



UNIFORM LAW CONFERENCE OF CANADA

CRIMINAL SECTION

**ENDORSEMENT OF SEARCH WARRANTS, ORDERS
AND AUTHORIZATIONS IN THE *CRIMINAL CODE* AND
THE *CONTROLLED DRUGS AND SUBSTANCES ACT***

FINAL REPORT OF THE WORKING GROUP

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INTRODUCTION

[1] At the 2014 meeting of the Criminal Section, the following resolution was carried:

That the Uniform Law Conference of Canada – Criminal Section establish a working group to develop options on how to address the endorsement of warrants, authorizations and orders; and that the working group report back to the Conference at the 2015 meeting.
(Carried: 26-0-0)¹

[2] A ULCC working group was established and started its work in the Fall of 2014. A status report of the work of the Working Group was presented at the 2015 Conference. The Working Group is composed of representatives from Alberta (Matthew Hinshaw), Manitoba (Michael Desautels), Ontario (Catherine Cooper), Office of the Director of Criminal and Penal Prosecutions – Quebec (Nicolas Abran), New Brunswick (Michel Bertrand, succeeded by Derek Weaver), the Public Prosecution Service of Canada (Laura Pitcairn), the Canadian Bar Association (Scott Bergman), and the federal Department of Justice (Stéphanie O'Connor and Normand Wong) and is chaired by Lucie Angers of the federal Department of Justice.

[3] The general concern which gave rise to this ULCC Working Group was a desire to make investigative tools available to law enforcement more easily enforceable across Canada with a view to enhancing the efficiency of the criminal justice system. The current endorsement provisions for out-of-province investigative warrants and authorizations raise a number of issues including uncertainty with respect to the nature of the endorsing judge's function, the appropriateness of reviewing the merits underlying the issuance of the warrant, and the endorsement process's impact on the administration of justice and the conduct of investigations in Canada.

[4] This report examines the legal and operational framework of the endorsement procedure for out-of-province investigative warrants and wiretap authorizations (hereinafter "warrants" unless otherwise specified) as it applies to Part VI (Invasion of Privacy) and Part XV (Special Procedures and Powers) of the *Criminal Code* and the *Controlled Drugs and Substances Act* (CDSA).² The report also examines the nature of the endorsement function for out-of-province warrants, current issues raised by endorsement as a method of giving effect to warrants outside the issuing jurisdiction, and options for reforming the endorsement process.

[5] It is important to mention at the outset that while the 2014 ULCC resolution included out-of-province endorsement of orders, there are currently no endorsement requirements

¹ It is noteworthy to mention that this issue was the subject of two previous ULCC Criminal Section resolutions which were carried. The first one was presented in 1984 and proposed to *make wiretap authorizations valid anywhere in Canada, subject to the consent of the host province's Attorney General before the authorization could be implemented in the executing jurisdiction*. This resolution was carried: 21-8-1. Another resolution (Can-PPSC2008-01) was presented in 2008 and provided as follows: *Make all warrants and warrant-like orders valid and enforceable throughout Canada without the need for endorsement by a local justice*. This resolution also carried: 21-2-7.

² Although they may raise similar issues, endorsement provisions for interprovincial execution of other types of warrants including proceeds of crime warrants and arrest warrants are not the subject of this Report.

for out-of-province orders in relation to investigations in the *Criminal Code*. The ULCC resolution that led to the creation of the Working Group was drafted at a time where there was uncertainty as to whether production orders in former sections 487.012 and 487.013 of the *Criminal Code* required endorsement in order to be valid anywhere in Canada. This issue was resolved with the coming-into-force of the *Protecting Canadians from Online Crime Act*, on March 10, 2015, which expressly provides at section 487.019 that the orders have effect throughout Canada.³ As a result, the Report generally focuses on endorsement of investigative warrants and authorizations. Annex A of this Report provides a list of all orders, authorizations and warrants that may be carried out or executed outside the jurisdiction of the issuing judge or justice that were reviewed by the Working Group for comparison.

ANALYSIS:

Legal Framework

[6] Warrants⁴ issued by a judge or justice of the peace (hereinafter “justice”) have effect within the issuing judge or justice’s territorial jurisdiction. A judge or justice may also issue a warrant for execution anywhere in Canada. Indeed, Parliament’s legislative competence over the criminal law and procedure allows it to confer extra-territorial jurisdiction on provincial courts if it does so explicitly.⁵ The *Criminal Code* generally provides two mechanisms for the valid execution of warrants and other processes outside the justice or judge’s territorial jurisdiction. Firstly, the *Criminal Code* can specifically provide that a warrant has Canada-wide effect upon issuance. For instance, pursuant to subsection 705(3) of the *Criminal Code*, a provincial court judge or a justice may issue a warrant for the arrest of a witness who has failed to appear in court after having been served with a subpoena. The section provides that once issued, the warrant may be executed anywhere in Canada.⁶

[7] Another way of giving effect to a warrant outside the province of issuance is by requiring a local justice or judge in the receiving jurisdiction to endorse the warrant (sometimes referred to as “backing”) before it may be executed. As will be discussed later in this report, some warrants always require endorsement while others require backing in limited circumstances.

[8] The following investigative warrants are subject to an endorsement requirement:

- Wiretap authorizations (sections 184.2, 184.3, 186 and 188 of the *Criminal Code*);
- Search warrant (section 487 of the *Criminal Code*);
- General warrant (section 487.01 of the *Criminal Code*);
- DNA evidence warrant (section 487.05 of the *Criminal Code*);

³ The other relevant investigative order is the assistance order. Section 487.02 of the *Criminal Code* allows an assistance order to be made in support of a wiretap authorization or any warrant where the assistance of a third party may reasonably be required to effect the warrant. This investigative order is ancillary to the warrant in that its purpose is to support an existing authorization or warrant. For example, an assistance order may compel a telephone company to provide assistance to the police to install and remove interception equipment. Where an assistance order is required to effect an out-of-province warrant, the practice appears to be that the assistance order may either be embedded as part of the warrant, which would be endorsed along with the warrant or, where it is created separately, is endorsed as part of the package along with the warrant.

⁴ In this paragraph, the term “warrant” is not restricted to investigative warrants.

⁵ Peter W Hogg, *Constitutional Law in Canada* (Scarborough: Thomson Carswell, 2007) at paras 13-18.

⁶ This method is also used in relation to the issuance of other types of processes. For instance, section 703.1 of the *Criminal Code* provides that a summons, which may be issued by a justice or judge, is effective throughout Canada.

- Bodily impression warrant (section 487.092 of the *Criminal Code*);
- Warrant for tracking device (section 492.1 of the *Criminal Code*);
- Warrant for transmission data recorder (section 492.2 of the *Criminal Code*); and
- Search warrant – *CDSA* (section 11).

[9] The above warrants encompass the search of physical things, sampling of bodily substances or bodily impressions or prints, special investigative techniques, electronic surveillance, and may involve entry onto a person's property or require the assistance of a third party to effect the warrant.

[10] Endorsement provisions that apply to the above warrants are reproduced in Annex B of this Report. One of the first endorsement provisions enacted in the *Criminal Code* applies to conventional search warrants, and reads as follows:

Endorsement of search warrant

487 (2) If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division *after it has been endorsed*, in Form 28, by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication.

Effect of endorsement

487(4) An endorsement that is made in accordance with subsection (2) is sufficient authority to the peace officers or public officers to whom the warrant was originally directed, and to all peace officers within the jurisdiction of the justice by whom it is endorsed, to execute the warrant and to deal with the things seized in accordance with section 489.1 or as otherwise provided by law.

[11] The endorsement of the conventional search warrant by the justice in the executing jurisdiction is effected by completing Form 28 of the *Criminal Code*.⁷ The form is then signed and dated. Form 28 provides as follows:

FORM 28

Endorsement of Warrant
(Sections 487 and 528)

Canada,

Province of
(*territorial division*).

Pursuant to application this day made to me, I hereby authorize the arrest of the accused (or defendant) (or execution of this warrant *in the case of a warrant issued pursuant to section 487*), within the said (*territorial division*).

Dated this day of A.D. , at A Justice of the Peace in and for

[12] The conventional search warrant (section 487), the bodily impression warrant, and the section 11 *CDSA* warrant always require endorsement to give them extra-provincial effect where the place to be searched as identified in the warrant is located in another province.^{8 9}

⁷ The other endorsement provisions do not require the use of a prescribed *Criminal Code* form.

⁸ See subsections 487(2) and (4), 487.092(3) of the *Criminal Code* and subsections 11(3) and (4) of the *CDSA* respectively.

