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UNIFORM LAW CONFERENCE OF CANADA

TELEWARRANTS

REPORT OF THE WORKING GROUP

Presented by
Stéphanie O'Connor

By videoconference
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1. Introduction

[1] At the 2016 meeting of the Criminal Section of the ULCC, the Criminal Section adopted the following resolution:

> To establish a working group to examine the telewarrant process under section 487.1 of the *Criminal Code*, in order to develop recommendations to make it more efficient. (Carried 22-0-1).

[2] A ULCC Working Group was formed and started its work in the Fall of 2016. A status report on the work of the Working Group was presented at subsequent annual meetings of the Conference. The Working Group is composed of representatives from British Columbia (Ken Madsen succeeded by Paul Kirk), Ontario (Frank Au), Office of the Québec Director of Criminal and Penal Prosecutions (André Brochu and Justin Tremblay), the Public Prosecution Service of Canada (Marke Kilkie and Laura Pitcairn), Defence Bar (Alex Millman), and Justice Canada (Lucie Angers, Karen Audcent, Kim Pearce and, Normand Wong) and is chaired by Stéphanie O'Connor of the federal Department of Justice.

[3] Since its enactment in 1985, there have been a number of calls to amend the telewarrant scheme in the *Criminal Code*.[1] In addition to the 2016 resolution that proposed to create a working group to study the issue, the ULCC Criminal Section adopted eight other resolutions calling for changes to the telewarrant regime.[2] These resolutions included recommendations to remove the requirement that the applicant show that it is impracticable to appear in person in order to obtain a search warrant by means of telecommunication and to provide that all investigative warrants and orders may be obtained by technological means.

[4] The Working Group examined a number of issues in relation to telewarrants, including some that were the topic of previous ULCC resolutions and focused on the issues that would have the greatest impact. The Report does not purport to represent a comprehensive review of all aspects of telewarrant regime but instead to provide a report on those aspects that were examined.[3]

2. Background

2.1 Current Legislative Framework of the Telewarrant Regime

[5] The current telewarrant regime is outlined in section 487.1 of the *Criminal Code*. Subsection 487.1(1) of the *Criminal Code* provides that a peace officer who believes that an indictable offence has been committed may present an information on oath by means of telecommunication if they believe that it would be "impracticable" to appear personally to make an application in writing for one of the warrants for which the telewarrant process is made available.[4] There are two ways of obtaining warrants by the telewarrant process:

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[1] Although the term "telewarrant" does not appear in section 487.1 *per se*, the process is well known by that term. It will be used interchangeably with the terms "means of telecommunication" as found in section 487.1 and other terms such as "technological means".

[2] CAN1983-05, ON993-07, ON1995-08, QC-1997-03, QC2004-01, NS2004-06, QC2006-01 (as amended), QC2012-02 (as amended), and Can-PPSC2016-01.

[3] As the study of the issues in this Report occurred before the COVID-19 outbreak, it does not take into consideration measures put in place within the criminal justice system as a result of the outbreak.

[4] See 2.1.1 of this Report for the list of warrants that can be sought by telewarrant.

a. An information submitted by a means of telecommunication that produces a writing (written telewarrant); or
b. An information submitted orally by telephone or another means of telecommunication that does not produce a writing (oral telewarrant).

[6] In both scenarios, the peace officer's information must be on oath and submitted to a justice that has been designated by the chief justice of the provincial court having jurisdiction in the matter.

[7] For both written and oral telewarrants, the justice must, as soon as practicable, file the information with the clerk of the court for the territorial division in which the warrant is intended for execution (subsections 487.1(2) and (2.1)). For oral telewarrants, this includes an obligation on the justice to record verbatim the information submitted by the peace officer, and to file the record, or transcription of it, with the clerk of the court in the territorial division in which the warrant is intended for execution. Subsections 487.1(3) and (3.1) address considerations regarding the oath that the peace officer must make when submitting an information for a warrant.

[8] Subsection 487.1(4) includes the information that must be contained in an information submitted with the telewarrant procedure, and subsection 487.1(5) provides for the circumstances in which a justice may issue a warrant to a peace officer who has submitted an information by telephone or other means of telecommunication and provides that the information must include (a) a statement of the circumstances that make it impracticable for the peace officer to appear personally, (b) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure; (c) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and (d) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge. A warrant issued under subsection 487.1(5) confers the same authority respecting search and seizure as may be conferred by a warrant issued by a justice pursuant to section 487 before whom the peace officer appears personally.

[9] Subsections 487.1(6) and (6.1) provide the procedure that the justice and peace officer must follow subsequent to the issuance of the telewarrant, with slightly different procedures depending on whether the means of telecommunication by which the warrant is issued produces a writing. For both oral and written telewarrants, the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance, and shall cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution. Subsections 487.1(7) and (8) pertain to obligations on the peace officer executing a warrant issued by means of telecommunication, including giving a facsimile of the warrant to any person present and ostensibly in control of the place or premises to be searched, or affixing a facsimile of the warrant to a prominent place within the place or premises if it is unoccupied.

[10] Subsection 487.1(9) requires a peace officer to whom a telewarrant is issued to file a written report with the clerk of the court for the territorial division in which the warrant was intended for

execution as soon as practicable, but within a period not exceeding seven days after the warrant has been executed. The subsection stipulates what information this written report shall include.

[11] Subsection 487.1(10) requires the clerk of the court who received the written report under (9) to bring the report, together with the information and the warrant, before a justice to deal with the things seized referred to in the report in the same manner as if the things were seized pursuant to a warrant issued on an information presented personally. This ties in the procedure for the detention of things seized outlined in section 490.

[12] Subsections 487.1(11) and (12) address rules of evidence for issues that may arise with a warrant issued by means of a telecommunication in relation to the inference to be drawn from the absence of the information or warrant and the probative force attributed to duplicates or facsimiles of an information or a warrant.

2.1.1 Which Warrants Can Be Sought by Telewarrant

[13] Section 487.1 provides that the telewarrant process may be used to obtain a conventional search warrant (section 487) instead of appearing personally before a justice to obtain the warrant. In addition, the telewarrant process may be used for the following investigative warrants:

- Warrant to obtain a blood sample in relation to impaired driving – subsection 320.29(1);
- General warrant – subsection 487.01(7);
- Warrant to take bodily substances for DNA analysis – subsection 487.05(3); and
- Impression warrant – subsection 487.092(4).[5]

[14] For these additional warrants, the authority to rely on the telewarrant process is found in the warrant provision itself, which provides that where the officer believes that it would be impracticable to appear personally before the judicial officer to make an application for the warrant, the warrant may be issued on an information submitted by telephone or other means of telecommunication and that the process described in section 487.1 applies with such modifications as the circumstances require.

[15] Under Part VI of the *Criminal Code*, the combination of sections 184.2 and 184.3 provide an alternative telewarrant process only applicable to an authorization for the interception of private communications with consent, which differs somewhat from the process in section 487.1.

[16] The telewarrant process does not currently apply to all investigative warrants and orders in the *Criminal Code*, including public safety warrants to search and seize weapons and other dangerous objects (section 117.04), preservation and production orders (sections 487.013-487.018), warrants for tracking devices (section 492.1), warrants for transmission data recorders (section 492.2), etc. However, the telewarrant process is available for some warrants pursuant to other federal statutes, such as search warrants under the *Controlled Drugs and Substances Act* (subsection 11(2)) and the *Cannabis Act* (subsection 87(2)).

[5] The telewarrant process is also available for other types of warrants and authorizations pursuant to the *Criminal Code*: the authorization/warrant to enter a dwelling house for the purpose of arrest or apprehension (s. 529.5) and a warrant for arrest for breach of condition of a conditional sentence order (para 742.6(1)(*f*)).

2.1.2 Legislation Enacting the Telewarrant Regime

[17] The *Criminal Law Amendment Act*, 1985 first enacted the telewarrant regime in what was then section 443.1 of the *Criminal Code*.[6] With the Revised Statutes of Canada in 1985, the telewarrant regime was renumbered from section 443.1 to what is now section 487.1.[7]

[18] Bill C-18,[8] which led to the *Criminal Law Amendment Act*, 1985, contained many of the same provisions that had been introduced in the previous Parliamentary session in what was Bill C-19; Bill C-19 did not make it past first reading in the House of Commons.[9] The provisions relating to telewarrants were substantially similar between Bills C-18 and C-19, with the primary difference being that Bill C-19 provided that applications for telewarrants had to be made to a designated provincial court judge, whereas Bill C-18 proposed that applications could be made to a designated justice.

[19] Bill C-18 also eliminated writs of assistance[10], which had been subject to judicial scrutiny under the *Canadian Charter of Rights and Freedoms (Charter)* and had been recommended by the Law Reform Commission of Canada (LRCC) to be abolished as these writs were viewed by the LRCC as being instruments of unconstitutional search and seizure.[11]

[20] In introducing Bill C-18 in the House of Commons, the then Minister of Justice and Attorney General of Canada, the Honourable John C. Crosbie, described the telewarrant as being a "conventional warrant that is obtained by using the telephone or other means of telecommunication when it is impractical to apply for a conventional warrant". The Minister also indicated it was similar to a recommendation made by the LRCC and fully protected individual rights.[12] The examples provided by the Minister of Justice of circumstances when the telewarrant regime would apply included when police needed to obtain a blood sample from a person who was in an accident and suspected of impaired driving but was unconscious, and in the Territories where police might have to travel up to a couple of hundred miles to make an in person application for a search warrant.

[21] The House of Commons Standing Committee on Justice and Legal Affairs (Committee) studied Bill C-18. The Minister of Justice's evidence before the Committee was that the telewarrant procedure, while likely not as efficient as writs of assistance[13], would still have significant benefits in ensuring that effective law (enforcement) measurements are in place.[14]

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[6] SC 1985, c 19 (Royal Assent on 20 June 1985 and came into force on 4 December 1985).
[7] RSC 1985, c 27 (1st Supp), s 69.
[8] Bill C-18, *Criminal Law Amendment Act, 1984*, 1st Sess, 33rd Parl, 1984 (first reading 19 December 1984).
[9] Bill C-19, *Criminal Law Reform Act, 1984*, 2nd Sess, 32nd Parl, 1983-1984 (first reading 7 February 1984).
[10] Before their repeal by Bill C-18, statutory writs of assistance provided extraordinary search and seizure powers. See for example *Canada (Writs of Assistance) (Re)*, [1965] 2 Ex.C.R. 645 at para 2.: "(…) statutory Writs of Assistance are, in effect, search warrants unrelated to any particular suspected offence and are issued to members of the R.C.M.P. and other officers in the service of the Government of Canada to have effect as long as the holder continues to hold the position by virtue of which the writ was issued to him".
[11] See e.g. *R v Noble*, [1984] OJ No 3395 (CA); [1985] OJ No 809 (CA); Canada, Law Reform Commission of Canada, *Writs of Assistance and Telewarrants: Report 19* (Ottawa: Law Reform Commission of Canada, 1983).
[12] *House of Commons Debates*, 33rd Parl 1st, vol 1 (20 December 1984) at 1389.
[13] House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, 33-1, No 5 (22 January 1985) at 5:16.
[14] *Supra* note 13 at 5:8. See also the Minister of Justice's evidence before the Standing Senate Committee on Legal and Constitutional Affairs where he stated that "We hope that this will be a significant contribution to effective law enforcement, offsetting the loss to the RCMP of writs of assistance"; Senate, Standing Committee on Justice and Legal Affairs, *Evidence*, 33-1, No 12 (30 May 1985) at 12:6 (Hon John Crosbie).

Before the Committee, the Canadian Bar Association expressed its support for the telewarrant regime as it represented a modernization of the criminal justice system and had sufficient safeguards built into the legislation.[15] The Standing Committee also heard from a representative of the Canadian Association of Chiefs of Police (CACP), who welcomed the telewarrant regime but did not think it went far enough as he supported search warrants being available by telephone in all cases and recommended that they not be limited to indictable offences or to those cases where it would be impracticable to appear personally before a justice.[16] The President of the LRCC also testified before the Committee in support of the telewarrant regime, stating:

> " (…) We believe that the modern technology of the telephone can be used to make the legal system more expeditious, more cost effective, and we were satisfied in our studies of these instruments that have been used in other jurisdictions (…) that the guarantees and the protections we have recommended, and which are built into this bill, should be able to work enabling the police to do their work judicially authorized and yet properly protecting the citizen's interest".[17]

[22] The Committee debated five proposed amendments to the telewarrant provisions: i) removing the restriction of telewarrants only being available for indictable offences, ii) requiring the application be made to a designated provincial court judge (instead of a designated justice), iii) adding the condition in what is now subsection 487.1(5) that the justice may require the warrant be executed within such time as the justice may order, iv) clarifying the timing in what is now subsection 487.1(9) of when the written report is to be filed after the warrant has been executed, and v) removing a subsection that provided that a warrant issued by telephone or other means of telecommunication is not subject to challenge by reason only that the circumstances were not such as to make it reasonable to dispense with an information submitted personally and in writing.[18] The last three amendments were adopted and reported back to the House of Commons and reflected in the legislation.

