs (swabbing inside the mouth), and blood samples.[22]

In addition, the *DNA Identification Act*[23] has established a DNA data bank. Recent amendments to the *Code* allow a judge to make an order for the provision of DNA samples after a person is convicted or discharged of a criminal offence so that the samples may be stored in the data bank. The order is mandatory where the accused has been convicted of a primary designated offence (paragraph 487.051(1)(a)) and is discretionary in the case of a secondary designated offence (paragraph 487.051(1)(b)). In the case of a young person, however, the judge has the discretion not to make such an order in the case of a primary offence pursuant to subsection 487.051(2).

More recently, the *Code* has been amended to provide for the issuance of a warrant to take "any handprint, fingerprint, footprint, foot impression or other print or impression of the body or any part of the person".[24] These warrants may be issued in respect of an investigation of any offence in the *Code* or "any other Act of Parliament", and need not be limited to the investigation of "designated offences", as are the DNA warrants.

3) The Location to Be Searched

The range of premises contemplated by section 487 seems unrestricted, with the single proviso that the word "place" contemplates geographic locations, and not anatomical ones.[25] The location may be anywhere in Canada, except that where the place is in a territorial division other than that of the issuing justice, the warrant must be endorsed in Form 28 by a justice having jurisdiction in that other division before it can be executed. The endorsement is simply a statement on the back of the warrant signed by a justice of the peace in the jurisdiction where the warrant is to be executed, which authorizes the officers to execute it. The extent of the territorial division in each case is to be determined on the basis of the jurisdiction of the particular justice, since territorial division is defined in section 2 of the *Code* to include "province, county . . . or other judicial division or place to which the context applies." Accordingly, the Ontario Court of

Appeal has held that where a justice of the peace is appointed in and for the entire province, as many are, the search warrant may be executed anywhere in Ontario without being endorsed.[26]

The location to be searched must be accurately described. Trivial misdescriptions, however, such as a misspelling, will not invalidate the warrant. Again, the point of the description of the place to be searched is to permit the justice to determine that the items sought to be searched for and seized are on the premises, and so the information must clearly make out a case for believing that the items sought, whether they be evidence or contraband, are on the targeted premises.

In *R.* v. *Noseworthy*[27] the Ontario Court of Appeal held that section 487.01 permits the issuance of an anticipatory warrant to seize specified items of property in a named location regardless of whether or not a special investigative technique (such as optical surveillance) will be employed by the police during the execution of the warrant. In this case, an anticipatory search warrant was properly issued for the re-seizure of items to be returned to the owner later that same day.

4) The Reasonable Grounds

The information must set out sufficient material so that the justice can make a judicial determination of whether the warrant should issue. The justice will apply a standard of credibly based probability. It is obviously inappropriate to apply a test of reasonable doubt or even balance of probabilities. The information must set out reasonable grounds for believing that evidence or contraband in relation to the specified offence will be found in the named premises. The information must state the actual grounds of belief, and not merely conclusions. The justice is, of course, entitled to draw inferences from the stated facts. Reliable hearsay can be the basis for obtaining a warrant, and most informations to obtain a warrant contain both the information gathered by the informant personally and information from other sources reported to the informant.

Confidential informers pose a special problem for counsel advising the police. Because of the constitutional right to protection against unreasonable search and seizure, the person against whom the warrant has been issued is entitled to know the grounds upon which the warrant was issued. If the informant has obtained information from a confidential informer, the informant will want to protect the informer's identity while at the same time providing enough information to the justice of the peace so that the warrant can issue and its validity can be sustained if subject to subsequent attack. In determining the sufficiency of the grounds for a search where the police rely on information from an informer, the Supreme Court of Canada has adopted the "totality of circumstances" test. Thus, the court must consider whether the information predicting the commission of a criminal offence was compelling, whether the source of the information was credible, and whether the information was corroborated by a police investigation prior to the making of the decision to conduct the search. Weaknesses in one of these three areas may to some extent be offset by strengths in the other two. Police are also entitled to take into account the suspect's past record and reputation provided that reputation is related to the ostensible reasons for the search. It is not necessary for the police to confirm each detail in an informer's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. On the other hand, the level of verification required may be higher where the police rely on an informer whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater.[28]

On occasion, the authorities are of the view that disclosure of the contents of an information would directly or indirectly reveal the identity of an informer. Although the information becomes a public document once the warrant is executed (provided that something is seized),[29] in a number of cases courts have been of the view that they retain the right to seal the information where it is established that the ends of justice would be subverted by disclosure.[30] The *Code* has recently been amended to provide for this power expressly.[31]

In *R.* v. *Hunter*,[32] the Ontario Court of Appeal considered the interplay of the right to make full answer and defence, and the principle that the identity of an informant should not be disclosed, in the context of a challenge to the reasonableness of a search at a criminal trial. Where the accused wishes access to a sealed information for this purpose at his trial, the court approved of the following procedure:

Upon receipt of such a request, the trial judge should review the information with the object of deleting all references to the identity of the informer. The information as edited should then be made available to the accused. However, if at the conclusion of the editing procedure the Crown should still be of the opinion that the informer would become known to the accused upon production of the information, a decision would have to be made by the Crown. The informer might, by this time, be willing to consent to being identified. Alternatively, the informer's identity might have become so notorious in the community or become so well known to the accused that identification would no longer be a significant issue.

It must be remembered that the object of the procedure is to make available to an accused enough information to enable the court to determine whether reasonable and probable grounds for the issuance of the warrant have been demonstrated. Most informations should lend themselves to careful editing. It would always be preferable to have the validity of the warrant determined on its merits.[33]

A slightly different procedure has been set out in section 187 of the *Code* for disclosure of an affidavit used to obtain a wiretap authorization under Part VI of the *Code*. In the first instance, the Crown will provide a copy of the edited affidavit to the accused. The accused may then apply to the trial judge to order disclosure of any part of the affidavit that has been deleted by the Crown. The judge shall order disclosure of any part that, in the opinion of the judge, is required for the accused to make full answer and defence and for which provision of a "judicial summary" would not be sufficient. Presumably, if the Crown is unwilling to comply with such an order, being of the view that the public interest would be prejudiced by disclosure, it can attempt to tender the wiretap evidence as a warrantless seizure. With the repeal of the automatic exclusionary rule in relation to unlawfully obtained wiretap evidence, admission of the evidence would be determined in accordance with subsection 24(2) of the *Charter*.

5. THE WARRANT

5.1 Formal Requirements

1) Form 5

Subsection 487(3) provides that a search warrant may be in Form 5, varied to suit the case. Thus, the use of Form 5 is not mandatory. The substance of Form 5 must, however, appear in some manner.[34] The substance includes basic descriptions of the offence, items to be searched for and location.

2) Designation of Executors

Subsection 487(1) permits a warrant to be executed by a person named in it or by a peace officer. Thus, where it is intended that investigators who are not peace officers will execute or assist in the execution of the warrant, they should be designated individually by name and not as a class. Peace officers, however, need not be specifically named, but may be described as a class (for example, "all the peace officers in the said territorial division").[35] Other statutes may, however, have different requirements and require that the warrant name the peace officer who is to execute the warrant.

5.2 Substantive Requirements

The substantive requirements of a valid search warrant have largely been covered in the discussion of informations. To summarize, the warrant must state an offence with sufficient precision to "apprise anyone concerned with the nature of the offence for which evidence is being sought". The warrant must describe the items to be seized with enough specificity "to permit the officers responsible to execute the search warrant to identify such objects and to link them to the offence described in the information and the search warrant". The warrant must describe the location with sufficient accuracy to enable one from the mere reading of it to know "of what premises it authorizes the search".[36] These are important safeguards. Both the target of the search and the officer executing the warrant must be able to determine what is a legitimate object of the warrant.

5.3 Severability

Either the justice who is being asked to issue a warrant, or a court reviewing a warrant already issued, may sever such part of the warrant or proposed warrant as is defective.[37] A reviewing court, however, may not proceed to amend parts of a warrant it considers to be defective.[38]

5.4 The Execution of Search Warrants

1) Location of the Search

Obviously, a search warrant can only be executed at the place named on its face. It sometimes happens, however, that the description of the location is inaccurate, while the identity of the location is clear. In such cases, the good faith of the officers executing the warrant has been considered to be an important consideration in determining whether the search was lawful and reasonable, or, alternatively, whether the admission into evidence of anything seized under the authority of the warrant would bring the administration of justice into disrepute.

The Ontario Court of Appeal has held that a warrant to search the premises at a stated address would permit the search of a motor vehicle in the garage or driveway of the premises, and might also permit the search of a motor vehicle of the occupant of the premises parked in the street nearby.[39]

2) Manner of Execution

Procedural rules have been imposed on the execution of search warrants by courts and by statute. In *Wah Kie* v. *Cuddy*,[40] the Alberta Court of Appeal set out the following procedure for the execution of *Code* search warrants:

- The peace officer must have the warrant in his or her possession at the time of the search.
- Generally, when the place to be searched is a dwelling house, a demand to open must be made before a forced entry is effected.
- The officer executing the warrant must exhibit it for inspection if asked.
- The officer may use no more force than is reasonably necessary under the circumstances to effect any entry or search.

In respect of rule 1, the failure to have the warrant and produce it on request may constitute a breach of section 8 of the *Charter*.[41]

In respect of rule 2, where there is a need to prevent the destruction of evidence, announcement prior to entry is not required.[42]

In respect of rule 4, the police may, when executing a warrant, keep persons present under reasonable surveillance, and may use force to keep a suspect from fleeing.[43] However, the greater the use of force, the heavier the onus on the Crown to show why the police thought it necessary to use such force.[44]

A *Code* search warrant may only be executed by day unless the justice authorizes execution by night (after 9:00 p.m. and before 6:00 a.m.): (section 488).[45] In fact, in *R.* v. *Sutherland* (2000), 150 C.C.C. (3d) 231, the Ontario Court of Appeal held that warrant unjustifiably executed at night will constitute a serious Charter violation.