⁹ Subsection 487(2) provides that the endorsement is required if the building, receptacle or place is located in another territorial division, which is defined in s. 2 to include (...) any *province*, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies.

[13] Section 188.1 of the *Criminal Code*,¹⁰ which provides for the out-of-province confirmation of Part VI wiretap authorizations, explicitly states that wiretap authorizations are enforceable across Canada unless they are reasonably expected to be executed in another province and the execution of the authorization would require entry into or upon the property of any person in the other jurisdiction or require the assistance of a third party pursuant to section 487.02 of the *Criminal Code*.

[14] Subsection 487.03(1) of the *Criminal Code*,¹¹ addresses the backing requirement for Part XV warrants, other than section 487 warrants and bodily impression warrants. It provides that warrants for tracking devices, warrants for transmission data recorders, DNA evidence warrants, and general warrants require endorsement in the following circumstances: if it may reasonably be expected that they be executed in the other province and that their execution would require entry into or on the property of a person or where assistance of a third party is required to execute a warrant pursuant to section 487.02.¹²

[15] Subsection 487.01(6) of the *Criminal Code*, makes the endorsement provision of the conventional search warrant applicable to general warrants. It would appear that in addition to being subject to the endorsement requirement in section 487.03, the general warrant also requires endorsement where the building, receptacle or place in relation to the warrant is located in another jurisdiction.¹³

[16] In sum, conventional search warrants, *CDSA* warrants, general warrants, and bodily impression warrants always require endorsement to be enforced in another jurisdiction. All other warrants listed at paragraph [8] of this report must be endorsed if they may reasonably be expected to be executed in another province and the execution would require property entry or an assistance order.

[17] Endorsement orders pursuant to subsection 487.03(1) and confirmation orders under section 188.1 must be sought by way of application to a judge or justice in the receiving jurisdiction. However, subsection 487(2) and section 11 of the *CDSA* are silent as to whether an application must be presented to the justice when seeking an endorsement. None of the relevant endorsement provisions indicate who may present the endorsement application nor do they address the scope of the review process to be carried out by the endorsing judge.

[18] In 2008, sections 487 and 487.03 were amended to allow endorsements to be made either on the original warrant or on a *copy* that has been transmitted by any means of

¹⁰ Section 188.1 of the *Criminal Code* was added in 1993 along with the provisions pertaining to the wiretap authorization, the general warrant, the assistance order, the tracking warrant and the warrant for dial number recorder, as part of Bill C-109, *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, 3rd Sess, 34th Parl, 1993 (assented to 23 June 1993) SC 1993, c 40.

¹¹ Section 487.03 was also first enacted by Bill C-109, *supra* note 10.

¹² Interestingly, when Bill C-109, *ibid*, was enacted, both sections 188.1 and 487.03 used the term “confirm”. Section 487.03 was later amended and the term “confirm” was replaced by the term “endorsed” in that section. The Working Group is of the view that these terms essentially have the same meaning.

¹³ It is not clear why Parliament felt there was a need to provide for both an endorsement requirement pursuant to section 487.03 and subsection 487.01(6) of the *Criminal Code*.

telecommunications.¹⁴ These amendments were intended to streamline the out-of-province warrant procedure, making more efficient use of time and resources of law enforcement agencies.¹⁵ Before 2008, the endorsement of warrants referred to in these two sections could only be made on the original warrant, which prolonged the time it took for the warrant to be sent to the other jurisdiction for the purpose of endorsement.

Operational Framework

[19] From an operational perspective, the process of backing a warrant appears to vary from province to province and from police force to police force so there is very little consistency of practice to draw upon. Most of the information retrieved by the Working Group on the role of the judiciary in the backing process comes from anecdotal conversations held with various judges and the representatives of various police forces, including through the Canadian Association of Chiefs of Police.

Backing of Search Warrants

[20] The Royal Canadian Mounted Police (RCMP) advised that typically, the process of backing a warrant is commenced by an RCMP member in the issuing province contacting an RCMP member in the endorsing province. Notably, the RCMP in Ontario has a specialized Central Intake Unit created just for this purpose given the volume of endorsement requests that come to Ontario.

[21] By way of example, if an Alberta-based RCMP member obtains a tracking warrant pursuant to section 492.1 of the *Criminal Code* and an assistance order in Alberta, related to a Bell Mobility mobile device in Alberta, as the law currently stands the warrant must be endorsed in Ontario. This is because the Bell Canada Corporate Security office, where the warrant will be sent and actioned, is located in Ontario. An RCMP member in the endorsing jurisdiction in Ontario is assigned to the matter. The member from the originating jurisdiction, in this case Alberta, will send the assigned officer a copy of the warrant and a short affidavit attesting to the fact that the original warrant was signed by a justice or a judge in the issuing province. The endorsing member then prepares a short affidavit attesting to the fact that the warrant was issued outside of Ontario and briefly explains why it is necessary for it to be endorsed in Ontario. A copy of the signed warrant and the originating investigator's affidavit are attached to the endorsing member's affidavit. The member in the endorsing province also prepares a draft endorsement and sealing order for the justice or judge's consideration. In the Greater Toronto Area, there is an extra step required when the original warrant was signed by a judge. In this case the endorsing member also obtains a letter from the Crown in the endorsing province due to a requirement by the Crown to review all materials being considered by a judge. In situations that involve police forces other than RCMP members, the above process will vary. In some situations, including where Quebec is the province of issuance or execution, translation for the purpose of endorsement would also likely be required. The Working Group also heard from

¹⁴ It is not clear why Parliament did not also make this change applicable to wiretap authorizations and section 11 *CDSA* warrants.

¹⁵ 2008, ch. 18, sections 11 and 12.

some police officers that the process of preparing a warrant for endorsement can take half-a-day to a full day.

[22] A visiting police officer generally has no status in another province so practically speaking an officer with the local police force in the endorsing jurisdiction must be engaged to assist. In some regions, visiting police officers will receive a police officer status designation provided under various police acts.¹⁶ The Working Group was not in a position to verify whether any protocols between law enforcement agencies for the endorsement process are used *per se* but the various police acts include a framework that provides for, among other things, the designation process, the duration of the designation, the nature of the function of the visiting police officer, the authority under which the powers may be exercised as well as a notice requirement to the local police force in the receiving jurisdiction before commencing a police operation or investigation. Visiting police officers are usually accompanied by local police forces for police operations in their jurisdiction. Some of the provincial police acts may also allow for agreements between police forces as required.¹⁷

Backing of Wiretap Authorizations

[23] The backing of wiretap authorizations is not much different in practice from the backing of search warrants, however, the application for endorsement under section 188.1 is made by the Crown designated agent rather than the peace officer. As a result, it is a lengthier process that requires the Crown to prepare documents such as the application, affidavit and endorsement followed by an appointment made with a superior court judge in that jurisdiction. Samples of an application for confirmation of an authorization pursuant to section 188.1 can be found at Annex C.

Nature of the Endorsement Function

[24] The *Criminal Code* does not clearly indicate whether the endorsement of an out-of-province warrant is a ministerial (administrative) or judicial act.¹⁸ However, the legal and practical aspects of this function would appear to clearly signal that endorsing a warrant issued in another jurisdiction is administrative in nature.

[25] In its 1984 report entitled *Recodifying Criminal Procedure* (Volume 1) the Law Reform Commission of Canada (LRCC) explained the purpose of the endorsement as it applies to conventional search warrants as follows:

¹⁶ A number of provincial statutes provide for a police officer status designation regime for visiting police officers. See for example: *Interprovincial Policing Act, 2009*, SO 2009, c 30, online: <https://www.ontario.ca/laws/statute/s09030>; *Cross-Border Policing Act*, SNB 2008, c C-35.5, online: <http://laws.gnb.ca/en/showdoc/c/C-35.5>; *The Police Act, 1990*, SS 1990-91, c P-15.01, online: <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/P15-01.pdf>. These statutes were enacted or amended following a ULCC uniform Act initiative on extraprovincial authority of provincially appointed police officers in Canada.

¹⁷ See for example: *Quebec Police Act*, CQLR c P-13.1, s 104.1, online: <http://legisquebec.gouv.qc.ca/en/pdf/cs/P-13.1.pdf>

¹⁸ A judicial act is one where the magistrate exercises a discretionary or judicial power; a ministerial act is one which he is obliged to perform as a matter of course: *Staverton v Ashburton* (1855), 4 E & B 526 OR.