[23] Generally, there was very little criticism of - or opposition to - the telewarrant regime as Bill C-18 went through the House of Commons and the Senate.[19] It was highlighted throughout the debates that telewarrants would provide an efficiency measure for law enforcement and would have the same safeguards as conventional warrants, such as applications made under oath to a judicial officer.

2.1.3 Report by the Law Reform Commission of Canada

[24] The telewarrant regime was the subject of a recommendation made by the LRCC in their 1983 report.[20] Underpinning the LRCC's recommendation to eliminate writs of assistance and to introduce the telewarrant was the precept that police search and seizure powers should generally

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[15] *Supra* note 13, No 6 (24 January 1985) at 6:10, 21.
[16] *Supra* note 13, No 10 (5 February 1985) at 10:15, 16, 31.
[17] *Supra* note 13, No 12 (12 February 1985) at 12:28. The LRCC also recommended that the telewarrant be available for all offences under the *Criminal Code*, and not just indictable offences (*supra* note 13 at 12:38, 39); however the Parliamentary Secretary to the Minister of Justice opposed having telewarrants being available for all offences (*supra* note 13, No 20 (25 March 1985) at 20:38).
[18] *Supra* note 13, No. 20 (25 March 1985) at 20:6.
[19] The Bill was referred to the *Standing Senate Committee on Legal and Constitutional Affairs*, *supra* note 13, which reported back to the Senate with no amendments.
[20] *Writs of Assistance and Telewarrants: Report 19, supra* note 11.

be exercised by judicial warrant, except in circumstances of recognized urgency or informed consent. The LRCC emphasized that difficulties in obtaining access to a justice of the peace was not appropriate as an exigency to justify a warrantless search. Instead of dispensing with the requirements of judicial authorization prior to a search, the LRCC's proposed solution was to make justices of the peace more accessible by making it permissible for them to receive applications and issue search warrants orally by telephone or other means of telecommunication in circumstances where a personal appearance before a justice would be impracticable.[21]

[25] The LRCC's recommendation was to dispense, in appropriate circumstances, with the usual requirement that the information upon oath be tendered personally and in writing. However, the other requirements for obtaining a conventional warrant, such as an information upon oath describing the offence alleged, the items liable to seizure, and the premises to be searched, would remain in the telewarrant regime. The LRCC was of the view that the telewarrant presented no risk of a diminution in the standards of judicial oversight which attached to the issuance of conventional search warrants, while presenting a way for the search warrant process to be more accessible and expeditious.[22]

[26] The LRCC recommended that a new section 443.1 of the *Criminal Code* (now section 487.1) be enacted containing provisions for the issuance of search warrants by telephone or other means of telecommunication. The LRCC's recommendation included text for twelve subsections to section 443.1. The subsections were replicated in Bill C-18 (with some minor discrepancies), which the government introduced in December 1984, and which eventually became law with the *Criminal Law Amendment Act*, 1985.

[27] A few of the primary discrepancies between the LRCC recommendation and Bill C-18 were that the LRCC's recommendation did not limit the use of the telewarrant process to indictable offences where Bill C-18 did; the LRCC's recommendation was only for conventional search warrant applications[23], whereas Bill C-18 permitted applications for search warrants and warrants to obtain blood samples in relation to impaired driving; the LRCC's recommendation did not require that justices receiving telewarrant applications be designated by the chief justice of the provincial court whereas Bill C-18 contained this requirement; and the LRCC recommended that a peace officer to whom a telewarrant is issued shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution within three days of the issuance of the warrant, whereas Bill C-18 extended the period to seven days.

2.1.4 Amendments to the Telewarrant Regime

[28] Minor technical amendments were made to the telewarrant regime in 1992 with the *Miscellaneous Statute Law Amendment Act, 1991*.[24] The 1992 amendments replaced all references

[21] *Ibid* at 79.
[22] *Ibid* at 82. The LRCC was of the view that it would be imperative that such a process maintain the need for an information to be on oath, and that the sworn information be reduced to writing, (though not necessarily prior to the application for the warrant), that the warrant be issued in writing under the hand of the authorizing justice, that it satisfy the prevailing formal and substantive requirements of the of the warrant provision and that there be a report to justice following the execution of the warrant (*ibid* at 80-81.)
[23] S 443 addressed conventional search warrants.
[24] *Miscellaneous Statute Law Amendment Act, 1991*, SC 1992, c 1.

to section 258 with references to section 256 to reflect the correct *Criminal Code* section for obtaining a warrant for blood samples in relation to impaired driving.[25]

[29] More substantial amendments to the telewarrant regime were enacted in 1994 with the *Criminal Law Amendment Act*.[26] These amendments focused primarily on providing separate procedures for when the means of telecommunication produces a writing as opposed to where it does not produce a writing. This was to provide for telewarrants to be applied for and issued by facsimile transmission. To this effect, subsections 487.1(2.1), (3.1), and (6.1) were added to address the procedure for when an application for a warrant is made by a means of telecommunication that produces a writing. Further, subsection 487.1(12) was added to address the probative value of a duplicate or facsimile of an information or warrant.

[30] In 2009, Bill C-31, entitled *An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act*, included amendments regarding telewarrants.[27] While that Bill died on the Order Paper the same year, it had proposed three significant changes to the telewarrant regime.

[31] The first proposed change was to eliminate the requirement that the peace officer believe "that it would be impracticable to appear personally before a justice to make an application for a warrant" when the peace officer makes an application by means of telecommunication that produces a writing. This would have permitted the use of written telewarrants in all circumstances without having to demonstrate that it is impracticable to appear in person, a measure that aimed to streamline the telewarrant process and make it more efficient.[28] However, Bill C-31 would have maintained a slightly different impracticability requirement for oral telewarrants (applications by telephone or other means of telecommunication that does not produce a writing). It would have required that the peace officer state his or her belief that it would be impracticable to apply for a warrant by means of telecommunication that produces a writing (written telewarrant). The need for maintaining such a requirement in order to make an application by oral telewarrant was based on a desire to encourage peace officers to submit the information setting out grounds of belief in writing for the justice's consideration, which tends to produce a more logical and consistent narrative, thereby making it easier for the justice to determine whether to issue a warrant.[29]

[32] The second proposed change was to extend the use of the telewarrant regime beyond just peace officers to certain public officers. Had Bill C-31 become law, public officers who had been appointed or designated to administer or enforce a federal or provincial law and whose duties included the enforcement of the *Criminal Code* or any other Act of Parliament could have used the telewarrant regime in section 487.1 in situations where warrant provisions authorize them to obtain warrants.[30]

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[25] Changes were made to ss 487.1(1), (5), (7), and (8).
[26] *Criminal Law Amendment Act*, SC 1994, c 44.
[27] 2nd Sess, 40th Parl, 2009 (first reading 15 May 2009).
[28] *House of Commons Debates*, 40th Parl, 2nd Sess, No 116, Vol 144 (24 November 2009) at 7163 (Brent Rathgeber).
[29] At second reading for Bill C-31 in the House of Commons, Mr. Daniel Petit, the Parliamentary Secretary to the Minister of Justice (CPC), indicated that the impracticability requirement was being maintained for oral telewarrants because "our provincial and territorial partners have observed that requiring police officers to express their reasons in writing promotes the provision of complete and well-organized information for the judge's consideration", *supra* note 28, (27 November 2009) at 7307.
[30] It was explained before the House of Commons that extending the telewarrant regime to public officers would "not in any way expand the powers that may be exercised by public officers but rather will give them access to the same means of obtaining

[33] The third proposed change was to make telewarrants applicable to a wider range of warrants and investigative orders including public safety warrants. Bill C-31 proposed to make the telewarrant regime apply to section 117.04 (warrant to search and seize weapons and other dangerous objects), section 199 (warrants related to gaming or betting houses and bawdy-houses), section 395 (warrants related to valuable minerals), former section 487.012 (general production order), former section 487.013 (production order for financial information), section 492.1 (warrant to install, monitor and covertly remove a tracking device), and section 492.2 (warrant to install and monitor telephone number recorders).

[34] At second reading in the House of Commons for Bill C-31, Brent Rathgeber (Edmonton-St. Albert, CPC) explained the rationale for making the telewarrant regime applicable to more warrants and orders: "Given advances in technology and the trend over the past several years to introduce more technology into the justice system to allow, for example, remote appearance and the electronic filing of documents, expanding the number of warrants which can be obtained through the use of telecommunications simply makes good sense. It contributes to greater efficiency in the use of the criminal justice system's limited resources".[31]

[35] Section 487.1 was also amended by Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, which received Royal Assent on June 21, 2018 as S.C. 2018, c. 21. This bill enacted a number of changes to the impaired driving regime of the *Criminal Code*. Among other things, Bill C-46 repealed former section 256. This section was replaced by a new search warrant to obtain blood samples pursuant to new subsection 320.29(1). Bill C-46 also amended section 487.1 to remove all references to former section 256. Subsection 320.29(3) now provides that section 487.1 applies, with any modifications that the circumstances require, in respect of an application for a warrant to obtain blood samples that is submitted by telephone or other means of telecommunication.

2.2 Current Operational Framework

[36] In 2017, the Working Group obtained information from various law enforcement agencies through the CACP, as well as some members of the judiciary across Canada, on their respective in-person search warrant application processes and on their use of telewarrants.

2.2.1 In-person Search Warrant Application Process

[37] In many jurisdictions, the usual process for obtaining a warrant typically involves leaving the warrant application at the courthouse for review and consideration by the judicial officer. If granted, the officer returns at a later time to obtain the signed warrant. For instance, in the Northwest Territories, typically, a police officer brings a sworn application to the justice or judge or is sworn before the justice who will review the application. The police officer may wait, or alternatively, the judge will telephone the officer when the warrant is signed. In British Columbia (BC), Ontario, and some regions of Quebec, the police officer files the application at the courthouse and leaves while the judge reviews the application and the officer returns when the warrant is signed. In other regions of Quebec, the officer makes an appointment with the judge

authorizations for the exercise of those existing powers as is available to other officers [peace officers] able to exercise those same powers". *Supra* note 28 at 7163 (Brent Rathgeber).

[31] *Ibid.*

and the application is sent in advance for review. During the appointment, the justice takes the police officer's oath, reviews the materials and either grants or denies the application. In Manitoba and Ontario, it was reported that officers rarely see the reviewing authority for an in-person application as they drop off their application at an intake office and are notified by the office administration once the documents have been reviewed and warrants and orders issued (or denied). In Prince Edward Island (PEI), if the application is very short, the police officer may stay while the judge reviews it. If the application is submitted after business hours, the police officer will attend at the judge's home and wait in another room or in their car while the judge reviews the application. The Edmonton police reported that their current process is to drop off the submission at the justice or judge's office. Once the search warrant application has been reviewed, the officer is notified as to whether the application was authorized. If it is rejected, reasons for rejection are provided and the officer can make a new application informed by the reasons for rejection.

[38] When making an application other than by telewarrant, the majority of law enforcement agency respondents noted that officers were rarely called upon to answer questions from the judicial officer. In some cases, the justice may provide written questions or send written reasons if the warrant is denied. Some respondents suggested caution was warranted in relation to interactions between peace officers and the reviewing authority during an in-person application because any additional information is not then included in the written sworn information on which the decision to issue a warrant is based, which can result in the warrant being subsequently challenged.

2.2.2 Warrants Submitted by Telecommunications

[39] When consulted in 2017, law enforcement agencies indicated that section 487 warrants, former section 256 warrants (warrants in relation to blood samples[32]) and section 11 of the *Controlled Drugs and Substances Act* warrants were the most common investigative warrants obtained by written telewarrant. Less common search warrants obtained by telewarrant are the general warrants and the warrants for DNA analysis (section 487.05). It was reported that section 184.3 of the *Criminal Code*, which allows for an application for a one-party intercept authorization through a process similar to the telewarrant regime, was relied upon in some jurisdictions, but only rarely, and has never been used in most jurisdictions.

[40] Law enforcement agencies and members of the judiciary noted that warrants obtained by way of telecommunications are primarily sought outside business hours either through a telewarrant centre (e.g., Ontario), a justice centre (e.g., British Columbia), or by accessing a justice who is on call to receive applications for submissions (e.g., Quebec).