It is not unreasonable to delay execution of a warrant for the purpose of apprehending the suspect. Nor is it unreasonable to extend the currency of a warrant for that purpose so long as the time period over which the warrant extends is reasonable in the circumstances of the case. Even if a warrant is issued for an extended period of time, it nevertheless may only be executed once.[46]

It should be noted that "oversearch" (seizure and search that exceed the authority of a warrant) cannot retroactively affect the jurisdiction to issue the warrant in the first instance[47] but may constitute a violation of section 8 of the *Charter* which may be raised at trial and lead to an exclusion of the evidence seized.[48]

During the execution of a *Code* search warrant, pursuant to section 489 of the *Code*, a peace officer may seize, in addition to the things specified in the warrant, "anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence". During the execution of a *Controlled Drugs and Substances Act*[49] search warrant, a peace officer may seize any controlled substance, any thing that the peace officer believes on reasonable grounds to contain or conceal a controlled substance, any offence related property and any thing that the peace officer believes on

reasonable grounds will afford evidence of an offence under the Act (section 11).

While section 489 did not previously authorize the seizure of items which are merely evidentiary, Canadian courts have shown a willingness to adopt the "plain view" doctrine, which permits a constable with a prior justification for intrusion (such as a valid search warrant) who inadvertently comes across a piece of evidence to seize it.[50] In any event, the newly amended section 489 does allow for the seizure of such items. Furthermore, the Supreme Court of Canada recently held that this provision does allow for seizure of evidence of negligence in a strict liability offence.[51]

Paragraph 487(1)(e) and subsection 489(1) of the *Code* require a peace officer who seizes anything under a warrant or otherwise in the execution of the officer's duties as soon as practicable to return it to its lawful owner, to bring it before a justice, or to report its detention to a justice, following the procedure in section 490. The justice has the power to order the detention or return of goods seized pursuant to the statutory scheme.[52]

Subsection 490(2) of the *Code* provides that nothing shall be detained under the authority of such an order for more than three months after the date of seizure unless, before the expiry of the period, proceedings are instituted in which the things may be required, or an order or orders of further detention is made. Such further order or orders must be made on notice, and may not, cumulatively, exceed one year. An order of further detention which exceeds one year may be made by a judge of the Superior Court of Justice.

3) Search of a Lawyer's Office

Section 488.1 of the *Code*, until recently, provided a complete code of procedure for the search of a law office. In *Lavallee, Rackel & Heintz* v. *Canada (Attorney General); White, Ottenheimer & Baker* v. *Canada (Attorney General); R* v. *Fink*,[53] the Supreme Court of Canada held that section 488.1 violated sections 7 and 8 of the *Charter*. The court reaffirmed that importance of solicitor-client privilege which must be treated as absolute as possible. A client had a reasonable expectation of privacy in all documents in the possession of the lawyer which constituted information that the lawyer was ethically required to keep confidential, and an expectation of privacy of the highest order when such documents were protected by solicitor-client privilege. Section 488.1 failed to meet the necessary constitutional threshold in part because the privilege could be violated if counsel simply failed to act, there was no obligation to contact the privilege holder and there was no mechanism for a judicial determination of the solicitor-client privilege.

In the absence of legislation from Parliament, the Supreme Court of Canada held that the following principles should govern the search of a law office. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search. When allowing a law office to be searched, the issuing justice must be rigorously demanding so as to afford the maximum protection to solicitor-client confidentiality. It is important to note that unless the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in the possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

Once a warrant is issued, every effort must be made to contact the lawyer and the client at the time of the execution of the warrant. Where the lawyer or client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents. The investigative officer executing the warrant must report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given reasonable opportunity to assert a claim of privilege and if that claim is contested, to have the issue judicially decided. If notification of the possible privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted. Counsel should be given a reasonable opportunity to make this determination. It may be that the client is not asserting privilege in respect of the items or that the particular document is not subject to solicitor-client privilege. However, in the absence of specific instructions any doubt ought to be resolved in favour of a claim of privilege. It is not

for the lawyer to make a unilateral judicial determination the documents are not privileged and it is not open to the lawyer to waive privilege without instructions from the client. Counsel is ethically bound to assert the privilege that exists in documents in counsel's possession. Further, counsel should avoid being placed in a conflict of interest. Especially where the conduct of counsel may become an issue in the case, the lawyer may not be able to properly advise the client who is the target of the search as to whether privilege should be waived and whether a credible claim of privilege can be made in respect of certain documents. The interests of the client and the lawyer may be opposed, the lawyer wanting to disclose the documents to show no wrongdoing on the lawyer's part, the client retaining an interest in the documents remaining confidential. In those circumstances, the client must be advised of the right to retain independent legal advice.

The Supreme Court of Canada was unequivocal that counsel and the privilege holder must have a meaningful opportunity to consider their position as to privilege. As it was said in one case, "no lawyer can fairly be expected to remember immediately every document which is in the files and immediately make a considered decision about which documents are privileged and which are not. Thus in order properly to protect the client, the lawyer must claim privilege for all of the documents in the file." In the same case, the point was made, albeit in the context of a demand under the *Income Tax Act*,[54] that the lawyer should have the opportunity to make copies of the documents in the file which it was intended the claim of privilege would be made "so that after the seizure was made he could continue in the legitimate prosecution of his client's affairs without being deprived of the contents of files, or having to apply to a judge to get access to them."

After the warrant has been executed and the material which is subject to a claim of solicitor client privilege sealed, the parties (being the Attorney General, the lawyer or the client) may make an application to determine the issue of privilege. While section 488.1 prescribed time limitations for such applications, no such time limitations are in place at present. In *Lavalee et al*, the Supreme Court of Canada held that while crown counsel may make submissions on the issue of privilege, they are not permitted to inspect the documents beforehand. The prosecuting authority can only inspect documents if and when it is determined by a judge that the documents are not privileged. Where sealed documents are found not to be privileged, they may be used in the normal course of an investigation. If the documents are found to be privileged, they must be immediately returned to the holder of the privilege or to a person designated by the court.

It is unwise for the lawyer from whom the documents were seized to act as counsel on the application, since this lawyer may be a witness on the application. An inference that the documents are privileged cannot be drawn simply from the fact that they were seized from the office of a lawyer. It has been held that "the lawyer must, at the very least adduce reasonable evidence, either *viva voce* or by affidavit, from which the court can infer a solicitor-client relationship and solicitor-client privilege. To meet the criteria for the privilege, it is necessary to show that there were communications between the lawyer and client, those communications entailed the seeking or giving of legal advice, and the advice was intended to be confidential by the parties."[55]

5.5 Other Search Warrant Provisions

Brief mention should also be made of the search and seizure provisions under the *Income Tax Act*. Sections 231 to 232 set out a code of procedure requiring taxpayers and others to allow access to documents and provide information upon demand. Section 231.3 of the *Income Tax Act*, which provides for an application to a superior court judge for a search warrant in certain circumstances, has been held to be unconstitutional as violating the guarantee to protection against unreasonable search and seizure.[56] As a result, officials enforcing the *Income Tax Act* must apply for a *Code* search warrant if they wish to seize material alleged to be evidence of commission of an offence under that *Act*.

5.6 Review of Search Warrants

It has been firmly established at common law that a search warrant can be reviewed through *certiorari* and quashed by a superior court. The scope of review is limited to jurisdictional error. Where it is alleged that the evidence was insufficient for the issuance of a warrant, the opinion of the reviewing judge must not be

substituted for that of the justice. Rather, the judge must determine whether there was evidence upon which a justice, acting judicially, could (not should) have determined that a warrant should issue. Only if the judge concludes that there was not, can the warrant be quashed.[57] The *Charter* has not altered the scope of review. Where a *Charter* violation is alleged, the reviewing court must determine whether the violation was jurisdictional. If it was, *certiorari* is available. If the error was not jurisdictional but violated section 8, the court must determine whether an appropriate remedy should be granted under subsection 24(1) of the *Charter*.[58]

Note that where a warrant is issued by a judge of the Superior Court of Justice (as is required, for some federal legislation), *certiorari* is unavailable to quash the warrant as a matter of law.[59] It would appear, however, that an application can be made to a judge of the court that granted the authorization, to set it aside.[60]

On a motion to quash a search warrant, there is no absolute right to examine or cross-examine the informant. The test for whether the judge should grant leave to cross-examine would seem to be whether the applicant can show a basis for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions for the granting of the warrant, such as reasonable grounds for belief. It is probably not necessary, however, to make out a *prima facie* case of fraud or deliberate falsehood. The cross-examination will be limited by the judge to questions that are directed to establish that there was no basis upon which the warrant could have been granted. Confidential informers are protected by the law, and the informant cannot be required to disclose their identity or produce them for cross-examination unless the applicant can bring his or her case within the exception which permits disclosure of the informer's identity where the accused's innocence is at stake.[61]

The procedure for bringing an application in the nature of *certiorari* to quash the warrant is governed by Rules 6 and 43 of the *Ontario Court of Justice Criminal Proceedings Rules*. Unless otherwise directed, the application is made in the county, district or region in which the proceedings arose. A notice of application in Form 1 must be served on the Crown and filed at least thirty days from the date the warrant was issued and must be returnable within thirty days of service. Provision, however, is made for an extension of time. The contents of the notice of application are set out in rule 6.03 as follows:

a) the place and date of hearing;
b) the precise relief sought (*e.g.*, that the warrant be quashed and all documents seized and any copies returned to the owner);
c) the grounds to be argued, including a reference to any statutory provision or rule to be relied upon (*e.g.*, that the evidence to obtain the warrant failed to set out sufficient information to show that the items sought would be found in the named premises as required by subsection 487(1) of the *Code*);
d) the documentary, affidavit and other evidence to be used at the hearing of the application; and
e) whether any order is required abridging or extending the time for service of filing of the notice of application or supporting materials.

In addition, rule 43.03(2) requires the applicant to include a notice addressed to the court services manager requiring the manager to make a return. Where the relief sought is the quashing of a search warrant, ordinarily the return will merely be true copies of the warrant and the information to obtain the warrant. If charges have already been laid, it would probably be advisable for the manager to include a copy of the information. The notice of application must also be accompanied by a copy of the warrant and any other material in the court file that is necessary for the hearing and determination of the application. Since the information to obtain the warrant will be required to hear the application, a copy of this document should be obtained from the provincial court and included with the other material.