*“Endorsement” is basically an administrative requirement; in practical terms, it is a signature that has the effect of indicating the approval of a judicial officer in the location of the intended search.*¹⁹

[26] The LRCC suggested maintaining the endorsement for out-of-province warrants but did not expand on the reason why it would recommend doing so except to state the following:

*“We have retained an extraprovincial endorsement requirement to ensure that justices are made aware of, and are given some say in, the execution of search warrants within their province. Subsection (2) elaborates and, in our view, improves upon subsection 487(2) of the present Code by clearly articulating a test for the justice to apply in determining whether to endorse the warrant”.*²⁰

[27] As indicated in the excerpt above, the LRCC proposed a test to be applied by the endorsing justice. The test was articulated in the following way:

*36(2) The justice may endorse the warrant if it was issued on application made in person and the justice is satisfied that the person, place or vehicle to be searched is in the province.*²¹

[28] The LRCC’s proposed amendment to subsection 487(2) is closely in line with an administrative function rather than a judicial one. It also very likely reflects the current day-to-day reality for the vast majority of endorsement of out-of-province warrants.

[29] The view that endorsement of out-of-province warrants is merely administrative in nature was expressed in the 1930 decision *Solloway Mills & Co v AG Alta*, in which the British Columbia Court of Appeal held that the backing of a search warrant was solely a ministerial act.²² In another case a “rubber-stamp” was literally used to endorse the out-of-province warrant under attack.²³

[30] Academics have also generally expressed the view that the act of endorsing an out-of-province warrant is administrative in nature.²⁴

¹⁹ Canada, Law Reform Commission of Canada, *Recodifying Criminal Procedure*, Police Powers, Title 1 (Law Reform Commission of Canada, 1984) vol 1 at 40.

²⁰ *Ibid.*

²¹ *Ibid* at 39.

²² (1930), 42 BCR 524, 53 CCC 306 (CA) [*Solloway Mills*]. Other cases that have held the endorsement function to be ministerial in nature include *R v Simard*, 2002 JQ No 1110, *R v Benz*, [1986] 51 CR (3d) 363, 26 CRR 319 (Ont CA), and *R v Smith* (2004) 256 Sask R 45, 64 WCB (2nd) 444 (in obiter).

²³ See *R v QMP Fisheries Ltd*, 2001 BCPC 210, [2001] B.C.J. No. 1832 at para 43 where the issue under consideration was that the endorsing justice of the peace used a stamp that read “Section 467” instead of “Section 487”.

²⁴ Scott C Hutchison, *Hutchison’s Search Warrant Manual* (Carswell, 2015) at 210-211. “It is not clear what function is performed by the “backing” judicial officer. There would appear to be no real judicial function, but rather a “ministerial” or administrative function in receiving and being aware of the execution of the warrant in question”; see also Hon Justice James A Fontana & David Keeshan, *The Law of Search & Seizure in Canada*, 9th ed (LexisNexis Canada, 2015) at 192-194. “Clearly, the issuance of search warrants is a judicial function. It is equally clear that the justice is performing a purely administrative task when “backing” a search warrant from another jurisdiction”; Robert W Hubbard et al, *Wiretapping and Other Electronic Surveillance: Law and Procedure*, vol 1 (Canada Law Book, 2000) at 3-85, 6-33 where the authors conclude that the review performed by the backing judge involves merely an administrative act on the part of the judge backing the order.

[31] Some members of the judiciary that were canvassed by Working Group members expressed the view that the endorsement procedure may have some utility in providing a degree of local oversight over entry onto property within the executing jurisdiction. This may be perceived as particularly true with wiretap applications where the police are often seeking to enter a house to install a recording device. In those situations, some endorsing judges may request that the affidavit supporting the endorsement application specify that the local police have checked the accuracy of the location to be entered. The affidavit also serves to confirm that there is an existing wiretap order issued from the original jurisdiction. Yet, even the above description of what the endorsement function may sometimes entail in practice appears to reflect a role for the endorsing judge that can be characterized as administrative in nature. Other judges did not share the view that the endorsement process provides an added value.

[32] Most peace officers canvassed by the Working Group were of the view that in practice the process of endorsement was merely a “rubber-stamp” and an extra step, which wastes officer and court time and causes delays. The fact that endorsing justices or judges rarely asked police officers any questions strengthened the police view that the endorsement process was merely administrative in nature. In some instances however, officers have reported that the endorsing justice or judge went so far as to review the grounds for the original warrant and rejected the application for endorsement because the justice or judge felt the original grounds were not sufficient. There is also some authority for the proposition that the endorsing judge has some latitude to go beyond a simple rubber-stamping exercise. In *R v Yahoo! Canada Co.*,²⁵ Maranger, J. notes that “*by implication the Court in exercising its discretion to confirm an authorization will by necessity scrutinize the original authorization in general terms*”. This statement could be seen as importing an additional element into the confirmation process beyond simply ensuring that the out-of-province warrant is valid on its face.²⁶

[33] Despite some views that the endorsement function could mean something more than verifying that the warrant is valid on its face and that the place to be searched is within the endorsing judge’s territorial jurisdiction, the Working Group believes that, unlike the issuing judge, the endorsing judge does not (and should not) engage in any sort of inquiry into the sufficiency of grounds advanced in support of the initial warrant application. This would amount to a judge reviewing the grounds that were determined to be sufficient by another judge in a separate proceeding, essentially, a collateral attack on the issuing judge’s order.²⁷ The amendment proposed by the LRCC to section 487 implicitly recognizes that an exercise that involves for instance the assessment of the sufficiency of grounds are functions reserved for the issuing judge. The receiving judge’s endorsing function is (or ought to be) limited to confirming such essential information required to verify that the out-of-province warrant is valid on its face.

[34] In summary, case law, academics and the general practice appear to strongly indicate that the judge who endorses an out-of-province warrant performs an administrative act. With that

²⁵ (2004) 191 CCC (3d) 122, [2004] O.J. No. 3910 (ONSC).

²⁶ For the purpose of this report, the expression “valid on its face” refers to obvious technical defects such as the omission of the issuing justice’s signature, the exact location of the intended search, or the list of offences to which the investigation pertains.

²⁷ *Wilson v The Queen*, [1983] 2 SCR 594 at 599, [1983] SCJ No. 88: “*It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.*”

characterization in mind, the Working Group explored whether out-of-province endorsement of warrants serves a real practical purpose or an important policy objective.

Issues raised by the current out-of-province endorsement of warrants

1) Resource implications for the criminal justice system

[35] As described under *Operational Framework* above, the endorsement requirement for out-of-province warrants adds steps to the process of obtaining and enforcing a warrant. Each step extends the time it takes to execute the warrant and entails the expenditure of police resources, as well as judicial resources for the actual endorsement appearance. As noted, in the case of Part VI authorizations, a local Crown wiretap agent may need to be involved as well. In some situations, time may be of the essence in executing the warrant and any delay can be problematic. The 2008 amendments to sections 487 and 487.03 of the *Criminal Code* allowing for an endorsement to be made on a copy of the warrant may have contributed to improving efficiencies in relation to out-of-province warrants;²⁸ however, the fact remains that seeking the endorsement for such warrants still involves judicial and police resources in two different jurisdictions.

2) Uncertainty regarding the application and scope of the review

[36] With respect to the application of endorsement provisions, in a series of cases, an issue arose as to whether the “confirmation” provision in subsection 188.1(2) was mandatory or permissive.²⁹ In *Rodney*,³⁰ the evidence was actually excluded under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* as a result of the Part VI wiretap authorization not having been confirmed, although the weight of authority is now against the view that the confirmation provision in subsection 188.1(2) is mandatory.³¹ In addition, some cases have considered the issue of whether the reference to “territorial division” in what is now subsection 487(2) requires endorsement when the warrant is to be executed in a different part of the same province within which it was issued. In *Ciment Indépendant Inc.*,³² the Quebec Court of Appeal held that “territorial division” meant a district within the province, notwithstanding that Quebec justices have jurisdiction throughout the province. The Court concluded that a section 487 search warrant issued in the city of Hull had to be endorsed to be executed in Montreal. However, the Ontario Court of Appeal took a different view in *R v Benz* and considered the words “territorial division” in the context of the provincial legislation that provides for justices to be appointed in and for the province. The Court determined that the search warrant issued in one county and executed in another did not require endorsement.³³ As illustrated by the above cases, there can be confusion or uncertainty about whether or not endorsement is required in a particular situation. That can result either in unnecessary, and

²⁸ *Supra* note 14.

²⁹ See, e.g., *R v Rodney*, 1998 ABPC 119, 233 AR 375, *R v Pham* (1997), 122 CCC (3d) 90, [1997] BCJ No 2944 (CA), leave to appeal to SCC refused, [1998] SCCA No 57; *R v Chang* (2003), 9 CR (6th) 304, 173 CCC (3d) 397 (Ont CA).