[41] The operation of each telewarrant centre or judicial centre varies between those jurisdictions that have centres that process warrants by telewarrants. Some jurisdictions have a provincial 24-hour on-call service with the regional court available during office hours. Others have a telewarrant centre that operates 24 hours/day, 7 days/week where the justices change on a one-month rotation basis (e.g., Ontario). In Quebec, there is an attendant in Montreal who redirects each search warrant application submitted by telewarrant to the appropriate court registry; although it was noted that in another Quebec jurisdiction, police officers communicate directly

[32] Now s 320.29(1) of the *Criminal Code*, *supra* note 5.

with the administrative assistant of the presiding justice, following which the warrant application is sent by fax or email and forwarded to the on-call justice.

[42] Some law enforcement agency respondents consulted found that the current system works well, while others noted that submitting search warrant applications through fax transmission, which is the primary source of telecommunications used in many jurisdictions, is slow and inappropriate, and a statement was also made that email can also be slow in certain regions of Quebec.

2.2.2.1 Written Telewarrant

[43] For the vast majority of law enforcement agencies, search warrant applications are submitted by telecommunications in written form by way of fax transmission as their primary means of telecommunications. However, some jurisdictions also use email, including encrypted email for a more secure transmission, particularly when submitting sensitive and confidential information. For instance, in Ontario, secure email capability is primarily relied on. When consulted in 2018, representatives of the York Regional Police and Toronto Police forces described a process that was made available to officers across Ontario for the electronic filing of telewarrant applications using Entrust Public Key infrastructure certificates. This feature allows users to electronically sign telewarrant documents and encrypt emails to securely exchange documents between the justice and the peace officer. Early reports on this capability were very favourable and it is now seen as a very valuable development by those police officers who are using it to apply for telewarrants.

2.2.2.2 Oral Telewarrant

[44] The majority of law enforcement respondents confirmed that oral telewarrants (e.g., telephone) are either never used or rarely relied upon. In Ontario, the Ontario Court of Justice does not allow for oral telewarrant applications. At the time respondents were consulted, Manitoba courts did not have the capability to record oral applications. In Calgary, it was reported that oral telewarrants are used for applications for search warrants to obtain blood samples in the impaired driving context.

[45] Respondents from the judiciary indicated they relied on the use of a digital recording service or a recording device when receiving search warrant applications by oral telewarrant. For instance, in BC, it was explained that typically a justice will contact the affiant by telephone, with a digital recording device activated. If the affiant demonstrates grounds to support the impracticability of an in-person application, the justice will proceed to swear or affirm the affiant, prior to hearing their evidence in support of the application. If the application is denied, reasons are provided to the affiant. If the application is granted, the affiant proceeds to fill complete a blank warrant in Form 5.1 as dictated by the justice; or completes an entire warrant document if they do not have a blank form available. The justice will have also filled in the content on both the forms acquired for the Information to Obtain and the warrant. The justice requests a transcript to be produced and to be forwarded to the appropriate court registry. In the Northwest Territories, a recording is also transcribed and the original is filed with the clerk of the court and a certified copy is provided to the police. In Quebec, an automated recording service is used. Once the recording is complete, the transcript is requested and sent to the relevant courthouse. Shorthand notes may also be drafted.

2.2.2.3 Challenges Reported in Relation to the Threshold Requirement of Impracticability to Appear in Person

[46] With respect to the requirement to show that it is impracticable to appear in person pursuant to paragraph 487.1(4)(*a*) of the *Criminal Code*, some jurisdictions have indicated that the uncertainty surrounding the meaning of the term "impracticable" in section 487.1 of the *Criminal Code* constitutes a challenge. More specifically, some have commented on the time consuming and cumbersome nature of this requirement. For example, Burnaby BC law enforcement respondents indicated that all search warrant applications are to be made at the BC Justice Centre. The officer is required to first call the court registry and be told that a justice is unavailable at that location or at other courthouses in surrounding areas in order to satisfy the impracticability requirement in paragraph 487.1(4)(*a*). In addition, a number of detachments in BC are situated in a community without a courthouse. The precise distance the officer must be required to travel to reach the nearest courthouse before it is considered impracticable to make an in-person application is uncertain. In addition, in rural areas where there may only be one or two officers on duty for the whole community, one concern raised is that for an officer to leave their detachment to travel the distance to make an in-person application can put the community or the remaining officer at risk. In Manitoba, many Royal Canadian Mounted Police (RCMP) detachments are also far from a court office making the in-person application difficult. While the determination of impracticability is at the discretion of the justice, in Manitoba, it was noted that telewarrant applications are usually granted because of geographical challenges. However, the process still involves an additional step in order to meet the requirement. As reported by the Edmonton police in 2017, because there is a hearing office and judges are available to receive the applicant at their residence, this high level of access to justices and judges makes it difficult to meet the requirement that it is impracticable to appear in person. In Calgary, it was reported that the use of telewarrants may be limited due to the uncertainty in how it can be shown that it is impracticable to apply for a warrant in person, however, a 45-minute drive for personal attendance before a justice has been determined to be sufficiently impracticable in certain contexts.

[47] In some areas of Quebec, it was reported that the requirement that it be impracticable to appear in person was difficult to meet unless there was an urgent situation. The RCMP in Ottawa reported that where the detachment or police station is located near the courthouse, search warrant applications are usually made by personal appearance. However, it was noted that the impracticability requirement would be easily met where an application is submitted after court hours.

[48] In the Yukon, the challenges with meeting the impracticability requirement were reported as being minimal as the distance to travel between detachments in the Yukon communities and the courthouse in Whitehorse is considerable and there are limited police resources. In Nunavut, respondents indicated that the impracticability requirement is fairly easy to meet because travelling to make an in-person application before a justice most often requires air travel. Respondent members of the RCMP in Newfoundland and Labrador reported that there were no significant challenges with the application of the impracticability requirement when based on the two common reasons for applying for a telewarrant – the courthouse is closed or the member is in an isolated area where no courthouse is available. Some respondents from the Newfoundland Royal Constabulary reported that this requirement is perhaps too subjective and unclear and queried whether the requirement means that it should be impracticable from the perspective of the officer.

Respondents in Boucherville, Quebec noted that the impracticability requirement posed no difficulty and the telewarrant is available during the day where no justice is available.

[49] Other operational challenges reported in Ontario and Manitoba were that there may surprisingly be longer wait times when a warrant is submitted by telewarrant as there is often only one on-call justice on duty for the whole province after hours and there can be a high volume of applications submitted by telecommunications.

[50] Respondent members of the judiciary in Quebec and PEI noted that it can be challenging when a police officer must travel over a long distance to the judge's home. This was reported as time-consuming for both the police officer and the judge and is not in keeping with modern society and efficiencies. It was suggested that allowing search warrant applications to be made by telecommunications throughout the province would relieve pressure in major centres. One respondent from BC expressed concerns with the delay in considering an application on its merits when it is denied for want of jurisdiction to proceed by telewarrant, in the absence of grounds to support the impracticability test. In such circumstances, the applicant may experience a delay as the warrant application must wait to be considered on its merits by way of an in-person application at the next available opportunity. It was also noted by another respondent that removing the impracticability criterion would alleviate concerns about future litigation challenging the warrant on the basis of the impracticability requirement.

2.2.2.4 Other Challenges Reported by Law Enforcement

[51] Generally, it was reported that the telewarrant process works fairly well in practice but could benefit from improvements such as removing the requirement to show that it is impracticable to appear in person and providing that all investigative warrants and orders may be obtained electronically. From an operational perspective, it was suggested that email should be relied upon rather than fax transmission systems and that it would be beneficial to have better training for judicial officers dealing with telewarrant applications.

3. Analysis

[52] The next part of the Report will briefly touch on the use of technology in the criminal justice system. The Report then examines whether the underlying policy of a number of requirements or limitations set out in section 487.1 of the *Criminal Code* should continue to apply today. Such features include the impracticability requirement and the limitation in relation to the unavailability of the telewarrant process vis-à-vis some search warrants and investigative orders, and to out-of-province search warrants. The Report also examines other aspects of the telewarrant provision in relation to the nature of the offence, the judicial officer and the search warrant applicant. Other post-execution features of the telewarant provision have also been considered. Recommendations to the main components of the telewarrant process are also set out with a view to streamlining the process, updating and increasing efficiencies in obtaining search warrants and other investigative orders. Proposed measures also aim to favour, to the extent possible, a consistent approach for applications for search warrant and investigative orders whether they are sought in person or by electronic means. Additional considerations are also presented for further study.

3.1 Use of Technology

[53] Since the enactment of the telewarrant provision, there have been significant advancements in telecommunications technology, including technology that would make submitting all investigative warrants, orders and authorizations through the use of telecommunications quite simple. Technology is generally consistent and stable nowadays, and in fact, often leads to a more transparent and accountable process due to the electronic trail that is created, for instance, when transmitting documents over email. Responses received from law enforcement in 2017 indicated that fax transmission was still the most common manner identified to seek a warrant pursuant to section 487.1. However, the use of other more modern technology is not precluded. The term "telecommunication" as found in section 487.1 is defined in section 35 of the *Interpretation Act*[33] as the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system. The term "telecommunication" as currently defined is sufficiently broad to encompass all technologies including fax transmission, telephone, videoconferencing applications (i.e., Skype), email or other web-based applications, which can currently be relied on to present a warrant application pursuant to section 487.1.

[54] Since 1985, other sections in the *Criminal Code* have also been added and provide for the use of technology, including providing for remote appearances in criminal court proceedings. Some of these sections were recently amended to further expand their use by all persons involved in the criminal justice process.[34] These amendments follow calls for increased use of technology in the criminal justice system.[35]

[55] Given the wide use of modern and reliable technologies in all aspects of society today, the Working Group is of the view that additional legislative rules are not required to allow for the application and issuance of search warrants or other investigative orders by means of telecommunication. Each jurisdiction can implement their own process using a technology that meets their needs so long as there exists a proper record of the sworn information, the warrant and other relevant documents, and that such documents are available to those requiring access to them. Any administrative challenges associated with the use of a particular technology can be addressed locally.

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[33] RSC 1985, c I-21.

[34] See for instance amendments enacted by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 including sections 502.1, 515 (2.2) (2.3), 714.1 to 714.8, and 715.21 to 715.26. There are also other sections of the *Criminal Code* providing for use of technology including section 508.1, which allows an information in relation to an alleged offence to be laid by means of telecommunication that produces a writing, and sections 841 to 847 regarding electronic documents.

[35] Senate Standing Committee on Legal and Constitutional Affairs: June 2017 *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on the Use of Technology in the Criminal Justice System*, June 2013, online:<https://icclr.org/publications/report-on-the-use-of-technology-in-the-criminal-justice-system/>.

3.2 Current Challenges of the Telewarrant Scheme

3.2.1 The "Impracticability to Appear in Person" Requirement

3.2.1.1 *Charter* perspective

[56] Section 487.1 of the *Criminal Code* imposes an additional requirement on peace officers seeking a search warrant or other judicial authorization by technological means that is one of the central features of the telewarrant process. Paragraph 487.1(4)(*a*) requires a peace officer to state the circumstances that make it impracticable to present the warrant application in person. This is in addition to the requirement that the officer state the facts sufficient to establish his or her grounds of belief in support of the warrant application. Paragraph 487.1(5)(*b*) precludes the issuing justice from granting an officer's warrant application unless the sworn Information "discloses reasonable grounds for dispensing with an information presented personally and in writing". Where the officer fails to convince the justice that it is impracticable to appear in person, the request to execute the warrant will be denied despite the fact that the appropriate standard associated with the warrant granting provision has been met. By contrast, when the warrant application is made by personal appearance, the impracticability requirement is not a relevant consideration in the determination of whether a warrant should issue.

[57] In *Collins*,[36] the Supreme Court of Canada held that section 8 of the *Charter* requires that to be considered reasonable the search must be authorized by law, the law itself must be reasonable and the manner in which the search was carried out must be reasonable. In *Hunter v. Southam*[37], the Supreme Court held that a statute authorizing a search will not be found unreasonable if it (1) provides for a form of prior authorization (2) by a person acting judicially (3) on the basis of reasonable and probable grounds established in an information on oath. Considering the reasoning in *Collins* and *Hunter v. Southam*, the Working Group suggests that the additional impracticability requirement imposed for obtaining a telewarrant may not be required to ensure the constitutional validity of the state action.

[58] When comparing the section 487 in-person application process with the remote application procedure provided in section 487.1, the Working Group noted that both processes essentially authorize an officer to make an application on oath to a judicial officer, on a threshold that there are reasonable grounds to believe that evidence of a particular offence may be found at a specific location. One distinguishing feature between the in-person application in writing and the application presented by written telewarrant is that to accommodate the written telewarrant, subsection 487(3.1) provides for an alternative to swearing an oath. That provision allows the applicant to make a statement in writing stating that all matters contained in the information are true to his or her knowledge and belief and such a statement is deemed to be a statement made under oath[38]. For oral telewarrants, the oath may be administered by means of telecommunication and the information presented orally must be recorded verbatim.