It may be necessary to support the application by affidavit evidence. If so, the affidavit will be prepared in accordance with rule 4.06 and Form 4, and served and filed in accordance with rule 6.11. This rule also contemplates that there may be cross-examination on the affidavit either before a special examiner or, with leave, before the judge hearing the application. Counsel should take care not only in drafting the affidavit, to ensure its accuracy, but in choosing the deponent of the affidavit. Especially where there is any possibility of criminal charges against an individual, it is probably unwise to have that person swear the affidavit, since he or

she may be subject to cross-examination pursuant to these rules — a cross-examination which may stray into areas relating to the proposed charges.

Rule 43.05 also requires that, in accordance with rule 6.05, the applicant serve and file an application record and a factum. The contents of the record are set out in rule 6.05(2) and the contents of the factum in rule 6.07. The *Rules* also require that the respondent serve and file a factum, the contents of which are governed by rule 6.08. While the court has the power to dispense with the serving and filing of an application record or a factum, counsel should proceed on the basis that in normal circumstances these will be required for the hearing of the application. Absent an order abridging the time for service, the record and the applicant's factum is to be served fifteen days before the hearing and filed with proof of service with the court ten days before the commencement of the week in which the application shall be heard. The respondent's factum and record, if any, is to be served on the applicant and filed with the court with proof of service five days before the commencement of the week in which the application is to be heard.

As a practical matter, in most cases, there is little to be gained from moving to quash a warrant, unless there is a strong jurisdictional argument to be made, and what is sought is the return of the seized evidence. The scope of inquiry on an application to exclude evidence at trial pursuant to subsection 24(2) of the *Charter* based on a violation is much greater. Where the only reason for seeking to quash the search warrant is that the accused intends to argue that the evidence obtained as a result of its execution is inadmissible by reason of a violation of section 8 of the *Charter*, there is no need to bring a separate application to the Superior Court of Justice by way of *certiorari*. A trial judge has the jurisdiction to decide all aspects of the question of admissibility of evidence, including an allegation that the evidence should be excluded because the search warrant was improperly granted. In fact, where the only basis for the bringing the application in the nature of *certiorari* is to provide a foundation for an argument that evidence seized pursuant to the warrant should be excluded, the application will virtually always be dismissed and the matter left to the trial judge to deal with.[62]

6. SEARCH AND THE RIGHT TO COUNSEL

In most circumstances, a person subject to a search of the person is detained within the meaning of subsection 10(b) of the *Charter* and therefore may have the right to be informed of the right to counsel and the right to contact counsel. In a series of cases the Supreme Court of Canada has attempted to determine when the right to counsel attaches and what rights the detainee has. A traveller attempting to enter Canada and subjected to a search of her luggage or a frisk search was held not to be detained within the meaning of subsection 10(b).[63] Where, however, she was required to submit to a more intrusive strip search, she was detained and had the right to contact counsel before the search was undertaken.[64] Similarly, a person who is taken into an interview room on suspicion of importing narcotics, interrogated and required to empty pockets, place hands against the wall and spread the feet is also detained and entitled to subsection 10(b) rights.[65]

Where the person is subject to search by police, as for example a search incident to arrest, the person is detained and must be informed of the right to contact counsel. However, the police are not obligated to suspend the search until the detainee has had the opportunity to consult with counsel, except, for example, where the lawfulness of the search is dependent on the detainee's consent or where a statute gives a person a right to seek review of the decision to search.[66] Where the police have executed a search warrant and arrested the occupant of the premises, the occupant is detained. However, the police are not required to afford the accused the opportunity to contact counsel until the situation is clearly under control.[67]

When contacted in the course of execution of a search warrant, counsel should ascertain the basis for the warrant and, if possible, obtain a copy of the warrant to confirm that it authorizes the search that is being undertaken. However, the lawyer cannot obstruct the search nor counsel anyone else to do so. If there is a concern that the search exceeds the authority granted by the warrant and the officer refuses to agree to suspend the search, counsel should simply instruct the owner to make careful notes of what takes place and attempt to obtain an inventory of items seized. This information may then form the basis of an

application to quash the warrant or to exclude evidence at trial if charges are subsequently laid.

6.1 Warrantless Search Powers

Other than in the context of breathalyser demands, it will be rare that counsel is contacted in the course of attempted execution of warrantless powers of search, and so no extended discussion of those powers is included here. One must, however, be aware that these powers are extensive and exercised on a daily basis far more frequently than the warrant power. Thus, probably the most common search power is the power to search any place or any person on consent. Recent cases from the Court of Appeal and the Supreme Court of Canada have explored the nature of a valid consent and the relationship to the right to counsel as guaranteed by section 10 of the *Charter*.[68] The other search power that is most often invoked is the power to search a person and the immediate surroundings as an incident of a lawful arrest. A recent decision of the Supreme Court of Canada has defined the circumstances in which such a search may take place and noted that the power can be exercised even in the absence of reasonable grounds to believe that the arrestee is in possession of evidence, contraband or a weapon.[69] However, a search incidental to arrest must have a purpose related to that arrest and enjoy a sufficient spatial and temporal nexus to the arrest itself. The three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence.[70]

A strip search incident to arrest, however, should rarely be used. Merely because police have reasonable grounds to carry out an arrest does not confer authority to automatically carry out a strip search. The police must have additional grounds for concluding that the strip search is necessary to discover weapons or evidence. In addition, strip searches must be conducted in police stations absent exigent circumstances and should be executed by an office of the same gender and with minimal force.[71]

The Court has also indicated that the power to search incident to arrest is not so broad as to permit the taking of bodily samples from the arrestee.[72]

It should be noted here that the *Code* has recently been amended to allow for the exercise of the powers contained in subsections 487(1) and 492.1(1) without a warrant "if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant."[73]

7. PROCEEDS OF CRIME[74]

7.1 Main Features of the Legislation

A complete review of the proceeds of crime legislation is beyond the scope of this course. Set out below is a very brief summary of the most important features. Anyone required to deal with the special orders or warrants under these provisions must refer to the detailed statutory provisions.

The proceeds of crime legislation is found primarily in Part XII.2 of the *Code*. There are, however, other related provisions in the *Controlled Drugs and Substances Act*. Generally, the legislation creates offences for possession or laundering of the proceeds of certain specified crimes. Those crimes are the serious narcotic and drug offences and so called "enterprise crimes" such as fraud, extortion, corruption and procuring. Of particular concern to lawyers is the very broad definition of proceeds of crime as "any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly" as a result of the commission of one of the listed crimes.

The legislation provides for the forfeiture of proceeds of crime following conviction for a designated drug offence or an enterprise crime. Exceptionally, the legislation allows for *in rem* proceedings where there has been no conviction because the accused person has died or absconded. Where a forfeiture order cannot be made because, for example, the property cannot be located, the court may impose a fine equal to the value of the property. The legislation allows for the imposition of substantial periods of imprisonment, depending on the amount of the fine, in default of payment.

The legislation also allows for an application to a superior court judge for special seize and freeze orders. These orders allow the Crown to seize property believed to be subject to forfeiture, or restrain the person from dealing with the property. Provision is also made, in section 462.4, for orders to set aside any conveyance or transfer of property that occurred after the order is made,

unless the conveyance or transfer was for valuable consideration to a person acting in good faith and without notice.

7.2 Legal Expenses[75]

Provision is made in the legislation for relief from the seize and freeze orders for purposes of meeting bail requirements, or reasonable living, business or legal expenses. Specifically in respect of legal fees, the legislation (section 462.34) provides for an application to a judge of the Superior Court of Justice where the accused must demonstrate that there are no other available financial sources. If this initial prerequisite is met, the judge will conduct an *in camera* hearing, in the absence of the Crown, to determine the reasonableness of the legal expenses. A recent amendment to section 462.34 of the *Code* permits the Crown, either before or after the *in camera* hearing, to make representations about what would constitute reasonable legal expenses. In determining what constitutes reasonable legal expenses, the court is to take into account the legal aid tariff of the appropriate province (subsection 462.34(5)).

7.3 Restraint on Lawyer's Trust Accounts

The legislation permits an application by the Attorney General to a superior court judge for an order freezing a bank account alleged to contain funds that are subject to forfeiture as being the proceeds of crime. There is no reason why this legislation could not apply to a lawyer's trust account. As well, it would appear that the provisions of section 462.4 for setting aside conveyances or transfers of property could be used to set aside a transfer of funds from a trust account to the lawyer's general account for the payment of the lawyer's fees. At present the Attorney General of Canada is studying the issue of the restraint of lawyers' accounts with a view to developing a policy.

7.4 Accepting Funds Suspected of Being Proceeds of Crime

A lawyer who accepts money or property, whether on account of fees or to be held in trust pending the completion of a transaction, knowing that the funds were the proceeds of crime may be guilty of the possession or laundering offence. The offences will also be committed where the lawyer, while not having actual knowledge, was wilfully blind to the source of the funds. The doctrine of wilful blindness applies where the person has become aware of the need for some inquiry but declines to make the inquiry because the person does not wish to know the truth.[76]

Even where the lawyer accepted the funds in ignorance of their true nature, the lawyer may become liable to prosecution as a result of dealing with the funds after learning that they are the proceeds of crime. The British Columbia Bar Association has offered the following advice to its members:

> Upon learning that funds held in trust are the proceeds of crime, the member should promptly:
>
> (1) retain counsel knowledgeable about the proceeds of crime legislation, disclose to that counsel his or her state of knowledge respecting the funds, and confirm that information in writing. . . ;
>
> (2) advise the client that the member is holding the funds in trust and that they will be released from trust only by court order;
>
> (3) if the client refuses to authorize disclosure to the other party for whose benefit the funds are being held the reason the member continues to hold the funds in trust, the member must be careful to maintain confidentiality respecting the tainted nature of the funds, and simply advise the other party to seek an explanation directly from the client and, if necessary, to seek independent legal advice;
>
> (4) if steps (1) to (3) do not satisfactorily resolve the member's problem, the member is encouraged to contact the Law Society for advice as to the proper course of professional conduct to be followed.