³⁰ *R v Rodney*, *ibid.*

³¹ *R v Chang*, *supra* note 29; *R v Doiron*, 2007 NBCA 41, 315 NBR (2d) 205, leave to appeal to SCC refused, [2007] SCCA No 413.

³² (1985), 47 CR (3d) 83, 21 CCC (3d) 429 (Que CA).

³³ *R v Benz*, *supra* note 22.

therefore wasteful, endorsement applications, or in after-the-fact litigation when endorsements are not obtained and the defence or third party argues that they should have been.

[37] With respect to the scope of the review by the endorsing judge, the Working Group understands, through anecdotal evidence, that in most instances the endorsement for out-of-province warrants is granted. However, the Working Group was informed of a few instances where the endorsing justice or judge looked beyond whether the out-of-province warrant was valid on its face and refused to endorse the order. For example, an Ontario justice refused to endorse five warrants from Quebec on the basis that the grounds were insufficient and that each page of the appendices had not been signed by the issuing justice. The endorsing justice also questioned the truthfulness of the allegations and the officer's good faith. In another case, an Ontario judge refused to endorse three general warrants from Quebec on the basis that the warrants were vague as to the subject matter of the searches and that they had no conditions attached to them. Additionally, the endorsing justice determined that the warrants lacked proof that the issuing judicial officer was in fact a judge (and not a justice of the peace) as is required under the section 487.01 general warrant power. There is no appeal from a refusal to endorse a warrant. Presumably a prerogative remedy could be obtained if the refusal entailed jurisdictional error. The above case illustrates that the scope of the review exercise that is performed by the endorsing justice or judge is not applied in a consistent manner and can impact on investigations.

3) *Does the endorsement process serve a compelling purpose?*

[38] Given the resource implications and uncertainties associated with the endorsement process, the Working Group asked whether those challenges are offset by any compelling purpose. The Working Group considered four rationales that are most frequently proffered for the endorsement process:

a) *Whether endorsement serves to protect privacy and property rights*

[39] Some have argued that the logic supporting a backing regime in the *Criminal Code* for investigative warrants is that there should be "local oversight" when law enforcement personnel intend to enter onto private property or require assistance to enter onto the property to give effect to a warrant issued in another jurisdiction. Proponents suggest that the local endorsement provides a check and balance on the citizen's privacy and property rights in that jurisdiction and that persons who are the subject of such warrants see some recognizable, local jurat and thus a court of remedy should the party wish to challenge the endorsement order. That position appears to be supported by the fact that the *Criminal Code* obligation for endorsement is generally tied to the fact that entry onto private property or assistance of a third party will be required.³⁴ Indeed, one could reasonably rely on the wording of section 188.1 and section 487.03 to conclude that a person's privacy and property interests were the main purpose for including an endorsement requirement to execute certain out-of-province warrants. Under this argument, there is a need to ensure that endorsing judges and justices have an opportunity to review the warrant issued by the judge or justice in the other jurisdiction with a view to protecting a resident's privacy and property interests.

³⁴ The Debates surrounding Bill C-109, *supra* note 9, which enacted both section 188.1 and section 487.03 did not provide helpful information to explain how the endorsement process could serve to protect a person's interests.

[40] However, on closer examination, it is difficult to see how endorsement adds any value in this regard. If it is accepted that the endorsement process is administrative in nature, then there should be no consideration by the endorsing justice of the grounds that formed the basis for granting the warrant. There is no requirement pursuant to sections 188.1 and 487.03 to include, as part of the application for endorsement, the Information to Obtain (or application as the case may be), which would be needed to properly review the basis upon which the warrant was initially issued.

[41] One could also argue that local oversight of entry onto property by the endorsing judge is effected to a certain degree by requiring that an affidavit be presented by the police in the executing jurisdiction indicating that police have verified that the location to be searched is accurate and does exist, and have confirmed the existence of a valid out-of-province warrant. Aside from this limited role, however, it is not at all apparent how the endorsement process protects the interests of affected persons. If this additional measure is considered a necessary step in the process of executing out-of-province search warrants, should this requirement not also be an important consideration when the location to be searched is within the jurisdiction of the issuing justice or judge?

[42] In addition, in relation to possible avenues of recourse, case law review reveals that the endorsement order is rarely challenged in the executing jurisdiction and, in any event, could only be challenged on the basis that the requirement for endorsing the warrant was not met. To bring an application on the basis that the person's property or privacy rights were violated would require challenging the search in the issuing jurisdiction. It is therefore not clear that the endorsement contributes to protecting privacy and property rights.

b) Whether endorsement serves to assist in ensuring that local processes are properly followed

[43] Some have also argued that the endorsement process may serve to ensure local protocols are complied with (e.g., search of law firms) as local practices and protocols pertaining to the execution of warrants can differ from jurisdiction to jurisdiction. One important consideration in the execution of an out-of-province warrant is that local law enforcement in the receiving jurisdiction will be informed that an outside law enforcement is seeking to have a warrant executed in their jurisdiction. As previously noted, a visiting police officer is not authorized to enforce the out-of-province warrant on their own. The officer seeking the warrant in the issuing jurisdiction would require a police officer designation from the executing jurisdiction in order to participate in an operation. The law enforcement agency in the receiving jurisdiction responsible for enforcing the out-of-province warrant would be knowledgeable of local protocols when executing the warrant (either on their own or together with visiting police officers). For the above reasons, it is not apparent that the endorsing function serves to ensure that there is compliance with local protocols.

c) Whether endorsement ensures easier enforcement against a reluctant third party

[44] In *R v Chang*, where subsection 188.1(2) was at issue, the trial judge opined:

*“...this provision does not reflect a concern by Parliament as to the jurisdiction of a judge in one province to affect the rights of third parties in another province, as argued by counsel for the accused. Rather, it is a mechanism to ensure easier enforcement of the extra-provincial order against a reluctant third party in that other province whose cooperation is sought either because his or her active assistance is required or because execution of the authorization will entail trespass on his or her property.”*³⁵

[45] The Working Group acknowledges that the existence of a warrant that is endorsed by a justice of the province of execution, rather than the issuance of a warrant by an out-of-province justice, theoretically might assist the executing police officers in persuading a reluctant third party to cooperate with the execution of the out-of-province warrant. Of note, when section 487.02 was enacted, the underlying purpose of the assistance order was to ensure that a wiretap authorization could be executed effectively by compelling third parties to assist police officers.³⁶ If the *Criminal Code* were amended to give judges and justices authority to issue warrants that can be executed in any jurisdiction across Canada, there are likely other means by which one could inform reluctant third parties who are subject to an out-of-province assistance order of their obligation to carry out the order. For instance, a statement in the warrant and assistance order could specify that they are enforceable across Canada, referencing the relevant *Criminal Code* sections, thereby clearly informing third parties that the order is valid in their province. In reality, it does not appear that the process of endorsing the warrant plays an important role in facilitating the cooperation of third parties where assistance is required.

d) Whether endorsement allows for better accessibility to the warrant in the executing jurisdiction

[46] Some have indicated that the fact that the warrant is endorsed in the other jurisdiction provides easier access to a copy of the warrant to those who have an interest in knowing that a warrant has been executed in the other jurisdiction. For instance, in the context of a section 487 warrant, persons who wish to obtain a copy of the warrant, including the target of the search, may contemplate challenging the validity of the warrant or obtaining information in order to retrieve property that was seized during the search. There is no requirement in the *Criminal Code* for the endorsed warrant to be filed in the executing jurisdiction. The Working Group was not in a position to confirm what is actually filed in the receiving jurisdiction when a warrant is endorsed. However, even if a copy of the endorsed warrant is filed at the courthouse, it would still seem more likely that a person who has an interest in knowing whether a warrant has been executed would inquire about the warrant by contacting the local police force where the search was conducted. As well, in the specific case of section 487 warrants, the usual practice is for the police officer to provide a copy of the warrant to the occupant of the place searched or to leave a copy of the warrant on the premises upon execution.

[47] In addition, if the purpose is to access the endorsed warrant to challenge the validity of the search, the information on the endorsed warrant may be insufficient for that purpose depending

³⁵ [1998] OJ No 1789, 38 WCB (2d) 234 (Gen Div) at 45.

³⁶ Section 487.02 was later amended to allow for assistance orders to be ordered to facilitate both authorizations and warrants.

on whether the challenge is with respect to the warrant or with respect to the supporting information. Therefore, a person challenging the search may still be required to seek the information from the issuing jurisdiction, whether or not they were able to obtain a copy of the endorsed warrant from the courthouse. Moreover, if the endorsement process addressed the policy objective of providing easier access to out-of-province warrants, one could argue that the objective is not completely met as a person would not have access to out-of-province warrants in the executing jurisdiction where the *Criminal Code* does not require endorsement.