[36] *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508.
[37] *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641.
[38] Recent cases have confirmed that the absence of an oath on the information sent by telecommunications does not render the telewarrant invalid (rather statements are deemed to be made on oath): *R v Charette*, 2013 QCCA 861 and *R v Phillips*, 2004 BCSC 1797.

[59] In the Working Group's view, those requirements would appear sufficient to meet the test in *Collins* and *Hunter v. Southam*. Both processes provide for either a (deemed) sworn written application or a record of the sworn oral application that will be filed with the court. The requirement that the justice be satisfied that the information include a statement that shows that there are reasonable and probable grounds to believe that it is impracticable for the officer to personally attend and present the information does not, in our view, contribute to protecting the target of the search against unreasonable search and seizure. Rather, it is the sufficiency of the sworn statements that must meet the particular grounds of belief threshold as set out in the warrant granting provision that remains the relevant consideration to protect a person from an unreasonable search and seizure.

3.2.1.2 Whether to Maintain the Impracticability Requirement

[60] Currently, all telewarrants sought by either means (written or oral) are subject to the "impracticability" requirement – the officer must satisfy the issuing justice that the circumstances "make it impracticable for the peace officer to appear personally before a justice".

[61] Above, we question whether there is any justification for imposing the "impracticability" requirement on telewarrants from a *Charter* perspective. In this Part of the Report, we distinguish between written and oral telewarrants, and explain why the "impracticability" requirement should be removed for written telewarrants, and why it should be modified for oral telewarrants.

a) Written Telewarrant: "Impracticability" Requirement Should be Removed

[62] For the reasons below, we recommend that the "impracticability" requirement be removed for written telewarrants. The proposal to remove the "impracticability requirement" is neither novel nor controversial. As noted earlier in this Report, in 2009, the federal government tabled former Bill C-31, which would have permitted applications to obtain search warrants by a means of telecommunication that produces a writing in all circumstances without requiring peace officers to demonstrate that it is "impracticable" for them to "appear personally". However, Bill C-31 died on the Order Paper that year, and the impracticability requirement has remained in the *Criminal Code*, continuing to generate considerable litigation regarding its proper application.[39]

[63] Judicial interpretation of the impracticability requirement has not always been consistent, especially before the recent Supreme Court of Canada decision in *R v Clark*.[40] In that case, the police officer deposed that it was impracticable to obtain a search warrant in person because he was working a nightshift in the early morning hours and the local courthouse was closed. The Supreme Court of Canada agreed with the observation that it was not necessary that the affiant actually contact the courthouse to enquire about the availability of a justice for an in-person application. Previously, in *R v Lao*,[41] the Court of Appeal for Ontario held that officers could not resort to telewarrants simply out of convenience (the Court did not appear to consider the French text of paragraph 487.1(4)(*a*), "peu commode", the meaning of which is closer to "convenient") and found a section 8 *Charter* breach because the officer had failed to give "cogent" reasons for

[39] See for example *R v Millard and Smich*, 2015 ONSC 7123; *R v Enns*, 2017 YKTC 42; *R v Stinton*, 2017 NLCA 60; *Janvier v R*, 2019 QCCA 889; *R v Boyd*, [2018] OJ No 7032 and *R v Francis*, 2020 ONSC 391.
[40] *R v Clark*, 2017 SCC 3, [2017] 1 SCR 86, aff'd 2015 BCCA 488, 330 CCC (3d) 448 [*Clark*]. See also *R. v Reid*, 2017 ONCA 430, 139 WCB (2d) 115 at para 22, where the Court of Appeal for Ontario cited *Clark*, and affirmed that the impracticability requirement "does not require that an immediate need for a warrant be demonstrated".
[41] *R v Lao*, 2013 ONCA 285.

why he could not appear personally before a justice. Similarly, in *R v Lacelle*,[42] a telewarrant was challenged on the basis that the mere assertion, "There is no justice of the peace available at this time", was insufficient to meet the impracticability requirement.

[64] Although the impracticability requirement in section 487.1 is meant to be a "relatively low threshold",[43] involving "a large measure of practicality, what may be termed common sense",[44] the frequency of litigation concerning the meaning of "impracticable" suggests that applying this low threshold has not been straightforward in practice, even after *Clark*.[45] Responses to the Working Group's informal survey indicate that the vast majority of telewarrant applications are submitted through written applications. Given the pressing need to preserve judicial resources, and avoid unnecessary litigation, particularly in the post-*Jordan* world,[46] it is appropriate to question whether the requirement to show that it be impracticable to appear in person serves any valid policy purpose for written telewarrants.

[65] In the Working Group's view, the impracticability requirement as it relates to written telewarrants serves no valid purpose, including from a *Charter* perspective, and should therefore be removed. For most jurisdictions, the only practical difference between written telewarrant and non-telewarrant applications is the lack of physical document delivery to the receiving justice's office.[47] Removing the impracticability requirement will not affect privacy rights – the safeguards available to protect persons against unreasonable search and seizure by state actors are unaffected by whether the written information is delivered personally or submitted electronically, for instance by fax or email. In addition, removing this requirement for written telewarrants would not hinder the possibility for the issuing justice to contact the applicant if further clarifications are needed.

[66] Included as part of its recommendation to create the telewarrant process, the LRCC had proposed the impracticability requirement for the following reasons:

> In seeking to have a search warrant issued by telephone or other means of telecommunication, a peace officer is essentially seeking a dispensation from the usual requirements that he attend personally before the justice and submit a written information on oath. The [impracticability requirement] thus obliges the applicant peace officer to establish to the justice's satisfaction that a personal appearance would be impracticable in the circumstances and, accordingly, that it would be reasonable to dispense with that requirement. Since granting or refusing this dispensation entails an exercise of judicial discretion, the facts and circumstances on which that discretion is exercised ought to form a part of the record.[48]

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[42] *R v Lacelle*, 2013 ONCA 390, 284 CRR (2d) 184.
[43] *R v Nguyen*, 2009 BCCA 89 at para 16, 243 CCC (3d) 392 at para 16; *R v Phillips*, *supra* note 38 at para 23.
[44] *R v Erickson*, 2003 BCCA 693, 19 CR (6th) 367 at para 33.
[45] See for example: *R v Persaud*, 2016 ONSC 8110, [2016] O.J. No. 6815, *R v Boyd*, *supra* note 39, and *R v Martins*, 2018 ONCA 315, 2018 CarswellOnt 4725.
[46] *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.
[47] As discussed in 2.2 of this Report, the survey conducted in 2017 indicated that while actual physical appearance before a justice still occurred in Canada, the majority of law enforcement and representatives of the judiciary respondents indicated that warrant applications presented in writing other than by telewarrant usually involved leaving the application at an intake office or with the justice's office without ever seeing the justice.
[48] *Writs of Assistance and Telewarrants, Report 19, supra* note 11 at 86 [emphasis added].

[67] Notably, in the context of a written telewarrant, no "dispensation" is sought from the usual requirement of "a written information on oath".[49] The oath requirement is not, itself, directly served by personal appearance before the justice who receives the information. In some jurisdictions, there is even a judicial preference for officers to swear the written information in front of a commissioner for taking oaths (not in front of the Justice of the Peace receiving the information), because it is seen to enhance judicial independence, and promote the fair and proper administration of justice during the search warrant application process.[50]

[68] Most importantly, whether it is submitted "personally before a justice" or remotely by way of telecommunications, the justice is required to issue the warrant on the basis of the content in the sworn "written information". The "four corners rule" requires that "anything important related to the application be recorded within the four corners of the written application";[51] any "additional evidence or information provided to the judicial officer in oral (unsworn) comments made at the time of the application do not form part of the record in support of the warrant application".[52] As discussed earlier, the evidentiary threshold, which is required to obtain judicial authorization to search is the same for a telewarrant as it is for a standard warrant. Moreover, both the written telewarrant process and the process by which a warrant is obtained by personal appearance before the justice produce the same reviewable record of the application and both processes require that the information be on oath.

[69] Therefore, there does not appear to be a principled basis to impose an additional "impracticability" requirement on search warrant applications submitted by telecommunications in written form; the submission of written information by fax or email is the functional equivalent of a traditional search warrant application. The personal delivery of a written application adds nothing of substance to the warrant application process. For these reasons, the Working Group concludes that the impracticability requirement serves no apparent purpose in protecting the integrity of the warrant application process, and appears to provide no added value as a prerequisite for warrants obtained by telecommunications in written form. It should be removed.

b) Oral Telewarrant: "Impracticability" Requirement Should be Modified

[70] In contrast to written telewarrants, oral telewarrants (information submitted by telephone or other means of telecommunications that does not produce a writing) are far less common. Responses received in 2017 from both law enforcement agencies and members of the judiciary suggest that oral telewarrants are rarely used and almost exclusively used in situations where there is some urgency such as the need to obtain a warrant for blood samples pursuant to former section 256 of the *Criminal Code*[53] during a short period.

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[49] The LRCC had proposed an "oral" telewarrant process (to which the impracticability requirement applied). Based on the LRCC's recommendation, Parliament enacted Bill C-18 in 1985, *supra* note 8, which also provided for an "oral" telewarrant with that same requirement. In 1994, amendments to s 487.1 of the *Criminal Code* were enacted focusing primarily on providing for two separate processes, one for the oral telewarrant and the other for a process accommodating a telewarrant in written form with the impracticability requirement applying to both oral and written telewarrants (*Criminal Law Amendment Act*, *supra* note 26).

[50] *R v DG*, 2014 ONCA 75 at para 4.

[51] Scott Hutchison, *Hutchison's Canadian Search Warrant Manual 2015* (Toronto: Carswell, 2014) at 56. For oral telewarrants, the four corners' rule is respected by requiring that the justice consider the issuance of the warrant based on the sworn oral information presented to the justice over the telephone or other means of telecommunications, which is recorded verbatim by the justice.

[52] *Ibid.*

[53] Now s 320.29 of the *Criminal Code*, *supra* note 5.

[71] While former Bill C-31 proposed to eliminate the impracticability requirement for written telewarrants, it would have maintained a modified requirement in order to submit a warrant application by oral telewarrant. Specifically, the Bill provided that in order for an officer to submit an application orally, the officer would be required to show that it is impracticable to submit the application by means of telecommunication that produces a writing. The rationale behind the proposed amendment to maintain a requirement in order to submit a warrant by oral telewarrant was to encourage police officers to set out the requisite grounds of belief in writing, thereby allowing a logical and coherent presentation of their application to facilitate the review and judicial determination of the legality of the search. The written narrative was considered more conducive to setting out the officer's statements in the information in a manner that facilitates the important task of determining whether the grounds of belief are sufficient. The Working Group agrees with this approach and the rationale behind it. An information on oath presented orally can entail a greater potential for confusion than one presented in writing where the absence of organized, written grounds of belief may hinder the evaluation process.

[72] Nonetheless, the Working Group is of the view that a modified impracticability requirement for oral telewarrants should remain a "relatively low threshold" based on jurisprudence interpreting the current threshold requirement,[54] involving "a large measure of practicality, what may be termed common sense".[55] Bearing in mind that the process by which applications may be presented – and warrants issued – remotely is intended to allow the police to use modern technology to bridge gaps over time and distance, the threshold requirement should not be so onerous as to undermine this objective of increasing accessibility of the warrant application procedure.[56]

[73] For example, oral telewarrants must not be limited to circumstances of urgency. In *Clark*, Frankel J.A. wrote:

> The telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week. Whether the application is made in-person or by fax the reasonable-grounds standard must be met before a warrant can be issued. The impracticability-requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought; it does not require that an immediate need for a warrant be demonstrated.[57]

[74] Similarly, the stringent standard applicable to warrantless searches under section 487.11 of the *Criminal Code* or section 11(7) of the *Controlled Drugs and Substances Act* (impracticable to obtain a warrant by reason of exigent circumstances) should not be applied to oral telewarrants. The French version of "impracticable" in those provisions – "difficilement réalisable" – denotes a more onerous standard than the "impracticable" requirement in paragraph 487.1(4)(*a*) of the *Code*, which employs not "difficilement réalisable" but "peu commode". As Brown J. explained in *R v Paterson*:

> I stress that the foregoing interpretation of "impracticable" is directed solely to that term as it is employed in s. 11(7) of the CDSA to conditions of a warrantless search thereunder.

[54] *R v Nguyen*, *supra* note 43 at para 16; *R v Phillips*, *supra* note 38 at para 23.
[55] *Supra* note 44 at para 33.
[56] *Writs of Assistance and Telewarrants, Report 19*, *supra* note 11 at 79, 84.
[57] *Supra* note 40 at para 66, aff'd 2017 SCC 3, [2017] 1 SCR 86.