7.5 Conclusion

The proceeds of crime legislation can raise extremely complicated issues for lawyers engaged in all types of practice. Lawyers are often used by persons to transfer funds or convert funds for perfectly legitimate purposes. However, lawyers must be aware that they can become the tools of dishonest clients attempting to use the lawyer's

reputation to cover tainted transactions. Lawyers must ensure that they do not become mere technicians carrying out the instructions of clients without making inquiries, which any reasonable person would make in the circumstances.

PART II: Investigation and Questioning of Suspects

8. INTRODUCTION

Generally speaking, outside the area of search and seizure, the other investigative powers given the police are governed by the common law. This next section of the chapter will be an attempt to set out guidelines for the most common incidents of police-citizen contact at the investigative stage, where a lawyer may be involved.

9. THE RIGHT TO QUESTION — THE DUTY TO ANSWER — NON-DETENTION

A police officer has a right, even a duty, to investigate crime, and this includes the right to ask questions of any person. This right or power may, however, be circumscribed by the common law or *Charter* provisions where the person is under arrest or detention. The non-detention situation will be considered first. While the police officer has the right to ask questions, in the absence of statutory requirements, the citizen need not reply. Certain provisions of the *Highway Traffic Act*[77] provide examples of when the citizen must reply to police questions. *Code* provisions requiring reply to police questions are extremely rare, although other federal legislation will often require cooperation with the authorities.[78] Accordingly, it is generally correct advice that a citizen who is under investigation for a *Code* offence is not required to answer questions and has the right to remain silent.[79]

Although entitled to question any person in order to obtain information about a suspected offence, a police officer has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person solely for the purpose of questioning or further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else. Although a police officer may, in some circumstances, briefly detain a person to question him or her on the street,[80] if the person refuses to answer, the police officer must allow the person to proceed unless, of course, the officer arrests the person on a specific charge or arrests pursuant to section 495 of the *Code* where the officer has reasonable and probable grounds to believe that the person has committed or is about to commit an indictable offence. It must be stressed that a person who chooses to speak to the police must not lie or otherwise mislead the police, since this can constitute the offence of attempting to obstruct justice (*Code*, section 139), public mischief (*Code*, section 140) or obstructing a police officer (*Code*, section 129). Where the investigation involves other Federal or provincial legislation, the lawyer must consult that legislation to determine the powers of the authorities and the duties that may be imposed upon the citizen to cooperate. Finally, this is not to say that the best advice that a lawyer can give is not to cooperate with the investigators. Each case is unique and there is no denying that criminal charges are sometimes avoided because the citizen was able to provide the police with an explanation. The lawyer's duty, however, is to provide accurate information concerning the citizen's rights, the police powers, and advice based on experience in dealing with similar situations.

Ultimately, the decision must be made by the client. Having chosen to speak to the police, the client may wish to be accompanied by a third person, such as a relative, the lawyer, or someone in the lawyer's firm, such as an articling student.[81] It is best to have statements made to the police videotaped. The courts have recently encouraged this practice in strong terms.[82] In any case, the client should be encouraged to make notes of the conversation during or immediately after the interview. These may be invaluable should a dispute arise later about what was said. The lawyer should be aware that if charges are later laid and a dispute arises concerning an interview that the lawyer has attended, the lawyer may be a witness and therefore unable to act as counsel in the case. Counsel's function is not simply to advise the client of the right to remain silent, but to advise the client how to exercise that right. For example, the client may believe that only written

statements are admissible in court. Therefore the client should be advised that anything that is said or done will be recorded and may become evidence. It is probably wise to advise the client that the police are often skilled interrogators and that many persons who thought they could talk their way out of the problem have ended up incriminating themselves.[83]

10. THE RIGHT TO QUESTION — THE DUTY TO ANSWER — DETENTION

As indicated above, there is no right at common law to detain or arrest a person solely for questioning or for investigation. The police have powers of arrest without warrant that are provided by statute, such as sections 494 and 495 of the *Code*, founded upon the person having apparently committed an offence or the officer having reasonable and probable grounds to believe that the person has committed or is about to commit an indictable offence. The police may also arrest where a warrant has been issued by a judicial officer, usually a justice of the peace (for example, *Code*, section 507). Where a person is under arrest or detention, certain additional rights accrue to the citizen and certain limitations and duties are imposed upon the police. The most significant duties imposed on the police are those set out in subsection 10(a) and (b) of the *Charter*, as follows:

> **10.—** Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefore;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right;

While the police have no common law right to detain a person without making an arrest for an offence, it may be that in certain citizen-police confrontations, detention, in fact, takes place — and thus the officer's duty to comply with section 10 arises. It is beyond the scope of this article to attempt an exhaustive exploration of the content of section 10. However, the Supreme Court of Canada has provided a definition of "detention" in the case of *R.* v. *Therens*.[84] That definition makes it apparent that detention can arise in situations short of actual physical constraint. For the purposes of this discussion, the important question is whether a citizen who attends for police questioning is under detention. The Ontario Court of Appeal has attempted to set out a number of factors to be considered to determine when the person who attends "voluntarily" at the police station is nevertheless detained for the purposes of section 10 of the *Charter*:[85]

- The precise language used by the officer in requesting the person's attendance and whether the person was given a choice as to where the interview should be held.
- Whether the person voluntarily came to the station.
- Whether the person left at the end of the interview or was arrested.
- The stage of the investigation, and in particular, whether the questioning was for the purpose of obtaining incriminating statements.
- Whether the police had grounds to arrest.
- The nature of questions.
- The subjective belief of the person.

Arrest is an easier situation, being a discrete event. In general, an arrest is constituted by a physical seizure or touching of the arrested person's body, with a view to detention. It is probably fair to observe that actual physical seizing or touching may not any longer be absolutely essential, especially if the arrestee acquiesces in the situation by acknowledging, through words or conduct, the deprivation of liberty. An arrest is constituted when any form of words is used that is calculated to bring home to the person and does so that the person is under compulsion and the person thereafter submits to such compulsion.[86] There is no set formula that will be sufficient in all cases. Different procedures may have to be followed for persons of differing age, ethnic origin, knowledge of the spoken language, intellectual capacity, and physical or mental disability.[87] The controlling obligation is to make it plain to the person that he or she is no longer a free person able to do as he or she pleases.

Where the person is arrested or detained and informed of the right to counsel, the arrestee is entitled to exercise that right by contacting counsel except in certain limited circumstances. One such circumstance occurs where a motorist

has been detained for a roadside screening device test pursuant to subsection 254(2) of the *Criminal Code*.[88] Similarly, the motorist is not entitled to consult counsel prior to complying with a demand to perform certain roadside sobriety tests.[89]

In most other circumstances, the detainee does have the right to consult counsel. In *R.* v. *Manninen*[90] the Supreme Court of Canada set out certain guidelines with respect to right to counsel as guaranteed by subsection 10(b) as follows:

- The police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay.
- Where the detainee asserts a right to counsel, the police must facilitate access by, for example, providing access to an immediately available telephone. The detainee need not make an express request to use the telephone.
- There may, however, be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee's communication with counsel.
- The police must cease questioning or otherwise attempting to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel, absent circumstances in which it is particularly urgent that the police proceed with their questioning of the detainee before providing him or her with a reasonable opportunity to retain and instruct counsel.
- A person may implicitly waive the rights under subsection 10(b) but otherwise has the right not to be asked questions until afforded an opportunity to consult counsel, and by answering questions asked in breach of this section cannot be held to have waived these rights.

In addition, the detainee must be afforded the opportunity to consult counsel in private. In Ontario, detainees are usually informed of their right to consult counsel as a matter of routine. If because of the circumstances, the detainee cannot be given privacy, absent exigent circumstances, the police have no right to question the detainee until the requisite degree of privacy can be provided. The detainee does not have to specifically ask to speak to counsel in private. Thus, when telephoned by a detainee, counsel should ensure that the conversation is in private.[91]

The Supreme Court of Canada has imposed an additional duty upon the police when advising the accused of the subsection 10(b) rights. The detainee must be informed, as a matter of routine, of the existence and availability of the applicable systems of duty counsel and legal aid in the jurisdiction, and informed of any immediate, although temporary, legal advice, irrespective of the detainee's financial status, in order to give the detainee a full understanding of the right to retain and instruct counsel.[92]

Imposing this additional duty may, however, affect what constitutes reasonable diligence in the exercise of the right to counsel. It may well be that a detainee will not be given unlimited opportunity to contact counsel of choice when duty counsel is available. This will likely be the case in circumstances where the investigation is continuing, whether or not there is any special urgency in the matter. In an earlier case, the Supreme Court of Canada had already emphasized the importance of the accused being diligent in the exercise of the subsection 10(b) rights. The Court held that the duties imposed on the police to refrain from attempting to elicit evidence from the detainee are suspended when the detainee is not reasonably diligent in the exercise of those rights. This limit on the rights of the detainee is essential because it would otherwise be possible for the accused to delay needlessly and with impunity an investigation and even in certain cases to allow for an essential piece of evidence to be destroyed or rendered impossible to obtain. Thus, in *R.* v. *Smith*[93] where the accused had indicated he would wait until morning before contacting his lawyer, the court imposed on the accused the burden of proving that it was impossible for him to have contacted his lawyer when he was initially arrested and informed of his rights or when he was first taken to the police station. Since he had not done so, it was permissible for the police to question him, notwithstanding his express desire to speak to his lawyer before answering.

Absent special circumstances indicating that the accused did not understand the right to counsel when informed of it, the onus is on the accused to prove that he or she asked for the right but that it was denied or that the accused was denied any opportunity to even ask for it.[94] In practical terms, this means that the police, having advised the

accused of his or her subsection 10(b) rights, are then free to question the accused, provided the accused makes no request to consult counsel. Absent special circumstances, the police do not have to give the accused time to consider whether to consult counsel and do not have to specifically obtain from the accused a waiver of his or her rights. In other words, no issue of waiver of the right to counsel arises where the accused does not first assert the right to consult counsel. Special considerations apply to the questioning of young offenders. This is dealt with below.