[48] For the above reasons, it is unlikely that the endorsement process for investigative warrants serves to ensure better access to out-of-province warrants in the executing jurisdiction, particularly in light of the fact that not all out-of-province warrants require endorsement in all circumstances.

OPTIONS FOR REFORM

[49] In light of the above considerations regarding the endorsement process, four options have been explored to improve the execution of out-of-province warrants in the *Criminal Code* and the *CDSA* listed in paragraph [8] of this Report:

- A) Remove the endorsement requirements in the *Criminal Code* and the *CDSA* for warrants and provide that warrants issued by a justice or judge have effect anywhere in Canada;
- B) Remove the endorsement requirements in the *Criminal Code* and the *CDSA* for warrants and provide that only warrants issued by a superior court judge would have effect anywhere in Canada;
- C) Proceed with Option A or B and require that a notice be filed with the court in the jurisdiction of execution; and
- D) Maintain the status quo but clarify the process for endorsement.

A) Remove the endorsement requirements in the *Criminal Code* and the *CDSA* for warrants and provide that warrants issued by a justice or judge have effect anywhere in Canada

[50] Under this option, the requirement for endorsement of warrants before they can be executed in a jurisdiction other than the one in which they were issued would be removed. The *Criminal Code* would, instead, explicitly provide that judges and justices may issue warrants under Parts VI (Invasion of Privacy) and XV (Special Powers) of the *Criminal Code*, and under section 11 of the *CDSA* that are enforceable across Canada.

[51] As discussed earlier in this report, requiring the endorsement of an out-of-province warrant by a judicial officer in the executing jurisdiction is one mechanism by which Parliament can make a warrant valid for execution in another province. The *Criminal Code* currently provides that some warrants can be executed in another province without endorsement if the execution of

the warrant does not require entry onto a person's property or require an assistance order. Therefore, the *Criminal Code* already provides that some warrants do not require endorsement in all situations. However, from our review of warrants that may be enforced extraprovincially, the *Criminal Code* does not appear to provide a clear policy divide between those out-of-province warrants that require endorsement and those that are effective across Canada without the need for endorsement.

[52] Having considered the relevant issues surrounding the endorsement of warrants and our conclusion that the endorsement function is administrative in nature, it does not appear that the endorsement requirement adds any value to the process of out-of-province execution of warrants. In particular, it is not clear that the endorsement plays any meaningful role in ensuring that local processes are properly followed, ensures easier enforcement against a reluctant third party, or ensures better accessibility to the warrant in the jurisdiction of execution. Furthermore, while some warrants call for endorsement where the execution would require entry into or upon the property of the person or the assistance of a third party, the nature of the out-of-province endorsement function does not, in reality, protect a person's privacy and property interests at that stage of the process. Rather, protection of the person's interests is considered by the issuing justice or judge when determining whether the warrant should issue based on the sufficiency of grounds presented by the informant. The procedure to have the issuance of the warrant reviewed should proceed before a court in the issuing jurisdiction with oversight over the judge who granted the warrant.

[53] All investigative warrants issued by courts in Canada should be given full effect and authorize peace officers who have jurisdiction in the place where the warrant is to be executed to enforce the warrant. This would include any peace officer with authority to execute a warrant in that other jurisdiction and visiting police officers who have received a police officer status designation pursuant to various police acts in order to execute the warrant.

[54] Removing the endorsement requirement for warrants would contribute to streamlining investigative procedures by saving valuable time as well as police and judicial resources.

B) Remove the endorsement requirements in the Criminal Code and the CDSA for warrants and provide that only warrants issued by a superior court judge would have effect anywhere in Canada

[55] This option is similar to that outlined in Option A, in that backing requirement provisions for out-of-province warrants listed in Annex B would be removed from the *Criminal Code* and from section 11 of the *CDSA*. The *Criminal Code* would provide instead that warrants could be issued in one province for execution in another. However, under Option B, this extension of jurisdiction would only apply to warrants issued by judges of the superior court.³⁷ Therefore, when a peace officer would seek to obtain one of these investigative tools, he or she could have it issued by a justice or a provincial court judge, as the case may be, if the search was to be executed in his or her jurisdiction. On the other hand, if the warrant would reasonably be expected to be executed in another province, the officer would apply to have it issued by a

³⁷ With this Option, the definition of the term "judge" as found in section 552 of the *Criminal Code* would be used to include judges of the Court of Québec in the province of Québec.

superior court judge. Note however, that Option B would now require all out-of-province warrants to be issued by a superior court judge including those out-of-province warrants that may currently be issued by a justice or judge without the need for endorsement (i.e., where entry onto a person's property or an assistance order is not required). Option B would mean that only superior court judges would be able to issue the warrant if it is to be executed extraprovincially.

[56] There are already precedents within the *Criminal Code* wherein superior court judges issue warrants that are in force nationally, most notably among them wiretap authorizations under Part VI of the *Criminal Code*. This option represents in many ways what is currently occurring since superior court judges regularly issue extra-jurisdictional warrants. Option B could be seen as a compromise between Option A, which is an unrestricted approach to all judicial officers across all provinces being able to issue warrants with extraprovincial effect, and Option D (status quo), essentially the current scheme of a slow and largely ineffectual system of local endorsement.

[57] As it stands presently, in some jurisdictions, large scale police projects with multiple warrants being executed extra-jurisdictionally are almost exclusively issued by superior court judges. In addition, since the coming-into-force of the *Protecting Canadians from Online Crime Act* in March 2015, the *Criminal Code* now enables superior court judges who give wiretap authorizations to also issue other warrants whether or not they are related to large scale, extra-jurisdictional investigations.

[58] Option B could contribute to addressing concerns about the differing levels of qualification and training for warrant-issuing justices from province to province. It is not the case that all justices are lawyers. For instance, in Manitoba, it is the exception, not the rule. In Ontario, there is no requirement for justices to be trained in law. Yet, in some provinces only justices with legal training can issue search warrants and in New Brunswick, there are no justices. However, it is important to keep in mind that justices are already issuing warrants for execution in another province. Some of these warrants require backing while others may be executable without endorsement (i.e., where entry onto a person's property or an assistance order is not required). As the endorsement function is administrative in nature, the endorsing justice has no authority to review grounds presented in the underlying Information to Obtain, let alone consider regional disparity. One could argue that regional disparity already exists and the endorsement function, where it applies, does not address it. Nonetheless, in order to ensure a more consistent application and interpretation of the law for the issuance of out-of-province warrants, there may be some wisdom in suggesting that only superior court judges should issue warrants that can be executed across the country.

[59] With option B, superior courts in some jurisdictions, such as in Manitoba, may perhaps not experience increased workload because of their current practices and the presumably small number of cases involving the issuance of out-of-province warrants. For instance, currently in Manitoba, law enforcement seeking extra-jurisdictional warrants tend to plan them well in advance of execution and a time to have the warrant reviewed and authorized could be scheduled with the superior court. However, if all extraprovincial warrants would now be issued by superior court judges, including those warrants that do not currently require endorsement to be executed in another province and those currently issued by a justice or provincial court judge,

then, it can be anticipated that this Option could add to the current workload of a number of superior courts.

[60] In addition to increasing the current workload of superior court judges during regular hours, Option B would likely make it more difficult, in a number of jurisdictions, to access superior court judges who would now be the only judicial officers with jurisdiction to issue extra-provincial warrants. The telewarrant provision³⁸ of the *Criminal Code* has facilitated better access to justices and is a particularly useful tool in jurisdictions with large rural and isolated communities. Provincial courts generally have an infrastructure in place for law enforcement to access judicial officers for the purpose of seeking warrants (i.e., availability of a judicial officer including support staff, telecommunications, duty rotations and cell phone contact numbers that make a system of access operational). However, such an infrastructure to access superior court judges is not necessarily in place. In particular, accessing superior court judges during off-hours in some provinces, such as in Manitoba, would be very exceptional and may, for instance, require special arrangements such as a call from the Crown's office or through the duty magistrate's office within the provincial court. Therefore, if Option B is pursued, there may be an additional practical concern in some jurisdictions with the lack of infrastructure to facilitate access to out-of-province warrants issued by superior court judges, particularly during off hours in urgent situations.

[61] This option would perhaps provide greater consistency by having one level of judicial officer issuing out-of-province warrants across the country, in contrast to the current situation where justices, provincial court judges or superior court judges are authorized to issue extraprovincial warrants. However, depending on the location, the lack of infrastructure of superior courts for this type of function and the anticipated added workload could contribute to reducing access to superior court judges when seeking such warrants, and could impact on efficiencies in the criminal justice system.