> My consideration of the meaning of "impracticable" here should not be taken as applying to that term as it is employed in other criminal statutory provisions, especially where the French version employs a term other than "difficilement réalisable". For example s. 487.1(4) of the *Criminal Code*, which requires an information submitted for the obtaining of a telewarrant to include "a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice", employs "peu commode".[58]

[75] When asked, the majority of law enforcement respondents agreed that the impracticability requirement should be removed for written telewarrants and that it should be retained for oral telewarrants. Of note, RCMP in British Columbia indicated that they do not feel it is necessary to retain the impracticability requirement for written telewarrants or for oral telewarrants given the rarity of the use of oral telewarrants in their jurisdiction. Toronto police service supports the removal of the impracticability requirement for written telewarrants as their current practice is to have the officer provide the warrant and affidavit to the justice's reception staff. Since there is currently no person to person interaction between the justice of the peace and the officer, it was suggested it would be a good idea to simply send the application electronically. It should be noted that oral telewarrants are not used in Ontario.

[76] One respondent from RCMP in Saskatchewan expressed the view that with advances in technology and the prevalence of digital signatures, encryption and high resolution scanned documents, there is a trend to move away from the use of paper more generally. The respondent also noted this natural evolution in practice would support the use of warrant applications in written form presented electronically as an efficiency in the process as the authenticity of digital documents is widely accepted; the removal of the impracticability requirement as it relates to warrant applications in written form is a logical and practical step at a time where those involved in the criminal justice system are asked to create efficiencies. On the other hand, Waterloo Regional Police Service responded that there was no need to remove the impracticability requirement for written telewarrants as in their jurisdiction, demonstrating that a justice was not available at the local courthouse was not considered an onerous undertaking. In addition, while some members of the judiciary who were consulted felt that allowing the application and disposition of written telewarrants in a more regular fashion would indeed create more efficiencies, others cautioned that if officers applied for warrants by remote application most of the time, this could affect resources and may require more on-call justices or judges.

[77] The Working Group endorses the modified test for oral telewarrants proposed in former Bill C-31, requiring the applicant to show that it is "impracticable (peu commode) to present the warrant application by means of telecommunication that produces a writing". It is a relatively low threshold, not limited to circumstances of exigency or urgency, but a sufficient standard to encourage written applications by means of telecommunication that produces a writing.

[58] *R v Paterson*, 2017 SCC 15, [2017] 1 SCR 202 at para 3.

RECOMMENDATION 1
The Working Group recommends that the requirement to show that it is impracticable to present a written application by appearing before a justice be *removed* for written telewarrants ("information submitted by a means of telecommunication that produces a writing").

RECOMMENDATION 2
As for oral telewarrants ("information submitted by telephone or other means of telecommunication" that does not produce a writing), the Working Group recommends that the impracticability requirement be *modified*, so as to require the applicant to show that it is "impracticable (*peu commode*) to make the application in writing by means of telecommunication".

3.2.2 The Telewarrant Process is Currently Unavailable in Relation to a Number of Investigative Warrants, Orders and Authorizations

[78] Section 487.1 precludes the possibility of seeking by technological means many investigative warrants and orders including production orders and some intercept authorizations pursuant to Part VI of the *Criminal Code*.

[79] When the telewarrant was first created in 1985, there were very few warrant provisions in the *Criminal Code*. The telewarrant only applied to search warrants that may be obtained pursuant to former section 443 (now section 487) and former section 258 warrants (now section 320.29) relating to blood samples in the impaired driving context. Considering the usual in-person process had been the only procedure by which an officer could seek a search warrant, a cautious approach was taken with respect to the introduction of technology as a new way to obtain warrants and as a guard against potential overuse or abuse of the telewarrant process.

[80] However, the use of telecommunication procedures in the *Criminal Code* have been expanded in other ways, such as the ability for a peace officer to obtain a warrant to take a DNA sample (subsection 487.05(3)), an impression warrant (subsection 487.092(4)) or a general warrant (section 487.01) by telewarrant.[59] As new investigative warrants and orders were created, amendments to the *Criminal Code* allowing for the use of telecommunications to rely on such investigative techniques did not always follow, or did but in a fragmented way. Despite these piecemeal amendments to the *Criminal Code* over the years, the telewarrant process as a whole has never been extended to encompass all the search warrants and investigative orders available in the *Criminal Code*.

[81] The lack of ability for the police to obtain all search warrants and investigative orders by means of telecommunication has a significant impact on the resources of law enforcement agencies, in particular in northern and remote communities where large geographic areas have to be travelled in order to make in-person applications. Indeed, a number of law enforcement respondents consulted by the Working Group noted that the fact that the *Criminal Code* does not give authority to obtain all investigative warrants and orders by telewarrant can be challenging for

[59] As noted previously, the use of telecommunications has also been expanded in other areas of the *Criminal Code*, *supra* note 5 and note 34.

law enforcement officers in remote or rural areas with limited access to a court registry and where it can be challenging to drive to the courthouse in a reasonable amount of time for warrant applications, which must currently be made in person, such as tracking and transmission data recorder warrants.

[82] The vast majority of law enforcement respondents consulted by the Working Group indicated that it would be useful to provide that all investigative warrants and orders can be obtained by telewarrant to streamline the process. In addition, some law enforcement respondents indicated that the telewarrant process should be relied upon to obtain public safety warrants such as warrants to remove weapons and ammunition (e.g., section 117.04 of the *Criminal Code*).[60]

[83] The result of the approach taken currently in the *Criminal Code* to this issue is manifestly inefficient with a large category of warrants having to be dealt with either through a cumbersome in-person process or as exigent circumstances pursuant to section 487.11 of the *Criminal Code* with no middle ground to cover the many instances in which the traditional approach is simply impractical. There does not appear to be any policy or practical reason for not applying the telewarrant procedure to all investigative warrants and orders in the *Criminal Code* and other search warrants in federal statutes.

[84] The Working Group proposes that the *Criminal Code* provide for the application for - and issuance of - search warrants and investigative orders to be submitted by any means of telecommunication. Such warrants and judicial orders would include special search and seizure warrants and orders, such as section 83.13 (search warrant for property in relation to a terrorist group), section 462.32 (search warrant in relation to proceeds), section 462.33 (restraint order – proceeds), as well as preventive warrants and orders such as section 83.222 (seizure warrant in relation to terrorist propaganda), section 83.223 (seizure in relation to terrorist propaganda – computer system), section 117.04 (search warrant for firearms), sections 164 (warrant of seizure for child pornography, etc.) and 164.1 (warrant of seizure for child pornography, etc., on computer system). (The corresponding chart at Annex 1 provides an overview of the full list of warrants, orders and authorizations contemplated by this proposal). Where a warrant provision includes the possibility of a notice to a third party and a hearing, the telewarrant process should be adapted and made available. Nothing should preclude seeking a warrant by telecommunications even where the subsequent issuance of the warrant is provided by the judge in person – or vice versa. The process should also be available to other search warrant provisions in federal statutes, such as those included in the *Controlled Drugs and Substances Act* and the *Cannabis Act*.

[85] Part VI of the *Criminal Code* which covers authorizations to intercept private communications includes section 184.3, which allows for applications to obtain a wiretap authorization by telecommunications may only be used in respect of one-party consent authorizations under section 184.2. Section 184.3 includes self-contained provisions that take into consideration the confidential nature of the process. This process differs somewhat from the

[60] A respondent from RCMP Saskatoon cautioned that the expansion of telewarrants to other investigative warrants and orders would be unhelpful unless resources were greatly increased. The Royal Newfoundland Constabulary responded that the expansion would only be useful if their operational telewarrant issues were resolved. Furthermore, they noted that their officers preferred appearing in person.

procedure provided in section 487.1 and is tailored specifically to wiretap applications. Section 184.3 also limits the authorization for 36 hours after issuance.

[86] Third party intercept authorizations pursuant to sections 185 and 186 may only be obtained by way of an in-person application while there is no requirement that applications to obtain section 188 emergency wiretap authorizations be made in writing[61]. We note, however, that the wording does not specify whether such emergency authorizations may be sought by telephone. The Working Group was unable to confirm the underlying policy rationale that would explain why the application of section 184.3 is limited to one-party consent authorizations. The Working Group highlights these particularities, which would require further study by those with the required expertise in the area of wiretap applications. However, it is recognized that any future legislative reform of section 487.1 should ensure a harmonized rule for wiretap authorizations taking into consideration the confidential nature of some aspects of this regime.

RECOMMENDATION 3
The Working Group recommends that the *Criminal Code* be amended to provide that all investigative warrants and orders, including public safety warrants and those described under 3.2.2 and warrants that are found in other federal statutes, such as those in the CDSA and the *Cannabis Act*, may be obtained and issued by a means of telecommunication.

RECOMMENDATION 4
The Working Group recommends that any future legislative initiative that proposes to expand the availability of telecommunications to obtain search warrants and other investigative orders also consider including the procedure for obtaining Part VI intercept authorizations taking into account the particular nature of the wiretap scheme.[62]

3.2.3 The Telewarrant Process is Currently Restricted to Indictable Offences

[87] In order to obtain a warrant in accordance with section 487.1 of the *Criminal Code*, a peace officer applying for a search warrant must believe that an indictable offence has been committed[63]. By virtue of section 34 of the *Interpretation Act*, indictable offences include hybrid offences, which are deemed indictable unless and until the Crown has elected to proceed summarily[64]. Therefore, a justice cannot currently issue a telewarrant in relation to a section 487 search warrant[65] as part of an investigation into a straight summary conviction offence.

[61] *R v Tse*, 2012 SCC 16, [2012] 1 SCR 531.
[62] Since Part VI requirements are incorporated into the provisions for video surveillance warrants, under ss. 487.01(4) and (5) of the *Criminal Code*, the need for further study also applies to any future changes affecting video surveillance warrants provided for in ss 487.01(5).
[63] Ss 487.1(1), (4), (5) of the *Criminal Code*, *supra* note 5.
[64] *R v Dudley*, 2009 SCC 58, [2009] 3 SCR 570 at para 21.
[65] We note however that some *Criminal Code* warrants, such as s 487.092 (impression warrant), provide that it is possible to apply for a warrant by telewarrant and that s 487.1 applies with the « *necessary modifications*». Therefore, it may be that the limitation associated with the application of the telewarrant to indictable offences does not necessarily apply vis-à-vis summary conviction offences in all circumstances. However, what is meant to be "applied with the necessary modifications" remains uncertain in this context.

[88] The Working Group therefore considered whether the telewarrant process should be made available in relation to search warrants to investigate summary conviction offences.

[89] The parliamentary record for former Bill C-18 shows that there was some unease expressed by members of Parliament about a new process applying to search warrant applications in relation to all offences (both indictable and summary offences). Before extending the procedure for obtaining a telewarrant in relation to all offences, it was suggested to first examine the experience with indictable offences to ensure the process is effective and non-intrusive.[66] During the parliamentary process, the CACP expressed the view that the telewarrant process should not be restricted to indictable offences but should apply on an equal level with conventional warrants (now section 487 search warrants), which are available in relation to both summary and indictable offences. The LRCC had also proposed that the telewarrant apply in respect of all offences and viewed this process as a "sensible utilization of modern technology"[67]

[90] A related issue explored by the Working Group is the situation where a search warrant is required after a charge laid on a hybrid offence proceeds summarily on election by the Crown. Once the election is made to proceed summarily, the hybrid offence is treated in all respects as a summary conviction offence[68]. However, the investigation may continue after electing to proceed summarily. Arguably, this may be interpreted to mean that when an investigation continues following election by summary proceeding, any subsequent search warrants could not be sought by telewarrant. Therefore, while hybridization may put into question the need for the proposed amendments on this particular issue, the possibility for Crown election by summary proceedings for less serious conduct no longer aligns with Parliament's initial intent to limit telewarrants to the most serious offences and may still leave open the question of whether an officer can obtain additional search warrants following Crown election to proceed by way of summary proceeding.

[91] There are over 60 straight summary offences in the *Criminal Code*. Other federal statutes also contain straight summary offences[69] for which the telewarrant process is currently precluded.

[92] In addition, since the early 1990s, there has been a steady increase in hybrid offences in the *Criminal Code*. Recent amendments brought by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, which received Royal Assent on June 21, 2019 as S.C. 2019, c. 25, hybridized 118 additional offences and raised the summary conviction maximum penalty to two years less a day, thus arguably raising the seriousness of many summary elections that might previously have proceeded by indictment. Therefore, even Parliament's initial reason for limiting the telewarrant to indictable offences may be somewhat less relevant today. As indicated above, during the parliamentary process for former Bill C-18, some stakeholders did not view this limitation on the use of the telewarrant as necessary.

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[66] *Supra*, note 13, (25 March 1985) at 2215 (Hon Robinson). During the clause by clause consideration of Bill C-18 by the *House of Commons Standing Committee on Justice and Legal Affairs*, one Committee member presented a motion to amend then s 443.1 (now s 487.1) to have it apply to any criminal offence, but the motion was defeated. See Bill C-18, *supra* note 13, vol 1 (25 March 1985).