In any event, the lawyer's first involvement in the issue will be when contacted by the accused and asked for advice. Again, absent some statutory compulsion, a citizen who has been detained or arrested has the right to remain silent and should be so advised. To date the *Charter* has *not* been interpreted as requiring the police to inform the person of the right to remain silent. When a person is charged with an offence, it is customary for the police to administer a standard caution that includes a recital that the accused has the right to remain silent. This warning is not required as a matter of law and is not given by the police where the suspect has not been charged and is not arrested.[95] Accordingly, the citizen must rely on the lawyer who has been contacted to provide an accurate statement of the citizen's rights. Again, it is impossible to otherwise generalize as to what further advice to give.

While some lawyers take the position that there is never a situation where the accused can advance his or her case by answering police questions after the initial arrest, the decision obviously having been made to charge the accused, it cannot be said that this is invariably the correct advice. At the least, the lawyer's obligation is to advise the client of his or her rights, and having been assured that the conversation is private, to obtain whatever other information is required to give any further advice. This may, as well, be the first occasion when the lawyer has an opportunity to gather some information for the next step in the proceedings — the bail hearing. While the lawyer may advise the client of the right to remain silent, it seems that to date there is no obligation on the police to cease questioning even where the accused indicates an intention to take that advice.[96] In these circumstances the best a lawyer can do is to advise the client and, if the client agrees, inform the police that the client chooses to exercise the right. It will then be for a court at some later date to determine the admissibility of anything said after the lawyer departs.

One further matter that counsel will want to canvass is the possibility that anything the accused says to a fellow inmate may later be adduced in evidence by the Crown. Where the "inmate" is in fact an undercover police officer or a police agent, different considerations may apply. The Supreme Court of Canada has held that where the accused consulted with counsel and informed the police that he did not wish to make a statement, it was a violation of section 7 of the *Charter* for the police to trick the accused into making a statement by placing an undercover officer in the cell.[97] In that case, the court placed a great deal of emphasis on the fact that the officer actively engaged the accused in conversation. The situation is different, however, where the undercover officer merely gave the detainee the opportunity to speak but did not attempt to elicit information concerning the offence.[98] It should be further emphasized to the client that this case law does not apply to "free agents" — inmates who for their own reasons are anxious to obtain information from their fellow prisoners, perhaps in exchange for lenient treatment, but who are otherwise not under the control of the police nor acting at their behest.[99]

The client should also be advised that, generally speaking, the police are not required to again advise the accused of the right to counsel on each occasion that the questioning touches a different offence, unless there is a discrete change in the purpose of the investigation or the offence has become significantly more serious. Thus a client should be advised again of the right to contact counsel should the subject matter of the questions change. A client who may be quite content to speak to the police about one matter may need further advice as the nature of the investigation changes.[100]

During the interview with the client, whether on the telephone or in person, the lawyer should make careful notes of the conversation and the advice given. At a subsequent trial the admissibility of what the client told the police may be an issue and the lawyer may be a witness. It is important that the lawyer has an accurate record available from which to refresh his or her memory.

It is sometimes said that an alibi must be disclosed at the first available opportunity. This,

however, is not correct. There is no statutory requirement to disclose an alibi. While a judge may advise a jury to draw an adverse inference from the late disclosure of an alibi, all that is required to avoid this instruction is that the alibi be disclosed sufficiently early, so that the police have an adequate opportunity to investigate it.[101] Accordingly, it is unnecessary to advise the client to tell the police of the alibi upon initial detention. There is adequate opportunity to do so several weeks or even months later after the full story has been obtained from the client and counsel has been able to investigate the circumstances sufficiently to ensure that the alibi is not fabricated. Nothing is more damaging to a client's case than proof of an attempt to mislead the police by providing a false alibi. In such circumstances the trier of fact can be instructed that there is an adverse inference based on the common sense proposition that an innocent person would not find it necessary to concoct evidence.[102]

11. THE QUESTIONING OF YOUNG PERSONS

The *Youth Criminal Justice Act*[103] includes additional protections for young offenders who are being questioned by the police. Section 146 sets out very specific procedures for the questioning of young persons. In particular, the young person must be advised that there is no obligation to give a statement, that the statement may be used in evidence, that the young person has the right to consult counsel and a parent or other adult relative, and that the young person has the right to make the statement in the presence of this other person. While the young person may waive the right to consult another person and have that other person present, any waiver must be recorded on video tape or audio tape, or in writing. If counsel is asked to be present during the taking of the statement, counsel will want to take notes of the conversation, obtain a copy of any video or audiotape of the statement, and/or a copy of the officer's notes, and generally be available to assist the young person by reminding the client of the right to silence where that seems appropriate. Again, by being present, counsel may well end up being a witness and therefore will be unable to act on the trial.

The offender should also be made aware of the possibility, where it exists, that he or she could be subject to an "adult sentence" pursuant to sections 62 to 74 of the *Youth Criminal Justice Act*.[104]

12. OTHER INVESTIGATIVE TESTS

There are a broad range of investigative tests to which the police may want the detainee to submit and for which counsel's advice may be sought. Some of these are discussed briefly below.

12.1 Lineup

The Supreme Court of Canada has indicated that a detainee has the right to contact counsel prior to being required to participate in a lineup. This includes the right to consult counsel of choice, provided that counsel is available within a reasonable time. Otherwise the detainee may have to be content to rely on the advice of duty counsel.[105] As to the advice counsel can give, the following should be taken into account. There is no legal obligation to participate in a lineup.[106] On the other hand, refusal to do so can have certain prejudicial effects. In particular, where the case turns on identification of the perpetrator, circumstances may arise during the trial that will permit the Crown to lead evidence that the accused refused to participate in a lineup to explain the absence of lineup evidence. In such a case a jury might well draw an inference adverse to the accused. The Supreme Court also suggested that the following advice could be given the detainee: "They could have been advised, for example, not to participate unless they were given a photograph of the lineup, or not to participate if the others in the lineup were obviously older than themselves. In short, they could have been told how a well-run lineup is conducted, even though there is no statutory framework governing the lineup process."[107] In other words, the best advice to the client is to participate only in a fair lineup. To this end, counsel should attempt to speak to the officer in charge to determine that proper procedures have been followed to obtain the other persons who will act as distracters, that everything said to and by the witness will be recorded, that the accused is permitted to choose a position in the lineup and that nothing is done to give any kind of clue to the witness. Ideally the procedure should be videotaped, but if not, a photograph should be taken of the lineup both before and after it was viewed by the witness. Where the police do not intend to conduct a proper lineup, but rather

seek to take the accused to the location of the offence, or to some other crowded area to conduct the identification, then the best advice is probably to instruct the client not to participate. Once again, there is no legal requirement to participate, and the conditions are so uncontrolled that the necessary reliability and fairness of the procedure simply cannot be guaranteed. In such a location the accused, perhaps standing or seated with two large police officers may stick out like a sore thumb.

12.2 Hair, Saliva and Similar Samples and Bodily Impressions

The provisions of the *Code* have been recently amended to create a comprehensive legislative scheme to allow for the issuance of a warrant to seize bodily substances for the purpose of DNA analysis.[108] The forensic DNA warrant can be issued only in respect of a "designated offence" which is defined in section 487.04 to include *inter alia* the offences of murder, assault, sexual assault, and robbery. The forensic DNA warrant authorizes the plucking of individual hairs, taking of buccal swabs and taking small blood samples (section 487.06). The warrant is issued by a judge of the Ontario Court of Justice (not a justice of the peace) on an *ex parte* basis. The new legislative scheme sets out the particular circumstances in which the warrant may be issued. Pursuant to section 487.05, the issuing judge must be satisfied of the following:

a) that a designated offence has been committed;
b) that a bodily substance connected with the offence has been found;
c) that the person was a party to the offence;
d) that there are reasonable grounds to believe that evidence will be obtained as a result of the seizure and subsequent DNA analysis; *and*
e) that the issuance of the warrant is in the best interests of the administration of justice.

In considering whether to issue the warrant, the judge shall have regard to the nature of the designated offence, the circumstances of its commission, the likelihood that evidence will be obtained and the intrusive nature of the seizure authorized. Unlike other warrant provisions, the DNA warrant provisions of the *Code* attempt to protect the privacy interests of the individual against whom the warrant is executed by limiting the use of evidence obtained through a forensic DNA warrant. The seized substances and the results may be used only in the course of an investigation of a designated offence (section 487.08). The samples and results of the analysis must be subsequently destroyed where it is established that the person from whom the bodily substances were seized is not the offender, either as a result of testing or as a result of a judicial determination, such as an acquittal or discharge at the preliminary inquiry. Note, however, that subsection 479.02(2) does give the judge the power to preserve the substances and forensic results pending the investigation of another designated offence for a reasonable period of time.

Pursuant to subsection 487.07(2), similar to breathalyser procedures, this provision contemplates the taking of such samples in the absence of the exercise of the right to consult with counsel. The constitutional validity of this limitation on the right to counsel has yet to be challenged. Special provisions, however, apply to young persons, as defined in subsection 2(1) of the *YCJA*. A young person is entitled to consult with counsel and have the warrant executed in the presence of counsel, a parent or another adult. Any waiver of such rights by the young person must be recorded by audiotape, videotape or in writing. Upon execution of the warrant, section 487.07 requires the peace officer executing the warrant to inform the person against whom it is to be executed of the contents of the warrant, the nature of the investigative procedure through which the bodily substance is to be seized; the purpose of obtaining the sample; the possibility that the results of forensic DNA analysis may be used in evidence and the authority to use as much force as is necessary to execute the warrant. In addition, where the warrant is being executed against a young person, the peace officer is required to inform the young person of the right to consult with counsel and the right to have counsel, a parent or another adult present during the execution of the warrant.