C) Proceed with Option A or B and require that a notice be filed with the court in the jurisdiction of execution

[62] Under this option, extra-provincial warrants would no longer need to be endorsed in the province where they are executed. Instead, Option C would combine either Option A or Option B with a separate requirement to file a notice with the court in the jurisdiction where the warrant is intended to be executed³⁹. With this Option, the filing of a notice would be required in all cases where an out-of-province warrant would be executed regardless of whether the warrant currently requires endorsement or not.

[63] A filing requirement could be considered an administrative complement to the execution of a warrant in another province. This is not to suggest that an administrative filing requirement

³⁸ Section 487.1 of the *Criminal Code* allows a peace officer to make an application for a warrant by means of a telecommunication if it is impracticable to apply for the warrant in person. The telewarrant regime is applicable to some warrants including section 487 (conventional search warrants), section 487.1 (general warrants) section 256 (breath sample warrants), Part VI authorizations and section 11 *CDSA* warrants.

³⁹ An alternative to the filing of the notice could be to file a copy of the warrant itself. There is a similar requirement to file a copy of the warrant in the jurisdiction where the warrant is to be executed in the telewarrant scheme under section 487.1 of the *Criminal Code*. The Working Group did not have the opportunity to explore this alternative.

would serve to make the warrant valid in the other jurisdiction. Indeed, the only purpose of filing such a notice would be to constructively inform the person subject to the warrant, the court or the public that a warrant will be, or has been, executed in that province. The purpose of providing notice would be in line with cases such as *R. v. Smith*,⁴⁰ in which Zarzeczny J stated in obiter that the object of an endorsement may be “*to clearly inform a recipient that its provisions, being initially authorized in another province, was authorized for execution in [the second province] ...*”, or *Ciment Indépendant Inc.*, where the Quebec Court of Appeal made the following assumption regarding the rationale behind endorsement requirements:

“This is the fact that search warrants frequently must be executed in districts other than the district of issue. Where that occurs, they must be endorsed by a justice in that district, and this, I presume, for the good reason that someone in the district should know of what occurs in his bailiwick”.⁴¹

[64] A requirement to file a notice should be simple and not place a heavier burden on police officers. Under this option, the court who issued the warrant could cause the notice to be filed with the clerk of the court in the receiving jurisdiction, or the notice could be filed either by the police officer who sought the out-of-province warrant or an officer who is authorized to execute the warrant in the executing jurisdiction. To the extent the existence of the warrant can be disclosed, the notice could, for instance, set out the provision under which the warrant was issued, the name of the judicial officer who issued it and the location to be searched.

[65] In exploring whether Option C would be useful or desirable, the Working Group queried whether those intended to be put on notice would indeed benefit from the filing of the notice. The fact that a notice would be filed in the local courthouse does not necessarily ensure that a judicial officer in the district of execution would actually become aware of the existence of an out-of-province warrant. Even if a judicial officer was in fact put on notice that a warrant will be executed in their jurisdiction, one may ask what purpose this notice could serve. There would be no authority for the justice or judge to review the warrant or to inquire further nor would there be any practical purpose for such an inquiry. To the extent that the existence of the warrant can be disclosed, a notice filed in a local courthouse could perhaps be considered useful to the target of the search, assuming the target knows of the requirement that a notice must be filed in the local courthouse. While the notice would provide some information to the target, it would provide less information than the warrant or the Information to Obtain.

[66] Furthermore, the Working Group was not persuaded that the requirement to file a notice would serve any purpose in informing law enforcement in the executing jurisdiction of the existence of the warrant. There would be no need for the local police force to access the notice as they would necessarily have received a copy of the warrant from the requesting law enforcement.

⁴⁰ *R v. Smith*, *supra* note 22 at para 34.

⁴¹ *Ciment Indépendant*, *supra* note 32. Note however, that the Ontario Court of Appeal in *Benz*, *supra* note 22, dismissed that argument as not being a relevant consideration. Citing the ministerial nature of the endorsement process, MacKinnon A.C.J.O. stated: “*To assume that one of a hundred justices of the peace in Toronto, in performing the purely ministerial act of backing a search warrant, an act in which there does not appear to be any discretion, thereupon becomes “aware of what is going on in his bailiwick” lacks an air of reality*”.

[67] Replacing the current endorsement requirement with a new requirement to file a notice when a warrant is to be executed extraprovincially may perhaps be easier to administer and contribute to lessening the burden on police and judicial resources. However, the most obvious weakness with Option C is the fact that from a policy perspective, such a requirement does not appear to serve a meaningful and practical purpose.

D) Maintain the status quo but clarify the process for endorsement

[68] Under this Option, endorsement requirements regarding the execution of an out-of-province warrant would remain, though the Working Group would propose that they be clarified to indicate that the function of the local justice is administrative in nature. The function should be clarified to specify that its purpose is to verify that the warrant is valid on its face.⁴² With this Option, the endorsement provision could also indicate what should be provided to the judicial officer when endorsing the warrant. In addition, unless there is a sound policy reason for distinguishing between the different types of warrants, endorsement requirements should apply consistently for all investigative warrants and wiretap authorizations. If endorsement requirements were retained, to the extent that there is inconsistency in the wording of the various endorsement provisions, amendments should be made to endorsement provisions including considering whether the term “endorse”⁴³ could be used for all endorsement requirements.

RECOMMENDATION

[69] The Working Group is of the view that out-of-province investigative warrants and wiretap authorizations can be more effectively executed by making warrants enforceable across Canada without the need for endorsement. Therefore, the Working Group recommends pursuing Option A, which proposes to remove the endorsement requirements in the *Criminal Code* and the *CDSA* for investigative warrants and wiretap authorizations and to provide that all warrants issued by a justice or judge have effect anywhere in Canada. Option A was felt to be the best option as the Working Group’s view is that the endorsement function does not, and should not, allow endorsing justices or judges to go beyond verifying that the warrant is valid on its face. Only a reviewing court in the issuing province has jurisdiction to review the decision of the justice who issued the warrant. The more limited task performed by the endorsing justice does not, in the view of the Working Group, add any real value to the process. This is a task that can be validated by law enforcement without resort to a judicial endorsement process. Furthermore, the criteria (i.e., reasonably expected to require entry onto a person’s property or requiring an assistance order) that must be met in order to proceed with the endorsement do not, in the Working Group’s view, contribute to protecting a person’s privacy or property interests.

[70] The Working Group’s main concern with Option B is that the anticipated added workload and challenges in accessing superior court judges to issue all out-of-province warrants could actually increase inefficiencies in the criminal justice system.

⁴² A test could be set out such as the one proposed by the LRCC in its Report # 33 (Volume 1), *Recodifying Criminal Procedure*, *supra* note 21.

⁴³ *Supra* note 12.

[71] While Option C, either combined with Option A or B may be fairly easy to administer, the Working Group was not convinced that this Option would serve any real purpose to any intended recipient. For the reasons set out in Option A, the Working Group does not propose to pursue Option D. Even with suggested clarifications, maintaining a judicial endorsement process for the execution of out-of-province warrants is the least attractive and efficient option.

[72] Option A would represent a tangible efficiency-based measure with practical advantages that outweigh any perceived concern related to the removal of endorsement requirements for out-of-province investigative warrants.

Comparative Table – Execution of Out-of-Province Warrants, Authorizations and Other Orders Pursuant to the *Criminal Code* and the *CDSA*

<i>Subject of Court Power</i>		<i>Is Endorsement Required?</i>		<i>Section</i>
<i>Order Compelling Civilian</i>	<i>Order Granting Authority to Police Officer</i>	<i>May be executed anywhere in Canada without endorsement</i>	<i>May be executed anywhere in Canada with endorsement</i>	
X		X 83.28(6)		83.28 - Evidence Gathering order – terrorism PCJ/SCJ
	X	X 83.29(2)		83.29 - Arrest warrant - Investigative hearing - terrorism PCJ/SCJ
	X	X May be carried out anywhere in Canada in circumstances other than ones mentioned in s. 188.1(2)	X Requires endorsement by SCJ if entering <u>onto the property of a person</u> in that other province or requires the assistance of a person in that province under section 487.02 188.1(2)	184.2, 184.3 - Wiretap PCJ/SCJ/552 186 and 188 - Wiretap SCJ/552
	X		X Requires confirmation by SCJ/552 <u>if entering onto the property of a person</u> in that other province 462.32(2.2) Requires endorsement: 487(2) and (4) apply, with such modifications as the circumstances require 462.32 (3)	462.32 - Search warrant respecting proceeds of crime property, which is subject to forfeiture SCJ/552