[67] *Supra*, note 13, (12 February 1985) at 1615 (Justice Linden, LRCC).

[68] *Supra*, note 64 at para 2.

[69] See for example: *Bank of Canada Act*, RSC 1985, c B-2, s 31; *Employment Insurance Act*, SC 1996, c 23, para 106(1)(*b*); *Excise Tax Act*, RSC 1985, c E-15, para 99(2)(*b*).

[93] The majority of law enforcement agencies consulted by the Working Group in 2017 indicated that they favoured the telewarrant process being made available for the investigation of all offences regardless of whether they are classified as indictable, hybrid or summary. Although it was noted that search warrants were rarely sought in relation to summary offences and that the majority of offences police investigate proceed summarily, these reasons alone were not considered sufficient to preclude the possibility of obtaining a search warrant by technological means for the investigation of such offences. It was further mentioned that to ensure consistency, these offences should not be excluded from the telewarrant process even though their use might be rare.

[94] There were no valid legal or policy reasons identified by this Working Group for limiting the possibility of obtaining a warrant by technological means on the basis of the classification of the offence being investigated. The Working Group is of the view that this distinction is not warranted. Providing that telewarrant applications may be presented by technological means in relation to all offences regardless of their classification would ensure a more logical consistent approach to telewarrants and remove any ambiguity associated with the availability of the telewarrant once the Crown elects to prosecute summarily on a hybrid offence. In addition, given that Recommendation 3 proposes to extend the telewarrant process to search warrants provided in federal statutes other than the *Criminal Code*, it would be sensible to provide that the telewarrant also apply in relation to summary offences found in these other statutes.

RECOMMENDATION 5
The Working Group recommends that telecommunications be made available to obtain search warrants and other investigative orders in relation to all offences irrespective of their classification.

3.2.4 Should All Judicial Officers be Authorized to Issue a Warrant or other Investigative Order by a Means of Telecommunication?

[95] Section 487.1 provides that only justices designated by the Chief Judge of the provincial court may issue a warrant pursuant to section 487.1. The Working Group considered whether the requirement that only designated justices may issue search warrants by telecommunications should be maintained in the *Criminal Code*.

3.2.4.1 Designated Justices

[96] At the time of the enactment of the 1985 amendments creating the telewarrant regime, courts were releasing landmark decisions interpreting the then new *Charter*, which clarified *Charter* rights in relation to the application and execution of search warrants. A common concern at the time was the justices' ability to comply with *Charter* requirements in the decision to grant or deny the issuance of search warrants without adequate training. As the telewarrant process was meant to be used in exceptional circumstances to obtain search warrants, there were also concerns in the proper application of the telewarrant process itself. The parliamentary record revealed the concern of some members of Parliament that justices of the peace, even designated ones, could issue warrants by telewarrant:

> "(…) I was concerned about the newness of the telewarrant and the Bill which was before the last Parliament reflected that concern by limiting the issuing of telewarrants to senior judicial officers, excluding justices of the peace. I notice in this Bill that a judge can designate specified justices of the peace to issue telewarrants. I am concerned about that. At the moment I am not saying that is an unacceptable feature, but I would like to know

> why the Government feels that it ought to extend the authority to issue telewarrants that widely. My own preference would be to keep them narrow and to have tight judge-shopping provisions, I think Canadians are concerned about their civil liberties. We are in an era of the *Canadian Charter of Rights and Freedoms*. I do not think that we want to introduce a provision lightly without all of the safeguards that can possibly be included. I am putting the Government on notice that I would like a good explanation for Canadians as to why the authority to issue telewarrants needs to be given to justices of the peace, even designated one."[70]

[97] While former Bill C-18 provided for designated justices, the LRCC's report included no limitation in relation to the issuing justice:

> ″Similarly, since we are confident that the telewarrant would entail no diminution in the prevailing standards of judiciality and particularity, we see no reason for reserving *responsibility* for their issuance to any higher judicial officer than the justice of the peace. We appreciate that, in some provinces, responsibility for issuing search warrants is exercised by provincial court judges. Under the scheme here being proposed, the designation of the order of judicial officer responsible for search warrant issuance would similarly accommodate the situation in each province.[71]

[98] The LRCC favoured greater access to justices, having full confidence in their capacity to issue search warrants whether remotely or through in-person applications. For the CRDC, the proposal could also accommodate jurisdictional distinctions where search warrants are issued by provincial court judges.

[99] The Working Group consulted some members of the judiciary on the continued need to provide for the designation of justices authorized to issue search warrants by technological means. Some respondents raised the concern that removing this limitation could have an impact on resources, including training of judicial officers unfamiliar with the telewarrant process, proper infrastructure and equipment. Others were of the view that since those authorized to grant search warrants are capable of exercising such functions, they should be equally competent to deal with a request for a warrant obtained through technological means. Some other respondents indicated that justices are all designated from the time of their appointment so this requirement is not seen as an impediment.

[100] The majority of law enforcement respondents indicated that the designation of justices should be discontinued so that all justices can be authorized to issue search warrants by technological means, noting the insufficient number of designated justices in some jurisdictions working after hours for an entire province. A number of law enforcement respondents noted that all judicial officers dealing with warrant applications by telecommunications should receive proper training.

[101] Since the enactment of the telewarrant regime, courts have set out clear parameters for obtaining and issuing search warrants and technology is now widely used. It is unclear whether the designation requirement in section 487.1 assisted in providing an additional safeguard to ensure compliance with *Charter* rights when search warrants are issued by telewarrants. If justices have the authority, the proper qualification and training to issue search warrants determined on the

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[70] *Supra* note 12, vol 1 (20 December 1984) at 1393-1394 (Hon Bob Kaplan).

[71] *Writs of Assistance and Telewarrants: Report 19*, *supra* note 11 at 84.

basis of a sworn information presented in person pursuant to section 487 of the *Criminal Code*, then it seems logical to state that they are equally qualified and authorized to do so when the application is made by technological means. In the view of the Working Group, the designation requirement does not appear to address the concern for the protection of *Charter* rights or to provide any added value. While proper training and resources in relation to the telewarrant process itself is an important consideration, these aspects are best left to be decided by those responsible for court administration.

3.2.4.2 Other Judicial Officers

[102] The Working Group considered whether there were any impediments to the availability of the telewarrant process to judicial officers of all levels of court, or whether it should be restricted to those courts that have the proper infrastructure or equipment to receive applications and issue warrants by technological means. For instance, there are a number of areas where highly sensitive information would need to be considered in relation to certain warrant applications and may not be suitable for a process by telecommunications due to security concerns, such as information related to national security.

[103] Recommendations 3 and 4, which propose that legislative changes provide that all search warrants, investigative orders and authorizations may be obtained by telecommunications will necessarily involve the issuance of search warrants, investigative orders and authorizations by judicial officers at various levels of court. In the view of the Working Group, changes to existing court infrastructures or additional procedures that may be required to permit judicial officers to receive applications and issue orders by a sufficiently secure technological means are best left as matters for those responsible for court administration in each jurisdiction.

RECOMMENDATION 6

The Working Group recommends that the *Criminal Code* provide that judicial officers of all levels of court (justice, provincial court judge, superior court judge, federal court judge) be authorized to issue search warrants and other investigative orders by a means of telecommunication.

RECOMMENDATION 7

The Working Group also recommends that the requirement in section 487.1 that justices issuing warrants by telecommunications be designated by the chief judge of the provincial court should be removed.

3.2.5 Only Peace Officers May Apply for a Telewarrant

[104] Section 487.1 provides that only peace officers may apply for a telewarrant. Other *Criminal Code* provisions that permit an application for judicial authorization by way of telecommunication by reference to section 487.1 are also clearly limited to peace officers, such as the general warrant (subsection 487.01(7)) and the forensic DNA warrant (subsection 487.05(3)).

[105] If Recommendation 3 of this Report is accepted, persons other than peace officers would be called upon to seek search warrants and investigative orders by technological means. This necessarily requires an examination of those who are currently authorized to seek such judicial

authorizations and consider whether there is a need to limit who should be authorized to make such applications by means of telecommunications.

[106] For the usual in-person process, judicial authorization provisions in the *Criminal Code* may either specify those authorized to apply for search warrants or other investigative orders, such as peace officers or public officers[72], or the Attorney General or their authorized official.[73] Other provisions such as section 487 (conventional warrant) or section 492.1(warrant for tracking device) do not specify any restrictions on who may apply for them.

3.2.5.1 Who Should Be Authorized to Make an Application by Means of Telecommunications?

[107] In the view of the Working Group, expanding the availability of judicial authorization applications by telecommunication to other search warrant and investigative orders equally requires that this process be made available to other state actors specified in judicial authorization provisions, such as a public officer or the Attorney General. If such state actors are currently authorized to make in-person applications to obtain search warrants and other investigative orders, these officials should also be authorized to apply for judicial authorizations by technological means.[74] As mentioned previously, former Bill C-31 proposed to provide that public officers also have access to the telewarrant regime for those warrants for which they are authorized to obtain.

3.2.5.2 Private Applicants

[108] There is some support in law in relation to private applicants being able to apply for a search warrant but the law remains uncertain in this area.[75] However, where some judicial authorizations in the *Criminal Code* may arguably permit a private person to make an in-person application under the current state of the law, the question arises about whether they should be permitted to apply for judicial authorizations by means of telecommunications or whether this feature should be limited to state actors. However, in considering this issue, the Working Group is not seeking to limit private persons' current access to judicial authorizations.

[109] The underlying objective for the creation of a new 'telewarrant' regime was to improve police access to justices for the purpose of seeking judicial authorizations.[76]

[110] Limiting the telecommunication process to state actors has a principled and practical justification. Private persons do not have unlimited access to enforcement of criminal law – the responsibility for enforcement of the criminal law in Canada rests with the government, primarily with police and prosecutors. Other government law enforcement officials, such as border control

[72] For example, ss 487, 487.013 – 487.018 of the *Criminal Code*, *supra* note 5.
[73] See in particular, s 462.32 of the *Criminal Code*, *supra* note 5, in relation to proceeds of crime property.
[74] Of note, former Bill C-31, *supra* note 27, had provided for public officers to apply by telewarant.
[75] See for instance, *Bird Construction Company v Alberta (AG)*, [1966] 2 CCC 137, 54 WWR (ns) 93 where the information was laid by a Barrister and *R v T.S.*, [1999] OJ No. 271; 1999 CarswellOnt 245 (Prov Ct) at para 75 where the Court commented on the availability of a private citizens seeking a search warrant. More recently, the Quebec Court of Appeal commented on the uncertainty of the availability of a private informant seeking a search warrant, in this case a barrister who sought a search warrant on behalf of his client; *Andraos v Procureure générale du Québec*, 2019 QCCA 908. The very few reported cases on this issue is likely indicative of the infrequency of private person applications for judicial authorization. The availability of private applicants and infrequency of search warrant applications was also noted by the LRCC in Canada, Law Reform Commission of Canada, *Recodifying Criminal Procedure: Report 33*, vol 1 (Ottawa: Law Reform Commission of Canada, 1991) at 28.
[76] *Writs of Assistance and Telewarrants: Report 19, supra* note 11 at 79.

or fisheries officers, also play a role in accordance with their respective mandates. While the *Criminal Code* makes some limited provision for access by private persons to seek fundamental tools for investigation (section 487 – search warrant) and initiation of prosecution by providing authority to lay an information (section 504, section 507.1), this is not an unlimited authority. Private persons may apply for search warrants but they are not authorized to execute them; a private prosecution is always subject to intervention by the Attorney General.[77] In addition, while civilians can lay an information, only peace officers may present them by means of telecommunications.[78]

[111] In addition, a new approach allowing civilians to apply for search warrants by telecommunications may create other operational challenges. For instance, some jurisdictions provide for encrypted email transmission, which allows for direct application by police services with security features such as login identification numbers to ensure proper identification of the peace officer applicant. Such systems are in place to provide police forces with secure access to judicial officers and make the criminal justice system more efficient; they are not meant to be used by non-state actors as a service to the public. An in-person appearance during business hours would also better serve the uninformed civilian applicant and allow them to receive some guidance by justice staff as to the process or time required for the application. For all these reasons, it seems advisable to provide that private persons continue to proceed through an in-person application.

[112] In the relatively uncommon event that a judicial authorization is issued pursuant to a private person's application, the *Criminal Code* invariably provides that only a peace officer, public officer, or other state actor, can execute it. As a result, state actors have an inherent interest in the issuance of any judicial authorization, as it requires them to use their resources to execute, seize, retain, and report to a justice regarding the search. Procedurally, given inevitable state actor involvement, a hearing justice may determine that the interests of justice require Crown Counsel or another agent of the Attorney General to be present in the application process. It may be easier to facilitate this involvement in person during business hours at a time when the court, police, and the applicant can all be available. In addition, Parliament and jurisprudence has recognized the risk of private persons misusing the criminal process in the context of section 507.1.[79] Again, this risk of misuse is best addressed with in-person applications.