It should be noted here that, in addition to the DNA provisions, the *Code* has recently been amended to provide for the issuance of a warrant to take "any handprint, fingerprint, footprint, foot impression or other print or impression of the body or any part of the person."[109] These warrants

are not limited to "designated offences" and may be issued in respect of an investigation into any offence against any Act of Parliament. The issuing justice must be satisfied that there are reasonable and probable grounds to believe that such an offence has been committed and that the impression or impressions sought will afford evidence of that offence. The justice must also be satisfied that "it is in the best interests of the administration of justice to issue the warrant." Furthermore, the warrant for such an impression must contain "such terms and conditions as the justice considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances."

Finally, pursuant to section 2 of the *Identification of Criminals Act*,[110] the police have the power to obtain fingerprints from anyone who is lawfully in custody (among others), and are authorized to use such force as is necessary to obtain those fingerprints. Pursuant to the *Code* (subsection 501(3)), a person accused of an indictable offence may be compelled by the police to attend at a specified time and place for the purpose of the taking of fingerprints under the *Identification of Criminals Act*.[111]

12.3 Blood, Breath and Sobriety Tests

Section 254 of the *Code* gives the police the power to demand breath samples and blood tests from a motorist in certain limited circumstances. It is a criminal offence to refuse to comply with a valid demand without reasonable excuse. The law of reasonable excuse is extremely complicated. It is simply not possible here to review the circumstances in which a motorist can be advised that he or she may have an excuse for refusing to comply with the demand. The law is clear that following advice of counsel is not *per se* a reasonable excuse for refusing to comply with the demand. While counsel might attempt to ascertain the circumstances surrounding the demand in order to determine if the demand was valid, *i.e.*, that the officer formed the belief that the accused had committed the offence within three hours of the offence and that there were reasonable grounds to believe that an offence of "over 80" or impaired operation had been committed, this may prove to be a very difficult task from a client who is upset and perhaps intoxicated. To date the cases have not required that the police officer converse with the lawyer and apprise the lawyer of the circumstances of the detention. Nevertheless, counsel may try to determine the relevant circumstances. In the end it may be that the best counsel can do is to warn the client of the legal consequences of a refusal to provide breath samples.

A slightly more complicated regime applies to the obtaining of blood samples. The circumstances in which a blood demand can be made are somewhat more limited and depend on the fact that the police believe that a breath sample could not be obtained because of the condition of the accused. In addition, the motorist must be advised that the sample will only be taken under supervision of a physician and where the physician is satisfied that the motorist's life will not be endangered by the procedure.[112]

There is no authority in the *Code* for compelled compliance with sobriety tests. These tests are often difficult to perform and the client can be advised of the right not to comply with a request to perform them. However, it should be noted that section 48 of the *Highway Traffic Act* provides that a police officer may stop a vehicle for the purpose of determining whether or not there is evidence that would justify the making of one of the demands in section 254 of the *Code*. This section has been interpreted as authorizing the police officer to require the driver to perform sobriety tests at the roadside.[113] While the results of these tests may be used by the officer to form an opinion about whether or not to make a demand, the results are not otherwise admissible at trial to prove impairment, since the tests are self-incriminatory and taken in breach of the right to counsel.[114]

12.4 Lie Detector Tests

Not only can a client not be required to take a lie detector test, but the results of the test, the refusal to take the test, or even the agreement to do so are inadmissible in evidence.[115] At its best a lie detector test is used by the police as a screening device to eliminate suspects. It is rarely productive for a person who is a suspect to take the test. More often than not the lie detector is used as a device to obtain a confession. By confronting the accused with the results of a failed test, the police may be able to obtain an admission by the client.[116] Most lawyers take the view that nothing is to be gained by participation in lie detector tests and so advise their clients.

12.5 Consent

It will be apparent that many investigative tests can only be done with the consent of the suspect. Where the test involves a search or seizure that would be unauthorized but for consent, the Court of Appeal has set out a stringent test as to what constitutes a valid consent. In particular, the consent must be voluntary, with the suspect aware of the nature of the police conduct for which consent is sought, aware of the right to refuse to consent, and aware of the potential consequences of giving consent.[117]

13. COOPERATION WITH THE AUTHORITIES

In the course of their investigation, the police may request that the accused cooperate in any number of procedures from hand washings to ascertain gun residues to returning to the scene of the crime to point out evidence, and even to re-enacting the crime for the benefit of a video camera. Unless there is a warrant, the accused is not required to cooperate in such procedures and can be so advised. It has been pointed out, however, that there is at least one circumstance in which cooperation can reap great benefits for the accused. A lawyer may receive a call from an international airport from a client who has been found in possession of a large quantity of narcotics. The police may wish the assistance of the client in making a controlled delivery of the drugs to the client's contact. Provided that the client is made aware of the personal risks, the client may be willing to act as a police agent. A lawyer faced with this situation for the first time will want to seek the assistance of more experienced counsel to conduct the necessary negotiations and assess the strength of the Crown's case against the client.

14. RELEASE FROM CUSTODY

The *Code* scheme for judicial interim release will be discussed in a later chapter. In this chapter, we simply wish to alert counsel to the issues that should be dealt with when the client calls from the police station seeking advice. Counsel will want to ascertain from the police whether they intend to hold the client for a show cause hearing in court. While in some circumstances the accused must be held in custody, for a wide variety of the most common offences the arresting officer or the officer in charge of the station has the power to release the accused, without a court hearing, on an appearance notice, promise to appear, or recognizance. This includes any Crown option offence, any offence within the absolute jurisdiction of the provincial court as listed in section 553 of the *Code* and any purely summary conviction offence. The officer in charge can also release the accused for an offence punishable by imprisonment for five years or less (*Code*, section 499).

Provided that it is not contrary to the public interest and that detention is not required to ensure attendance in court, the officer is *required* to release. The officer in charge also has a *discretion* to release for more serious offences, other than offences such as murder listed in section 469, pursuant to the provisions of section 503. Counsel should therefore, if possible, speak to the arresting officer or the officer in charge to determine whether the accused will be released. Sometimes counsel is in a position, from having acted for the accused in the past, to supply information (confirming identity, for example) that will assist the officer. Counsel ought not, however, to vouch for the accused. It would be highly irregular for counsel to act as a surety for a client. By doing so, the lawyer would step out of the role of counsel and assume a position that might place the lawyer in a conflict of interest.

The client may tell the lawyer that the client has been promised by the police that the client will be released if he or she provides a statement or provides some other form of cooperation. Such claims should be greeted with some scepticism. Counsel will want to talk to the police officer to ascertain the true state of affairs. Police are well aware that any statement obtained as a result of such a promise would be inadmissible. The client should be reminded of the right to remain silent and told that, if the client is not released from the station, the lawyer will take the necessary steps to ensure that a proper bail hearing is conducted the following day. To this end, counsel should determine the time and place of the bail hearing, and obtain some information about friends and relatives who may be able to act as sureties or provide information about the accused's background in order to conduct the show cause hearing. It is unwise to attempt to conduct an extended interview over the telephone either about

the circumstances of the offence or the proposed bail hearing. It will be more helpful for the lawyer to attend at the detention centre where the client can be seen in person and a full interview conducted.

NOTES

1 Marc Rosenberg, Justice of the Court of Appeal for Ontario. Based in part on a chapter originally written by Michael R. Dambrot, now a Justice of the Superior Court of Justice. Revised December 2004 by Marie Henein, LL.M. of Greenspan, Henein and White, and Ian R. Smith, of Fenton, Smith Barristers.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Construction Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (*Charter*).

3 *Criminal Code*, R.S.C. 1985, c. C-46 (*Code*).

4 *R.* v. *Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, 58 C.C.C. (3d) 257.

5 *R.* v. *Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1.

6 *R.* v. *Haley* (1986), 27 C.C.C. (3d) 454, 14 O.A.C. 297 (C.A.); *R.* v. *Katsigiorgis* (1987), 62 O.R. (2d) 441, 39 C.C.C. (3d) 256 (C.A.).

7 *R.* v. *Harris and Lighthouse Video Centres Ltd.* (1987), 35 C.C.C. (3d) 1, 20 O.A.C. 26 (C.A.).

8 *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97.

9 In order to have standing to raise a s. 8 issue at trial, an accused must first demonstrate that he or she personally enjoyed a reasonable expectation of privacy in the place searched: *R.* v. *Edwards*, [1996] 1 S.C.R. 128, 104 C.C.C. (3d) 136. In *R.* v. *Belnavis*, [1997] 3 S.C.R. 341, 118 C.C.C. (3d) 405, therefore, the Supreme Court of Canada concluded that a passenger's mere presence in a vehicle was insufficient to ground a reasonable expectation of privacy absent evidence that the passenger had control over the vehicle, owned the vehicle, used it in the past or had a relationship with the owner or driver which would establish some special access to or privilege in regard to the vehicle. For standing issues in relation to the interception of private communications, see *R.* v. *Cheung* (1997), 119 C.C.C. (3d) 507, 97 B.C.A.C. 161 (B.C.C.A).

10 Reference might be made, for example, to s. 487(1)(c), which authorizes issuance of a warrant to seize anything that there are reasonable grounds to believe is intended to be used for the purpose of committing certain types of offences. Section 103 permits issuance of a warrant where there is reason to believe that it is not desirable in the interests of safety that a person have possession of a firearm.

11 *Re Times Square Book Store and R.* (1985), 21 C.C.C. (3d) 503, 10 O.A.C. 105 (C.A.).

12 Section 487(1)(b) of the *Code* limits searches to "evidence with respect to the commission of an offence." In *R* v. *Branton* (2001), 53 O.R. (3d) 737, 199 D.L.R. (4th) 321 (C.A.) the Ontario Court of Appeal held that where a search warrant issued under s. 487(1) of the *Code* purports to authorize the seizure of evidence in respect of the "suspected commission" or "intended commission" of offences, it is facially invalid. Many law enforcement agencies use standardized forms for s. 487(1) warrants, which purport to authorize the seizure of evidence for suspected or intended offences (which is not permitted by the *Code*).