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X		X May be executed anywhere in Canada If not requiring entry onto property of a person 462.33(3.01), 462.2 (2.1)	X Requires confirmation by SCJ/552 if <u>entering onto the property of a person</u> in that other province 462.33(3.01), 462.32(2.2)	462.33 - Restraint order for proceeds of crime property SCJ/552
X		X Order may be executed anywhere in Canada 462.371(2)	X AG in province where property is situated files order with superior court 462.371(3)	462.37 - Forfeiture of proceeds of crime property upon conviction SCJ/PCJ (sentencing court)
X		X An order may be executed anywhere in Canada 462.371(1)(2)	Filing with court 462.371(3)	462.38 – Order of forfeiture SCJ
	X		X Requires endorsement by JP if the building, receptacle or place is in another territorial division 487(2)	487 - Search warrant JP/PCJ
	X		X Requires endorsement: 487(2) and (4) apply, with such modifications as the circumstances require 487.01(6) Requires endorsement by JP/SCJ, as the case may be, if <u>entering onto the property</u> of a person in that other province or <u>requires the assistance of a person in that province</u> under section 487.02 (487.03)	487.01 - General warrant PCJ/SCJ/552

X		X The order has effect throughout Canada (487.019)		487.013 - Preservation order JP/PCJ/SCJ/Ct of QC
X		X The order has effect throughout Canada (487.019)		487.014 - 487.018 - Production orders JP/PCJ/SCJ/Ct of QC
	X		X Requires endorsement by JP/SCJ, as the case may be, if <u>entering onto the property</u> of a person in that other province or <u>requires the assistance of a person in that province</u> under section 487.02 (487.03)	487.05 - DNA warrant – investigative PCJ
	X	X The warrant may be executed anywhere in Canada (487.0551(2))		487.0551 - Arrest warrant - samples of bodily substances PCJ
	X		X Requires endorsement: 487(2) and (4) apply, with such modifications as the circumstances require (487.092(3))	487.092 - Impression warrant
X				490.8 - Restraint order for offence-related property SCJ
	X		X Requires endorsement by JP/SCJ, as the case may be, if <u>entering onto the property</u> of a person in that other province or <u>requires the assistance of a person in that</u>	492.1 – Warrant for tracking device JP/PCJ/SCJ/Ct of QC

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			province under section 487.02 (487.03)	
	X		X Requires endorsement by JP/SCJ, as the case may be, if <u>entering onto the property</u> of a person in that other province or <u>requires the assistance of a person in that province</u> under section 487.02 (487.03)	492.2 – Warrant for transmission data recorder JP/PCJ/SCJ/Ct of QC
	X	X A warrant may be executed anywhere in Canada (520(6))		520(5) - Arrest warrant following non-attendance at bail review hearing SCJ
	X	X A warrant issued under 521(5) or (6) may be executed anywhere in Canada (521(7))		521 - Arrest warrant following non-attendance at bail review hearing SCJ
	X	X Warrant may be executed anywhere in Canada if issued by SCJ, CA (703(1))	X Must be endorsed if issued by JP or PCJ (528, 703)	529.1 - Warrant to enter dwelling and arrest or apprehend where existing arrest warrant is in force in Canada SCJ/PCJ/JP
	X	X Warrant may be executed anywhere in Canada (597(2))		597 - Bench warrant SCJ
X		X May be executed anywhere in Canada (683(4))		683 - Process issued CA
X		X		Power to issue summons pursuant

		May be served anywhere in Canada (703.1)		to the <i>Criminal Code</i> – e.g. Part XVI, section 320, 462.32, 482.1, 485, 487.055 etc.
X		X If issued by SCJ, CA or PCJ Effective anywhere in Canada (702(1))	X	699 - Power to issue subpoena* SCJ/PCJ/JP
	X		X Requires endorsement by JP unless in fresh pursuit (528, 703, 514)	704 - Arrest warrant for absconding person JP
	X	X Warrant issued by JP or PCJ may be executed anywhere in Canada (705(3)) Warrant issued by SCJ, CA may be executed anywhere in Canada (703(2))		705 - Arrest warrant of witness following issuance of subpoena/bound by recognizance Ct/JP/PCJ/SCJ
	X		X Requires endorsement if executed in another province (11(3) CDSA)	section 11 - <i>CDSA</i> Search warrant JP

* If issued by JP: effective anywhere in the province (section 702(2))

PCJ: Provincial court judge

SCJ: Superior court judge

JP: Justice of the Peace

552 judge: A judge as defined in section 552 of the *Criminal Code*

Ct of QC: judge of the Court of Quebec

Ct: Court

Endorsement Provisions for Investigative Warrants and Wiretap Authorizations Pursuant to the *Criminal Code* and the *CDSA*

188.1 CC	487(2) CC*	487.03 CC	11 CDSA
<p>Execution of authorizations 188.1 (1) Subject to subsection (2), the interception of a private communication authorized pursuant to section 184.2, 184.3, 186 or 188 may be carried out anywhere in Canada.</p> <p>Execution in another province (2) Where an authorization is given under section 184.2, 184.3, 186 or 188 in one province but it may reasonably be expected that it is to be executed in another province and the execution of the authorization would require entry into or upon the property of any person in the other province or would require that an order under section 487.02 be made with respect to any person in that other province, a judge in the other province may, on application, confirm the authorization and when the authorization is so confirmed, <i>it shall have full force and effect in that other province as though it had originally been given in that other province.</i></p>	<p>Endorsement of search warrant 487.(2) If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division after it has been endorsed, in Form 28, by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication.</p> <p>Effect of endorsement 487 (4) An endorsement that is made in accordance with subsection (2) is sufficient authority to the peace officers or public officers to whom the warrant was originally directed, and to all peace officers within the jurisdiction of the justice by whom it is endorsed, to execute the warrant and to deal with the things seized in accordance with section 489.1 or as otherwise provided by law.</p>	<p>Execution in another province 487.03 (1) If a warrant is issued under section 487.01, 487.05 or 492.1 or subsection 492.2(1) in one province, a judge or justice, as the case may be, in another province may, on application, endorse the warrant if it may reasonably be expected that it is to be executed in the other province and that its execution would require entry into or on the property of any person, or would require that an order be made under section 487.02 with respect to any person, in that province.</p> <p>Endorsement 487.03 (1.1) The endorsement may be made on the original of the warrant or on a copy of the warrant that is transmitted by any means of telecommunication and, once endorsed, the warrant has the same force in the other province as though it had originally been issued there.</p>	<p>Execution in another province 11(3) A justice may, where a place referred to in subsection (1) is in a province other than that in which the justice has jurisdiction, issue the warrant referred to in that subsection and the warrant may be executed in the other province after it has been endorsed by a justice having jurisdiction in that other province.</p> <p>Effect of endorsement 11 (4) An endorsement that is made on a warrant as provided for in subsection (3) is sufficient authority to any peace officer to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to deal with the things seized in accordance with the law.</p>

* Subsections 487.01(6) and 487.092(3) both provide that “*Subsections 487(2) and (4) apply, with such modifications as the circumstances require, to a warrant issued under subsection(1)*”.

**SUPERIOR COURT OF JUSTICE
(Toronto Region)**

IN THE MATTER OF an application for an Order pursuant to section 188.1(2) of the *Criminal Code* to confirm an authorization issued in the Province of Alberta;

AND IN THE MATTER OF an application for a Sealing Order pursuant to section 187 of the *Criminal Code*.

APPLICATION FOR CONFIRMATION AND SEALING ORDER

An *ex parte* application is hereby made by [Crown Agent], General Counsel and designated Crown Agent pursuant to section 185(1)(a)/185(1)(b) of the *Criminal Code*, for an Order confirming an authorization of the Honourable [name of Justice who issued the warrant] of the Supreme Court of Alberta issued on the XX day of March, 2013;

AND an *ex parte* application is hereby made by [Crown agent] for an Order sealing this application and any related materials;

IN SUPPORT OF THIS APPLICATION the following material is relied upon:

1. The affidavit of Constable XXXX of the Royal Canadian Mounted Police (RCMP), sworn on the XX day of March, 2013;
2. The authorization of the Honourable XXXX of the Supreme Court of Alberta, issued on the XX day of March, 2013 and attached as **Exhibit “A”** to the affidavit of Constable XX.

THE RELIEF SOUGHT IS:

1. An Order pursuant to section 188.1(2) of the *Criminal Code*, confirming the authorization of the Honourable XXXX of the Supreme Court of Alberta issued on the XX day of March, 2013;
2. An Order pursuant to section 187 of the *Criminal Code* sealing this application and all material in support thereof.