[113] The Working Group's view is that there should be no private person access to a process for application for search warrants or other judicial authorizations by means of telecommunications and a provision should be made to restrict its availability to make such applications by telewarrant. Given this view as to the inadvisability of permitting private persons to make use of such a process, the Working Group has not engaged in a section by section analysis of the provisions and contexts if access to an application process by means of telecommunication for private persons were granted.

[77] *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at paras 23-26, 29-32, 45; *R v McHale*, 2010 ONCA 361, 256 CCC (3d) 26 at 57.
[78] S 508.1 of the *Criminal Code*, *supra* note 5.
[79] *R v Friesen*, 229 CCC (3d) 97, 2008 CanLII 12493 (ONSC) at para 9.

RECOMMENDATION 8
The Working Group recommends that applications for search warrants and other judicial authorizations by means of telecommunication be limited to peace officers and other appropriate state actors, such as public officers or an agent for the Attorney General.

3.2.6 The Telewarrant Is Not Available for Out-of-Province Search Warrants

[114] The Working Group is not aware of situations where the telewarrant process has been used to obtain a warrant for the purpose of execution outside the province in which it was sought. This would appear unlikely from a reading of section 487.1 of the *Criminal Code* in relation to section 487 warrants since there is no provision in section 487.1 authorizing its execution at any place in Canada, such as what is found in other search warrant granting provisions which provide that a warrant issued by a provincial court judge and a justice is executable across Canada upon issuance. While other search warrant provisions provide for the telewarrant process to apply with such modifications as the circumstances require, it is unclear whether one could rely on this wording to present a warrant application by technological means to seek a warrant intended for execution outside the province of issuance.

[115] When consulted, one law enforcement respondent suggested that the telewarrant should be made available to search warrant applications that are intended for execution outside the jurisdiction of issuance.

[116] In the view of the Working Group, some of the same considerations examined under part 3.2.1 would be applicable in determining whether a differential treatment is required between in-person applications and applications presented by technological means when the warrant is sought for execution outside the jurisdiction of the issuing judicial officer. Currently, on the authority of the judicial officer to issue a search warrant, the warrant may be executed at any place in Canada and the peace officer who executes the warrant must have authority as a peace officer in the place where the warrant is executed. The Working Group does not consider the location of the execution of the search warrant or other investigative order as having any implications that would make the telewarrant process challenging in such scenarios or in need of additional rules or safeguards. Irrespective of the location of the search or seizure, the judicial officer must consider the issuance of the warrant based on the sufficiency of the grounds of belief threshold as presented in a sworn information or other application for an investigative technique. There is no apparent reason that the efficiencies gained in obtaining search warrants by technological means should not also apply to warrants that are intended for execution outside of the province.

[117] As is the case for in-person applications, it is expected that applicants would present an application for a search warrant by technological means to the appropriate judicial officer authorized to issue the warrant in the jurisdiction where the offence has been committed.

[118] Finally, the fact that an informant seeks a warrant by technological means from a justice authorizing a search or other investigative activity outside the province would not change the requirement that a police officer must have authority to enforce the warrant in the jurisdiction where the warrant is intended for execution.

RECOMMENDATION 9
Search warrants and other judicial authorizations sought by telecommunications should be made available in relation to searches or other investigative activities intended for execution outside the province of issuance.

3.2.7 Statements of an Information Submitted by a Means of Telecommunication

[119] As discussed earlier in this report, section 487.1 is set up to have all the features of a distinct warrant. As such, it requires the officer to make specific statements as set out in subsection 487.1(4):

a. a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;
b. a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;
c. a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and
d. a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

[120] If legislative reform to the telewarant scheme incorporates the recommendations in this Report, then it follows that the above statements referred to in subsection 487.1(4) that are currently required to be in an information submitted by a means of telecommunication should be removed with the exception of a new modified test that is in relation to the impracticability requirement proposed for oral telewarrants. [80]

[121] The first requirement set out in paragraph 487.1(4)(*a*) is unnecessary to the extent that it applies to warrants submitted in written form as the "impracticability to appear in person" requirement would be repealed in relation to applications submitted in writing. However, as discussed in 3.2.1.2 of this Report, a new threshold would remain for oral applications to obtain warrants by technological means.

[122] The requirement set out in paragraph 487.1(4)(*b*) that the telewarrant can only be obtained in relation to an indictable offence was discussed in 3.2.3 of the Report. This requirement would no longer be necessary since the Working Group recommends that search warrant applications obtained remotely should apply in relation to all offences.

[123] Paragraphs 487.1(4)(*b*) and (*c*) provide for a requirement to state the peace officer's reasonable grounds of belief in relation to the place to be searched and items that will be found. The required statement in relation to the reasonable grounds of belief set out in these provisions is similar to the test already found in relation to the conventional warrant and should be removed.

[80] Subsection 487.1(5), which provides that the justice may issue a telewarrant when they are satisfied that the Information meets the requirements as provided in subsection 487.1(4) would also require related changes to reflect the recommendation under this Part.

Considering the current grounds of belief threshold for section 487 search warrants, the threshold test in paragraphs (*b*) and (*c*) is redundant in substance and inconsistent in wording when compared with subsection 487(1). From this perspective, both subsection 487(1) and paragraphs 487.1 (4)(*b*) and (*c*) seek the same end, but express it differently[81]. Moreover, this wording is not relevant for other warrant provisions, which include their own reasonable grounds tests tailored to the type of warrant, which would continue to apply. *Criminal Code* requirements associated with the nature of the investigative technique or the sufficiency of the grounds test should be found in the warrant provision itself rather than in a provision setting out the procedure for obtaining warrants by technological means.

[124] Finally, paragraph 487.1(4)(*d*) imposes an obligation that relates to the principle of "honest information"[82]. As a general rule, an affiant is required to disclose whether an earlier application for the warrant was made and refused. A peace officer who knows that other judicial authorizations have been sought for the same matter must disclose this in the application made to the issuing judicial officer regardless of whether the application was granted or denied. As this statutory requirement would appear to be already required at common law for other warrants, the Working Group is of the view that the rule would continue to apply whether or not the application to obtain a search warrant is made in person or by technological means.

RECOMMENDATION 10
It is recommended that the requirement to include the statements in an information submitted by a means of telecommunication referred to in subsection 487.1(4) of the *Criminal Code* be repealed, but that a statement of the proposed impracticability requirement for oral telewarrants be maintained.

3.2.8 Post-Execution Issues Explored Regarding Section 487.1 of the *Criminal Code*

3.2.8.1 Report to Justice on Property Seized

[125] Sections 489.1 and 490 of the *Criminal Code* provide for an accountability mechanism and judicial control of searches and seizures, including ensuring that property seized is returned to the lawful owner. Section 489.1 is the general provision requiring police officers to prepare and present a report to justice in Form 5.2 and section 490 is the process that provides for the return of property seized.

[126] However, there are different reporting requirements following the execution of a search warrant obtained pursuant to section 487.1. Subsections 487.1(9) and 489.1(3) require the officer to include additional statements in the Form 5.2 report to justice that are not specifically required for a post-execution report filed in relation to search warrants obtained through the usual process (i.e., in person). In addition, once the telewarrant has been executed, subsection 487.1(9) provides that the report of property seized, which includes additional statements, such as where seized items are detained, must be presented to the clerk of the court in the territorial division in which the

[81] For instance, para 487.1(4)(*c*) refers to items that "will be found", while s 487(1) refers to "there is in a building (...)". In addition, para 487(1)(*b*) uses the test that the items to be seized "will afford evidence", while the requirement in para 487.1(4)(*c*) provides that "items…in respect of the offence alleged…". Some may argue that in contrast to para 487.1(4)(*c*), the test to meet for a conventional s 487 search warrant is more stringent.
[82] *R v Araujo*, 2000 SCC 65, [2000] 2 SCR 992.

warrant was *intended for execution*[83], who then presents it to the justice along with the Information to Obtain and the warrant, while section 489.1 provides that the report must be presented to the justice who *issued* the warrant or some other justice in the same territorial division.[84] The latter constitutes the usual location for filing post-execution reports.[85]

[127] This apparent differential treatment in the requirements for post-execution reports raises questions about the continued need for two distinct sets of rules. In addition, if legislative amendments are enacted to address telewarrants in a manner that incorporates Recommendations 1 and 2 of this Report, the Working Group anticipates that search warrants and other judicial authorizations obtained by technological means will become the norm and in-person applications, the exception. Therefore, if the current telewarrant requirements for reporting remain unchanged in a new scheme, a number of post-execution requirements associated with the telewarrant process, including the location of the filing of the report and the requirements on accessibility of information related to the search, would also apply more regularly.

[128] In exploring how best to harmonize the post-execution requirements applicable to an in-person search warrant application process with those of the telewarrant process, the Working Group considered the following elements: the importance of the possible *Charter* breach for failure to file a report to justice[86], the accessibility of the search warrant information by persons affected by the search, and the level of efficiency of the reporting process.

3.2.8.2 Location to File and Present a Report to Justice on Property Seized

[129] In their 1983 Report, the LRCC recommended that the report to justice be presented in the territorial division where the warrant is intended for execution:

> However, as our proposal for telewarrants is elaborated, it will become evident that we are anxious to ensure that persons whose premises are searched have all lawful access to the information on oath, to the warrant (or its facsimile), and to the report filed by the peace officer upon execution of the warrant. To facilitate that access, we have designated the territorial division in which the warrant is executed as the appropriate location for maintaining the necessary records. As well, the territorial division of execution is both the most likely locale for whatever prosecution might be connected with the investigation

[83] Note however that Form 5.2 (Report to Justice) also applies to s 487.1 telewarrants. Form5.2 provides that the report is to be presented to the *issuing* judicial officer. The Form also provides that where the search was executed following a telewarrant, the report must also include the statements required by s 487.1(9). This may leave uncertainty regarding whether the post-execution report of a telewarrant is to be filed in the issuing jurisdiction or, perhaps that a report is to be filed in both the issuing and executing jurisdiction. Such provisions would benefit from clearer wording.

[84] S 489.1 applies to all search warrants in which property is seized subject to other provisions of the *Criminal Code* or another Act of Parliament. S 462.32(4) (special search warrant in relation to proceeds of crime) provides for a separate post-execution report following execution of a search warrant in relation to proceeds of crime (s 462.32(1)). S 12.1 of the *Controlled Drugs and Substances Act* [CDSA] provides for a post-execution report following the execution of a s 11 *CDSA* search warrant, which must be presented to the justice who issued the warrant or another justice in the same territorial division. However pursuant to s 11(2), s 487.1 applies to s 11(1) (search warrant) with the necessary modifications as the circumstances require. Arguably, a peace officer would not be required to submit a report in the place of execution following a s 11 warrant obtained via the telewarrant regime.

[85] Of note, s 462.32(4) also provides for a post-execution report in relation to proceeds of crime property, which must be provided to "the clerk of the court" (presumably the clerk of the court in the territorial division where the warrant was issued).

[86] *R v Martens*, 2004 BCSC 1450, [2004] BCJ No 2300 at para 275.

> and the most convenient place for the peace officer to file his report after execution of the warrant.[87]

a) Relying on the Meaning of "Territorial Division"

[130] In examining how these rules apply, the Working Group reviewed the scope of the term "territorial division" found in both sections 487.1 and 489.1. This term is defined in section 2 of the *Criminal Code* as including "any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies". "Territorial division" has been interpreted broadly or narrowly depending on the *Criminal Code* provision under which it applies taking into consideration the court structure in a particular province[88]. However, the Working Group did not find a reported case on point regarding the scope attributed to "territorial division" as referred to in subsections 487.1(9) or section 489.1. If the term "territorial division" is interpreted narrowly (e.g., county, township, or judicial division) in the context of the requirement to report on property seized, then the application of the respective requirements under sections 487.1 and 489.1 could result in the report being filed in different locations depending on whether the officer presented their search warrant application in person or by technological means.[89]

[131] There is also jurisprudence interpreting "territorial division" and "territorial jurisdiction" in various sections of the *Criminal Code* as comprising an entire province.[90] If the broad meaning of the term was applied in determining a proposed acceptable location for the report to justice requirement, one could argue that where the warrant is issued and executed in the same province, a police officer could presumably present their report to justice anywhere in that province and that this would comply with the reporting requirements in both subsection 487.1(9) and section 489.1 without need for legislative changes. A broad interpretation could potentially apply and allow for a report to justice to be presented anywhere in the province, thereby making it easier to comply with the reporting requirement. However, this interpretation would not assist in achieving certainty in relation to the location where the report must be filed. In addition, a broad interpretation of the term "territorial division" would not address the situation of two different rules applying to search warrants intended to be executed outside the province of issuance depending on whether such

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[87] *Writs of Assistance and Telewarrants, Report 19, supra* note 11 at 85. The likely scenario might have been that the justice issuing a telewarrant was on call somewhere in the province or at a centralized telewarrant centre, which has no other link to the place where the offence is committed or place where the offence is being investigated, and therefore is a less relevant place to require the filing of post-execution reports on search and seizure.