13 *R.* v. *Dombrowski* (1985), 37 Sask.R. 259, 18 C.C.C. (3d) 164 (C.A.).

14 *Re PSI Mind Dev. Institute Ltd. and R.* (1977), 37 C.C.C. (2d) 263 (Ont. H.C.J.).

15 *Re Lubell and R.* (1973), 11 C.C.C. (2d) 188 (Ont. H.C.J.).

16 See Scott C. Hutchinson & James C. Morton, *Search and Seizure Law in Canada*, (Toronto: Carswell, 1991), Ch. 16, part 16(b)(viii)A.

17 *Re Abou-Assale and Pollack and R.*, [1978] C.S. 142, 39 C.C.C. (2d) 546 (Que. S.C.); *Re PSI Mind Dev. Institute Ltd. and R. supra* note 14; *Dare to be Great of Can.* (1971) Ltd. v. A.G. Alta., [1972] 3 W.W.R. 307, 6 C.C.C. (2d) 408 (Alta. T.D.); *Re Purdy and R.* (1972), 8 C.C.C. (2d) 52, 28 D.L.R.(3d) 720 (N.B.C.A.).

18 *Re Dare to be Great of Can., supra* note 17; *Re Alder and R.* (1977), 5 A.R. 473, 37 C.C.C. (2d) 234 (Alta. S.C. T.D.); *Re Print Three Inc. and R.* (1985), 51 O.R. (2d) 321, 20 C.C.C. (3d) 392 (Ont. C.A.); *Re Church of Scientology (No. 6) and R.*; *Re Walsh and R.* (1985), 21 C.C.C. (3d) 147, 15 C.R.R. 23 (Ont. H.C.J.); var'd (1987), 31 C.C.C. (3d) 449, 18 O.A.C. 321 (C.A.).

19 Section 487 has now been amended to allow also for the seizure of "offence-related property", which is property used in the commission of "criminal organization offences" (see s. 2 of the *Code* for the definitions of these terms).

20 Sections 462.32 and 462.33.

21 See ss. 487(2.1) and (2.2) of the *Code*. The warrant may authorize collection of data onsite or offsite. In *R.* v. *Weir* (2001), 156 C.C.C. (3d) 188 (Alta. C.A.) the Court held that the police could seize the computer and conduct an offsite search of the computer at a later date.

22 In *R.* v. *Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321, the Supreme Court of Canada indicated in *obiter dicta* that these new sections of the *Code* "might well meet all constitutional requirements". The constitutionality of these provisions has been challenged in various courts. Section 487.06(1), authorizing the plucking of hair for DNA analysis has been struck down as constituting an unnecessary intrusion of bodily integrity, as hair samples will not produce useable DNA evidence for 5 to 10% of the population. The seizure of buccal swabs (s. 487.06(b)) and blood (s. 487.06(c)), which do not suffer from the same scientific inaccuracies, have been upheld as constitutionally valid: *R.* v. *F. (S.)* (2000), 141 C.C.C. (3d) 225, 128 O.A.C. 329 (C.A.). See also *R.* v. *Brighteyes* (1997), 199 A.R. 161, [1998] 3 W.W.R. 276 (Q.B.) and *R.* v. *Feeney* (2001), 152 C.C.C. (3d) 390 (B.C.C.A.).

23 *DNA Identification Act*, S.C. 1998, c. 37.

24 See s. 487.091 of the *Code*.

25 *R.* v. *Miller* (1987), 62 O.R. (2d) 97, 38 C.C.C. (3d) 252 (C.A.). Although now consideration must be given to s. 487.01 and ss. 487.04 to 487.09, which allow for the seizure of "bodily substances".

26 *R.* v. *Haley* (1986), 27 C.C.C. (3d) 454, 14 O.A.C. 297 (C.A.).

27 *R.* v. *Noseworthy* (1997), 33 O.R. (3d) 641, 116 C.C.C. (3d) 376 (C.A.).

28 *R.* v. *Debot*, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193.

29 *A.G. of Nova Scotia* v. *MacIntyre*, [1982] 1 S.C.R. 175, 65 C.C.C. (2d) 129.

30 *Re A.G. Ont. and Yanover* (1982), 68 C.C.C. (2d) 151, 26 C.R. (3d) 216 (Ont. Prov. Ct.); *Re Gerol and The Queen* (1982), 69 C.C.C. (2d) 232 (Ont. Prov. Ct.); *Re Director of Investigation and Research and Irving Equipment*, [1988] 1 F.C. 27, 33 C.C.C. (3d) 447 (F.C.T.D.); but *cf. Re Rideout and The Queen* (1986), 61 Nfld. & P.E.I.R. 160, 31 C.C.C. (3d) 211 (Nfld. S.C.).

31 See s. 487.3 of the *Code*.

32 *R.* v. *Hunter* (1987), 59 O.R. (2d) 364, 34 C.C.C. (3d) 14 (C.A.).

33 This problem of disclosure of the material in the information should be distinguished from the related problem of disclosure of the identity of an informer who, although not named or otherwise identified in the information, was the basis for the information. Counsel may want to ascertain the identity of this informer in order to test the validity of the information contained in the information as the basis for an attack on the subfacial validity of the information. (In other words the information may be valid on its face but counsel may wish to try establish that the information was false and that the warrant was obtained by fraud.) The Court of Appeal has held that the common law rules of evidence, which prohibit judicial disclosure of a police informer's identity, are applicable. There is only one exception to this principle and that is where disclosure of the identity of the

informer is necessary to demonstrate the innocence of the accused. Thus, it may be that only where the informer has information about the crime which could demonstrate the innocence of the accused would the police be required to disclose the informer's identity: *R.* v. *Hunter*, *supra* note 32; *R.* v. *Leipert*, [1997] 1 S.C.R. 281, 112 C.C.C. (3d) 385.

34 *R.* v. *Solloway and Mills* (1930), 65 O.L.R. 218, 3 D.L.R. 770 (C.A.).

35 *R.* v. *Haley*, *supra* note 26.

36 *R.* v. *Gibson*, [1919] 30 C.C.C. 308 (Alta. T.D.).

37 *R.* v. *Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137, 7 O.A.C. 105 (C.A.); *Re Church of Scientology and R. (No. 6) supra* note 18.

38 *Re Dobney Hldgs. and R.* (1985), 18 C.C.C. (3d) 238, 5 C.P.R. (3d) 84 (B.C.C.A.).

39 *R.* v. *Haley*, *supra* note 26. But see *R.* v. *Laplante* (1987), 59 Sask. R. 251, 40 C.C.C. (3d) 63 (C.A.) with respect to the search of outbuildings on the same property as the building named in the warrant.

40 *Wah Kie* v. *Cuddy*, [1914] 23 C.C.C. 383 (Alta. S.C.); see also *R.* v. *Genest*, [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385.

41 See example *R.* v. *Bohn* (2000), 145 C.C.C. (3d) 320, 136 B.C.A.C. 263 (C.A.).

42 *Eccles* v. *Bourque*, [1975] 2 S.C.R. 739, 19 C.C.C. (2d) 129.

43 *Levitz* v. *Ryan*, [1972] 3 O.R. 783, 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519 (C.A.). See also *Seguar and Colon* v. *U.S.*, 104 S. Ct. 3380 (1984).

44 *R.* v. *Genest*, supra note 40.

45 A situation of "immediate urgency", such as the potential destruction of evidence, must exist before warrant is executed at night. The absence of urgent circumstances compelling a nocturnal search may result in damages being awarded for breach of *Charter* rights under s. 24(1) of the *Charter*. *Chrispen* v. *Kalinowski* (1997), 117 C.C.C. (3d) 176, 156 Sask.R. 58 (Q.B.).

46 *R.* v. *Coull and Dawe* (1986), 33 C.C.C. (3d) 186, [1986] B.C.J. No. 1338 (C.A.) (QL).

47 Re Church of Scientology and R. (No. 6), supra note 18.

48 *R.* v. *Thompson*, [1990] 2 S.C.R. 1111, 59 C.C.C. (3d) 225.

49 *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

50 *Re R. and Shea* (1982), 38 O.R. (2d) 582, 1 C.C.C. (3d) 316 (H.C.J.); *R.* v. *Longtin* (1983), 41 O.R. (2d) 545, 5 C.C.C. (3d) 12 (C.A.).

51 *CanadianOxy Chemicals Ltd.* v. *Canada (Attorney General)*, [1999] 1 S.C.R. 743, 133 C.C.C. (3d) 426.

52 In order to obtain an order of detention, the prosecutor must satisfy the justice that the evidence is required for an investigation, preliminary inquiry, trial or other proceeding. Where the test is satisfied, the justice must order detention. This task is administrative; the justice is given no discretion. Notice need not be given of an application for detention, nor need there be a hearing. No affidavit or other material need be filed in support of the application. No order need be made in writing: *Re Church of Scientology and R. (No. 6)*, *supra* note 18.

53 *R.* v. *Fink*, [2002] 3 S.C.R. 210.

54 *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1.

55 *R.* v. *Morra* (1991), 5 O.R. (3d) 255, 68 C.C.C. (3d) 273 (Ont. Ct. (Gen. Div.)); *R.* v. *Solosky*, [1980] 1 S.C.R. 821, 50 C.C.C. (2d) 495; *Descôteaux et al.* v. *Mierzwinski*, [1982] 1 S.C.R. 860, 70 C.C.C. (2d) 385.

56 *Baron* v. *Canada*, [1993] 1 S.C.R. 416, 78 C.C.C. (3d) 510.

57 *Re Church of Scientology and R. (No. 6)*, *supra* note 18.

58 *Re Church of Scientology and R. (No. 6), supra* note 18.

59 In addition, no appeal is available from the issuance or refusal of a search warrant: *Goldman* v. *Hoffmann-La Roche Ltd.* (1987), 60 O.R. (2d) 161, 35 C.C.C. (3d) 488 (C.A.). However, in some limited circumstances an action for a declaration may be available, in which case an appeal would lie to the Court of Appeal under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. *Kourtessis* v. *M.N.R.*, [1993] 2 S.C.R. 53, 81 C.C.C. (3d) 286.