DATED at the City of Toronto in the Province of Ontario this XX day of March, 2013.

Name of Crown Agent
General Counsel and Designated Agent

Court Registry:

**SUPERIOR COURT OF JUSTICE
(Toronto Region)**

IN THE MATTER OF an application for an Order pursuant to section 188.1(2) of the *Criminal Code* to confirm an authorization issued in the Province of Alberta;

AND IN THE MATTER OF an application for a Sealing Order pursuant to section 187 of the *Criminal Code*.

AFFIDAVIT

I, (*insert name*), a member of the Royal Canadian Mounted Police (RCMP) in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Peace Officer⁴⁴ and I have been a member of the RCMP for the past XX years. I am currently an investigator with the Golden Horseshoe Combined Forces Special Enforcement Unit (CFSEU) based in Hamilton, Ontario.
2. I have personal knowledge⁴⁵ of the matters and facts described in this affidavit, except where stated to be on information and belief. I believe the contents of this affidavit to be true to the best of my knowledge.
3. On March XX, 2013⁴⁶ I was advised by Constable Jane Smith (Cst. Smith), a Peace Officer and member of the RCMP in the Province of Alberta, of the following information:
 - a. Cst. Smith and members of her unit are currently involved in a homicide investigation surrounding the death of XXXX.
 - b. The investigation includes, in part, the use of intercepted communications in both Alberta and Ontario. As such, an authorization to intercept communications, pursuant to sections 185 and 186 of the *Criminal Code*, was granted by the Honourable Justice XXXX of the Supreme Court of Alberta on March XX, 2013.

⁴⁴ Use this introductory paragraph to briefly tell the Justice who you are, where you're posted, and how long you've been a Peace Officer.

⁴⁵ You must ensure that you have direct knowledge of the information you are presenting and that it is accurate to the best of your ability.

⁴⁶ In this paragraph, briefly highlight the important points of the investigation that pertain to this particular confirmation order (i.e., a Part VI was issued, it is currently valid, etc.)

4. On March XX, 2013⁴⁷ Cst. Smith faxed me a copy of the said authorization and upon reviewing it, I learned the following:
 - a. The authorization is valid for a period not exceeding sixty (60) days, from and including the XX day of March, 2013 up to and including the XX day of May, 2013.
 - b. The authorization granted the authority to intercept the private communications of three (3) Principal Known Persons. One of those individuals, John Doe, currently resides in the Province of Ontario. In order to capture the private communications of John Doe, the authorization granted the police the authority to intercept John Doe's private communications at his residence which is located at 123 Any Street, Toronto, Ontario.
5. In order to intercept the private communications at John Doe's residence, entry into or upon his property⁴⁸ is required here in the Province of Ontario. Therefore, pursuant to section 188.1(2), I am requesting that the authorization granted by the Honourable Justice XXXX of the Supreme Court of Alberta on March XX, 2013 (attached as **Exhibit "A"**) be confirmed in order to give it full force and effect in the Province of Ontario.
6. I further request that all materials related to this application, confirmation order, and authorization be sealed in a packet and kept in the custody of the Court in a place to which the public has no access or in any other place that the Justice may authorize. I further request that the packet remain sealed until otherwise ordered and treated in accordance with section 187 of the *Criminal Code*.

SWORN before me at the City of Toronto,)

in the Province of Ontario,)

this XX day of March, 2013. _____

) Constable XXXX

A Commissioner of Oaths)

in and for the Province of Ontario)

⁴⁷ Ensure that you review a copy of the authorization and that you understand why a confirmation order is required. If possible, speak directly to the original affiant of the authorization.

⁴⁸ An authorization issued under Part VI of the *Criminal Code* is valid anywhere in Canada. However, if the investigation requires entry into or upon private property (in a Province other than the Province where it was issued) a confirmation order is required.

**SUPERIOR COURT OF JUSTICE
(Toronto Region)**

IN THE MATTER OF an application for an Order pursuant to section 188.1(2) of the *Criminal Code* to confirm an authorization issued in the Province of Alberta;

AND IN THE MATTER OF an application for a Sealing Order pursuant to section 187 of the *Criminal Code*.

BEFORE THE HONOURABLE)	DATED this ____ day of
)	March, 2013
JUSTICE _____)	

CONFIRMATION AND SEALING ORDER

UPON the *ex parte* application of [name of Crown agent making the application], designated Crown Agent pursuant to section 185(1)(b) of the *Criminal Code*, for an Order confirming the authorization of the Honourable Justice XXXX of the Supreme Court of Alberta, dated March XX, 2013;

AND UPON the *ex parte* application of XXXX, designated Crown Agent for an Order sealing this application and all material in support thereof;

AND UPON BEING SATISFIED that the Crown Agent has been specially designated;

AND UPON READING the affidavit of Constable XXXX, a Peace Officer;

AND UPON BEING SATISFIED that the execution of the authorization will be required in the Province of Ontario;

IT IS ORDERED that the authorization of the Honourable Justice [name of the “out of province Justice who issued the authorization that you are seeking to have confirmed”], dated March XX, 2013, a copy of which is attached as **Exhibit “A”** to the affidavit of Constable XX, is confirmed pursuant to section 188.1 (2) of the *Criminal Code* and shall have full force and effect in the Province of Ontario as if it had been issued in the Province of Ontario;

IT IS FURTHER ORDERED that the application in support of this Order, including the affidavit of Constable XXXX, shall, as required by section 187 of the *Criminal Code*, be placed in a sealed packet. The application for this Order and all related materials in support thereof shall be kept in a sealed packet so as to preserve the integrity of the ongoing investigation. The packet shall remain sealed until otherwise ordered.

DATED at the City of Toronto in the Province of Ontario this ____ day of March, 2013.

A Justice of the Ontario Superior Court of Justice

Annex C

**COURT OF QUEEN'S BENCH
PROVINCE OF MANITOBA**

IN THE MATTER OF Applications for an Order pursuant to Section 188.1 and 487.03 of the *Criminal Code* to confirm an Authorization to Intercept Private Communications pursuant to Section 185 and 186 of the *Criminal Code* and related Assistance Order, an Authorization to Intercept Private Communications (One Party Consent) pursuant to Section 184.2 of the *Criminal Code*, a Transmission Data Recorder Warrant pursuant to Section 492.2 of the *Criminal Code*, a Transmission Data Production Order pursuant Section 487.016 of the *Criminal Code*, a Tracking Warrant pursuant to Section 492.1 of the *Criminal Code*, an Authorization for Removal after Expiry of Warrant pursuant to Subsection 492.1(7) of the *Criminal Code*, General Warrants pursuant to Section 487.01 of the *Criminal Code*, and Assistance Orders pursuant to Section 487.02 of the *Criminal Code*, issued in the Superior Court of Justice, Toronto Region of Ontario.

AND IN THE MATTER OF an Order Sealing all Materials pursuant to Section 187 of the *Criminal Code*.

CONFIRMATION AND ENDORSEMENT ORDER

UPON THE APPLICATION in writing dated XX, by XX, a peace officer for an Order pursuant to section 188.1 and 487.03 of the *Criminal Code* to confirm an Authorization to Intercept Private Communications and related Assistance Order, an Authorization to Intercept Private Communications (One Party Consent), a Transmission Data Recorder Warrant, a Transmission Data Production Order, a Tracking Warrant, an Authorization for Removal after Expiry of Warrant, General Warrants, and Assistance Orders, issued in the Superior Court of Justice, XX Region of XX.

AND UPON BEING SATISFIED that the execution of the Authorization, Warrant and related Orders granted by Justice XX, a Superior Court Justice, in and for the Province of Ontario, will require execution and assistance by persons in the Province of Manitoba, including but not limited to employees of XX Inc. based in XX Manitoba;

IT IS ORDERED that the Authorization, Warrant and related Orders of Justice XX, a Superior Court Justice, in and for the Province of Ontario, Toronto Region dated the XX in the Toronto Region, Province of Ontario, a copy of which is attached as APPENDIX 'A' is confirmed pursuant to Subsection 188.1(2) and Section 487.03 of the *Criminal Code* and shall have full force and effect in the Province of Manitoba as if it had been issued in Manitoba;

IT IS FURTHER ORDERED that the application in support of this Order, including the affidavit of XX, is required by section. 187(1) of the *Criminal Code* to be kept in a sealed packet. The application for this order and related materials in support shall be kept in a sealed packet so as to preserve the integrity of the ongoing investigation. The packet shall remain sealed until otherwise ordered.

Dated at the City of Winnipeg, in the Province of Manitoba, this _____ day of XX

the Court of Queen's Bench