[88] *R v Ellis*, 2009 ONCA 483, 95 OR (3d) 481, found that the reference to "territorial jurisdiction" in s 504 of the *Criminal Code* (laying of an information to justice re: indictable offence) refers to the entire province of Ontario. See also *Emberley's Transport Ltd v Newfoundland*, [1996] NJ No 315 (Prov Ct), in the context of s 489.1 and 490 of the *Criminal Code* (report by peace officer); *R v Ponnuthurai* (2002) 7 CR (6th) 317, 170 CCC (3d) 440 (Ont Ct J (Gen Div)), in the context of s 798 (jurisdiction of summary conviction court); *R v Benz*, [1986] OJ No 227 (CA), in the context of s 487(2) (*contra Ciment Independent Inc v Lafreniere* (1985), 47 CR (3d) 83, 21 CCC (3d) 429 (QCCA)); *R v Marshall*, [1999] NSJ No 135 (Prov Ct), "territorial division" means the entire province for purposes of jurisdiction of a provincial court judge but in the context of s 599 (change of venue for a trial), "territorial division" means anywhere courthouses and court locations have been established.

[89] This interpretation could mean that if an Ottawa police officer makes an in-person warrant application pursuant to s 487 of the *Criminal Code* to search a place in Toronto, the report on property seized would have to be filed in Ottawa (place of issuance). However, if that same officer makes a telewarrant application to search the place in Toronto, the report would have to be filed in Toronto (place of execution).

[90] *R v Marshall* and *R v Ellis, supra* note 88.

warrants were sought in person or by technological means. Any uncertainty in respect of the filing requirements raises the possibility of a section 8 *Charter* breach for non-compliance with the proper presentation of the report to justice.

b) Place of Issuance, Place of Execution or Other Location

[132] Applying these distinct location requirements to different scenarios, it became clear that the most relevant or convenient location to file a post-execution report to justice would not necessarily be the place of issuance or the place of execution in all situations. For instance, if the place of issuance is adopted as a rule, the place of issuance for a warrant sought by technological means may be: the physical location of the justice issuing the warrant from the telewarrant centre in another city within the province; a place that may have no connection to either the city where the search is taking place; the place where an application for return of seized things pursuant to section 490 would likely be heard; or the location where the offence occurred. When considering the interests of efficiency of the process and accessibility of the information, the place of issuance may not always be most relevant choice.

[133] On the other hand, if the place of "execution" is adopted as a rule for *all* post-execution reports, a similar question arises in situations where a search warrant is sought for execution in another province and obtained by technological means as discussed in 3.2.6. In such cases, the officer would be required to file the post-execution report in the province where the warrant is executed even though all other aspects of the investigation are likely connected to the issuing province. This result would not address two noteworthy considerations discussed by the Working Group: providing for the most likely location for whatever prosecution might be connected with the investigation and the most relevant and convenient place for the peace officer to file their report to encourage better compliance. On the other hand, the place of execution would address another equally important consideration. If the search warrant and related documents are filed in the jurisdiction where the search is executed, this could allow the subject of the search to have facilitated access to the information if they have primary residence there as contemplated by the LRCC[91].

[134] One possibility contemplated by the Working Group regarding the location to present the report to justice is with the local courthouse of the applying officer. The location of the applying officer is likely the primary place of investigation into the commission of the offence and where the charges are likely to be laid. The Working Group has not, however, had the chance to explore all implications of this possible avenue.

[135] The Working Group also considered imposing a requirement on the officer to file multiple copies of the report to places with a connection to the search (issuance, execution and/or other) to provide the target of the search better access to the relevant documentation. However, this option raises other issues such as the uncertainty of the related consequence of not filing the report in all relevant locations including the impact on a possible section 8 *Charter* breach and the fact that providing for multiple copies also creates duplication and inefficiencies. Filing in one single location renders the process simpler to comply with but might remove some of the accessibility of

[91] *Writs of Assistance and Telewarrants, Report 19, supra* note 11 at 85.

information to the subject of the search if they are situated in another location. A centralized filing system for search warrants and reports to justice, as well as electronic filing of reports, would greatly assist in both facilitating compliance with post-search report requirements and accessing the information relevant to the search.[92]

[136] The one situation where filing in two different places may have merit is where a search warrant is sought for execution outside the province. In such cases, the Working Group suggests considering a requirement to file a notice to the clerk of the court in the territorial division where the out-of-province search warrant was executed (or intended for execution) to facilitate accessibility of information in the location where the search occurred.

[137] As set out above, the considerations for post-search requirements are several and involve a more in-depth examination not only of the reporting requirement in relation to property seized but of also other distinct reporting requirements in relation to specific warrants[93], as well as the relationship between the post execution reporting requirement and the section 490 regime regarding the return of property seized. In addition, in considering the preferred location for the presentation of the report to justice, it would be desirable to consider jurisdictions' different operational structures as some of them may currently have a centralized "telewarrant/judicial centre" model, while others could contemplate a system that would easily allow all judicial officers to receive warrant applications by technological means wherever they may be situated in the province.

[138] The Working Group is of the view that further study would be required to fully consider all issues in relation to preferred location to present a report to justice. However, with the exception of search warrants executed outside the province, it would appear desirable that the *Criminal Code* provide for one harmonized rule regarding the location where the report must be presented, irrespective of the manner in which the search warrant application is presented to a judicial officer[94].

3.2.8.3 Other Considerations in Relation to the Report to Justice

a) Filing the Information and Related Search Warrant

[139] Related to the filing of the written report to justice is the filing of a copy of the Information to Obtain and the search warrant. Presently, section 487.1 provides that the judicial officer must file the Information to Obtain and the search warrant with the clerk of the court in the territorial division where the search warrant is intended for execution, which is the location where the report to justice must currently be filed in relation to telewarrants. It is the view of the Working Group that whether a warrant application is sought by a means of telecommunication or presented

[92] For example, the eReport to a Justice process has been implemented in Ontario in 2018 to enable peace officers in some court regions to present their report on property seized by electronic means.

[93] See for example s. 462.32(4) in relation to proceeds of crime, *Criminal Code*, supra note 5.

[94] There are other noted distinctions between sections 489.1 and 487.1 related to the Report to Justice where a harmonized rule would be beneficial. These distinctions were not fully considered by the Working Group due to time constraints: 487.1(9) requires that a Report to Justice be filed in the territorial division where the search was *intended* for execution as soon as practicable but within a period not exceeding 7 days after the execution of the warrant. Section 489.1 requires that as soon as practicable, either the thing seized be brought before the justice or that a report on the thing seized be presented to the justice.

personally, the Information and the search warrant should be filed wherever the report is required to be filed and brought before a justice so that all relevant information can be accessible in one place.

b) Accessibility of Information Relevant to the Search

[140] Unlike other search warrant provisions, section 487.1 and the related Form 5.1 currently include transparency safeguards that allow persons directly affected by the search to know where to access documents relevant to the search. A peace officer executing a telewarrant is required to provide a copy of the warrant to any person present and in control of the place being searched (subsection 487.1(7)), or leave a copy of the warrant in the place if it is unoccupied (subsection 487.1(8)).

[141] The above requirements do not apply in relation to a search warrant obtained by personal appearance although section 29 of the *Criminal Code* requires that a peace officer executing a warrant must have it with them and produce it upon request, where feasible.

[142] In our view, however, the requirements provided in subsections 487.1(7) and (8) go further than the rule in section 29 and should apply to all search and seizure warrants, regardless of whether the warrant is obtained in person or by a means of telecommunications. A requirement to leave a copy of the warrant on the premises searched should not be any different depending on which method the warrant is obtained because the legal effect of the warrant is the same. This is consistent with the overarching view of the Working Group that the telewarrant process should be a means to obtain a warrant, rather than a distinct type of warrant.

[143] More importantly, unlike other search warrants, the Form 5.1 provides in a "notice to the occupant" of the place searched the address of the courthouse where the occupant can obtain a copy of the information and the report to justice, which must indicate where seized items are being held. Thus, wherever a report on property seized is filed, even if it is in a judicial district other than the local courthouse where the warrant was executed, requiring this relevant information be included on all search warrants to seize property would facilitate information accessibility for the subject of the search including indicating where to obtain relevant documents about the search.

[144] Ideally, a centralized filing system for search warrants and related documents in all jurisdictions would facilitate access to this information and could render the location of the filing of the report less significant, at least with respect to warrants executed within the same province.

[145] The Working Group is of the view that regardless of the location the report should be filed, transparency safeguards associated with a search and seizure warrant should be retained for the subject of the search and publicly available documents should be easily accessible to those with an interest in the matter. Such requirements should apply to all search warrants and property seized rather than being restricted to search warrants obtained remotely. Therefore, a requirement to provide a copy of the search warrant to the occupant and to leave a copy of the warrant on the premises where no occupants are found should apply to all search warrants of property seized. In addition, the notification requirement currently found in Form 5.1 should be maintained for all search warrants including information about obtaining a copy of the report to Justice and the information.

[146] Finally, subsection 487.1(9) provides that a report to justice submitted following the issuance of a telewarrant must contain specific statements: the date and time of execution, the reasons for not executing the warrant, a statement of the things seized under the warrant and additional things seized including the reasonable grounds to believe the additional things have been obtained by or used in the commission of an offence, and where they are being held. In our view, based on the same principle of accessibility to relevant search warrant information, such statements should also be required in relation to all other search and seizure warrants where a report to justice is applicable.

RECOMMENDATION 11
Taking into account the considerations provided in 3.2.8.1 and 3.2.8.2 of this Report, it would be desirable that the *Criminal Code* provide for a harmonized rule regarding the location where the report to justice must be presented whether the search warrant was sought in person or by technological means for execution within the province.

RECOMMENDATION 12
A requirement to provide a copy of the warrant to the occupant or to leave a copy of a warrant on the premises where no occupants are found should be provided in the *Criminal Code* in relation to all warrants of search or seizure.

RECOMMENDATION 13
The notice to the occupant requirements contained in the Form 5.1 (Search Warrant) should be required for all search and seizure warrants including the address of the courthouse where the occupant can obtain a copy of the information and a copy of the report to justice, which must indicate where seized items are held.

RECOMMENDATION 14
All reports to Justice on property seized should require the inclusion of the statements referred to in subsection 487.1(9) of the *Criminal Code* (i.e., whether the warrant was executed, the date and time of execution, the reasons for not executing, a statement of the things seized in executing the warrant,where things seized are being held, etc.) irrespective of whether the warrant application was submitted by telecommunications or presented in person.

RECOMMENDATION 15
The *Criminal Code* should provide that a copy of the Information to Obtain and the warrant for search and seizure be filed wherever the related report on property seized is filed.

4. Conclusion

[147]The Working Group examined several components of the *Criminal Code's* telewarrant scheme and made a number of recommendations to address the 2016 ULCC resolution with a view to making it more efficient including by permitting greater use of technology for all search warrants and other judicial orders in the *Criminal Code* and other related statutes.

[148] In sum, the Working Group envisages that the current section 487.1 would be replaced with a provision(s) that sets out a process by which any search warrant or other investigative order could be sought by a means of telecommunication. Such a scheme would retain some basic key rules including who may apply for a search warrant by a means of telecommunication, providing that judicial officers of all levels of court may issue such warrants and other investigative orders in accordance with the requirements contained in the warrant granting provision, and that a *record* be created for applications submitted orally.

[149] A key change of this new scheme would be to allow written applications for search warrants, judicial orders and authorizations to be submitted by technological means without requiring that the applicant show that it is impracticable to appear in person. However, to encourage applicants to submit such applications in writing, the scheme would propose some threshold for oral applications.

[150] The Working Group examined a number of issues related to post-search requirements associated with the telewarrant scheme but was not in a position to provide a specific recommendation in relation to the place where a report to justice on property seized should be presented and filed. Instead, the Report offers some considerations to inform further policy development and proposes that rules associated with the requirements to present and file a report on property seized should be harmonized for both the in-person and the electronic search warrant application processes; in particular with respect to the most relevant and sensible place to file and present the report to justice. The Working Group recommends that the current telewarrant rules that favour accessibility of the information related to search and seizure apply more generally to all search and seizure warrants irrespective of whether the warrant was obtained in-person or by technological means.

[151] It is hoped that the proposed measures contained in this Report may be considered in informing legislative policy development in this area and that they may contribute to improving the current warrant application process for all search warrants, investigative orders and wiretap authorizations.