60 *Goldman* v. *Hoffmann-La Roche Ltd.*, *supra* note 59.

61 *R.* v. *Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161. Although this case dealt with an authorization to intercept private communications under Part VI of the *Code*, there is no reason to believe that the procedure set out in this decision would not be applicable to applications in respect of search warrants.

62 *Re Zevallos and R.* (1987), 37 C.C.C. (3d) 79, 22 O.A.C. 76 (C.A.).

63 See also *R.* v. *Hardy* (1995), 103 C.C.C. (3d) 289, 66 B.C.A.C. 270 (B.C.C.A.), in which successive questioning by an immigration officer and a customs officer, and the drilling of the accused's suitcase by the customs officer did not constitute detention during the course of an investigation. Reference should also be had to *R.* v. *Monney*, [1991] 1 S.C.R. 652, 133 C.C.C. (3d) 129 in which the detention of a traveller believed to have ingested drugs for the purpose of a "bedpan vigil" pursuant to s. 98 of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.) was held not to violate sections 7 or 8 of the *Charter*.

64 *R.* v. *Simmons*, [1988] 2 S.C.R. 495, 45 C.C.C. (3d) 296.

65 *R.* v. *Jacoy*, [1988] 2 S.C.R. 548, 45 C.C.C. (3d) 46.

66 *R.* v. *Debot*, *supra* note 28.

67 *R.* v. *Strachan*, [1988] 2 S.C.R. 980, 46 C.C.C. (3d) 479.

68 See in particular *R.* v. *Mercer* (1992),7 O.R. (3d) 9, 70 C.C.C. (3d) 180 (C.A.); *R.* v. *Wills* (1992), 70 C.C.C. (3d) 529, 7 O.R. (3d) 337 (C.A.) and *R.* v. *Borden*, [1994] 3 S.C.R. 145, 92 C.C.C. (3d) 404; *R.* v. *Clement*, [1996], 2 S.C.R. 289, 107 C.C.C. (3d) 52; *R.* v. *Lewis* (1998), 38 O.R. (3d) 540, 122 C.C.C. (3d) 481 (C.A.).

69 *Cloutier* v. *Langlois*, [1990] 1 S.C.R. 158, 53 C.C.C. (3d) 257.

70 Thus, the search of an automobile six hours after the initial arrest cannot be said to be a search incidental to the arrest: *R.* v. *Caslake*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97.

71 *R.* v. *Golden*, [2001] 3 S.C.R. 679, 159 C.C.C. (3d) 449.

72 *R.* v. *Stillman*, *supra* note 22.

73 See s. 487.11 of the *Code*.

74 I wish to express my appreciation to Graham Reynolds, Q.C., Section Head, Criminal Prosecutions, Department of Justice, Toronto, who assisted in the preparation of this part of the materials, and as well for drawing to my attention the Special Report to Members of the Law Society of British Columbia, "The Impact of Proceeds of Crime Legislation on the Practice of Law".

75 In respect of Parts 7.2 to 7.6 of this chapter, counsel may wish to refer to T. Brucker, "Money Laundering and the Client: How Can I Be Retained without Becoming a Party to an Offence?" (1997) 39 Crim.L.Q. 312.

76 *R.* v. *Sansregret*, [1985] 1 S.C.R. 570, 18 C.C.C. (3d) 223.

77 *Highway Traffic Act*, R.S.O 1990, c. H.8.

78 See, e.g. s.11 of the *Competition Act*, R.S.C. 1985, c. C-34.

79 *R.* v. *Dedman* (1981), 32 O.R. (2d) 641, 59 C.C.C. (2d) 97 (C.A.), aff'd, [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97 at 108-9.

80 See *R.* v. *Mann* (2004), 185 C.C.C. (3d) 308 (S.C.C.); *R.* v. *Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (C.A.); *R.* v. *Lewis* (1998), 38 O.R. (3d) 540, 122 C.C.C. (3d) 481 (C.A.).

81 However, counsel should be aware of Rule 5 of the *Rules of Professional Conduct* which governs the delegation of work to non-lawyers: Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: L.S.U.C., 2000).

82 See, for example, *R.* v. *Moore-McFarlane* (2001), 56 O.R. (3d) 737, 160 C.C.C. (3d) 493 (C.A.).

83 I wish to express my appreciation to Steven Skurka whose article, "When the Telephone Rings: Advising the Arrested Client" (1992) 34 Crim L.Q. 349 has proved to be an invaluable resource for some of the information contained in this Part of the chapter. Practitioners would be well advised to read Skurka's entire article which contains a number of important and useful tips for counsel called upon to give advice on very short notice with little or no time to research a problem.

84 *R.* v. *Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481.

85 *R.* v. *Moran* (1987), 36 C.C.C. (3d) 225, 21 O.A.C. 257 (C.A.).

86 *Alderson* v. *Booth*, [1969] 2 Q.B. 216. In some cases, the circumstances of the arrest are such as to render unnecessary a disclosure of the reasons for the arrest. See, *e.g. Christie* v. *Leachinsky*, [1947] A.C. 573 (H.L.).

87 See, *e.g. Wheatley* v. *Lodge*, [1971] 1 W.L.R. 29.

88 *Thomsen* v. *The Queen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411.

89 *R.* v. *Saunders* (1988), 41 C.C.C. (3d) 532, 27 O.A.C. 184 (C.A.).

90 *R.* v. *Manninen*, [1987] 1 S.C.R. 1233, 34 C.C.C. (3d) 385.

91 *R.* v. *Playford* (1987), 63 O.R. (2d) 289, 40 C.C.C. (3d) 142 (C.A.).

92 *R.* v. *Brydges*, [1990] 1 S.C.R. 190, 53 C.C.C. (3d) 330; *R.* v. *Prosper*, [1994] 3 S.C.R. 236, 92 C.C.C. (3d) 353; *R.* v. *Bartle*, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289.

93 *R.* v. *Smith*, [1989] 2 S.C.R. 368, 50 C.C.C. (3d) 308.

94 *Baig* v. *R.*, [1987] 2 S.C.R. 537, 37 C.C.C. (3d) 181.

95 *R.* v. *Esposito* (1985), 53 O.R. (2d) 356, 24 C.C.C. (3d) 88 (C.A.).

96 *R.* v. *Hicks* (1988), 42 C.C.C. (3d) 394, 28 O.A.C. 118 (C.A.).

97 *R.* v. *Hebert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1.

98 *R.* v. *Liew*, [1999] 137 C.C.C. (3d) 353, [1999] 3 S.C.R. 227.

99 *R.* v. *Broyles*, [1991] 68 C.C.C. (3d) 308, [1991] 3 S.C.R. 595.

100 *R.* v. *Evans*, [1991] 1 S.C.R. 869, 63 C.C.C. (3d) 289; *R.* v. *Schmautz*, [1990] 1 S.C.R. 398, 53 C.C.C. (3d) 556; *R.* v. *Sawatsky* (1997), 35 O.R. (3d) 767, 118 C.C.C. (3d) 17 (C.A.).

101 *R.* v. *Parrington* (1985), 20 C.C.C. (3d) 184, 9 O.A.C. 76 (C.A.); *R.* v. *Cleghorn*, [1995] 3 S.C.R. 175, 100 C.C.C. (3d) 393.

102 *R.* v. *Pollock* (2004), 187 C.C.C. (3d) 2004 (Ont.C.A.).

103 *Youth Criminal Justice Act*, S.C. 2002, c. 1. (*YCJA*)

104 These provisions of the *YCJA* replace the "transfer" provisions of the *Young Offenders Act*, R.S.C. 1985 c. Y-1. Under the former legislation, a young accused person faced the possibility that his or her case might be transferred to the regular courts where he or she would be treated as an adult. In *R.* v. *I.(L.R.)*, [1993] 4 S.C.R. 504. 86 C.C.C. (3d) 289, the Supreme Court ruled that the accused's waiver of counsel was not valid where he had not been informed of the possibility of transfer. See also *R.* v. *M.(S.)* (1996), 28 O.R. (3d) 776, 106 C.C.C. (3d) 289 (C.A.). Presumably, under the new legislation, the same principle will apply. In other words, the police should routinely tell young persons that they may be at risk of receiving an "adult sentence." Where the young person has had an opportunity to consult with counsel, counsel should ensure that the young person is made aware of this possibility.

105 *R.* v. *Ross*, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129.

106 Although it may be that a warrant could be obtained under s. 487.01. This remains to be seen.

107 *R.* v. *Ross*, *supra* note 105 at 137 (C.C.C.).

108 These provisions have survived constitutional challenge, see *R.* v. *S.A.B.*, [2003] 2 S.C.R. 678.

109 See s. 487.092 of the *Code*.

110 *Identification of Criminals Act*, R.S.C. 1985, c. I-1.

111 See *R.* v. *Connors* (1998), 121 C.C.C. (3d) 358, 155 D.L.R. (4th) 391 (B.C.C.A).

112 See *R.* v. *Knox*, [1996] 3 S.C.R. 199, 109 C.C.C. (3d) 481.

113 *R.* v. *Saunders* (1988), 27 O.A.C. 184, 41 C.C.C. (3d) 532 (C.A.); *R.* v. *Smith* (1996), 28 O.R. (3d) 75, 105 C.C.C. (3d) 58 (C.A.).

114 *R.* v. *Milne* (1996), 28 O.R. (3d) 577, 107 C.C.C. (3d) 118 (C.A.).

115 *R.* v. *Beland and Phillips*, [1987] 2 S.C.R. 398, 36 C.C.C. (3d) 481; *R.* v. *Siu* (1998), 124 C.C.C. (3d) 301, 106 B.C.A.C. 161.

116 See, for example, the facts in *R.* v. *Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321 or *R.* v. *McIntosh* (1999), 141 C.C.C. (3d) 97, 128 O.A.C. 69 (C.A.).

117 *R.* v. *Wills* (1992), 7 O.R. (3d) 337, 70 C.C.C. (3d) 529 (C.A.). See also *R.* v. *Borden*, [1994] 3 S.C.R. 145, 92 C.C.C. (3d) 404.