

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

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Outline

- Mandate of the ULCC Working Group
- Legal Framework
- Nature of endorsement function
- Current issues raised by out-of-province endorsement of warrants
- Options
- Recommendation

Mandate of the Working Group

- 2014 ULCC resolution established the Working Group
- Issue: How to make warrants more easily enforceable across Canada
- Report focuses on investigative warrants, wiretap authorizations and CDSA warrant (hereinafter “warrants”)
- Currently no endorsement requirements for investigative orders in the *Criminal Code*

Legal Framework

- Parliament's legislative competence over criminal law and procedure allows it to confer extra-territorial jurisdiction on provincial courts if it does so explicitly.
- *Criminal Code* provides two mechanisms for the valid execution of out-of-province warrants:
 - provides that a warrant has Canada-wide effect upon issuance (e.g., ss. 705(3));
 - requires local justice/judge in receiving jurisdiction to endorse warrant before it may be executed (e.g., ss. 487(2)).

Legal Framework (cont.)

- The following warrants always require endorsement to be executed extra-provincially:
 - search warrant (s. 487);
 - general warrant (s. 487.01);
 - bodily impression warrant (s. 487.092); and
 - *CDSA* warrant (s. 11).
- The following warrants require endorsement if it may reasonably be expected that they be executed in other province, require entry onto property or an assistance order :
 - wiretap authorizations (ss. 184.2, 184.3, 186 and 188);
 - DNA evidence warrant (s. 487.05);
 - warrant for tracking device (s. 492.1); and
 - warrant for transmission data recorder (s. 492.2).

Nature of Endorsement Function

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- Caselaw and academics strongly indicate that endorsement is administrative in nature (whether the warrant is valid on its face, e.g. obvious defects).
- Police officers canvassed by the Working Group confirmed that the general practice of endorsement was merely a “rubber-stamping” exercise.

Current issues raised by out-of-province endorsement of warrants

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- Resource implications for the criminal justice system
 - Adds steps to the process of obtaining and enforcing a warrant;
 - Involves judicial and police resources in two jurisdictions;
 - Local wiretap agent may also need to be involved in the case of wiretap authorizations.
- Uncertainty regarding the application and scope of the review
 - Whether “confirmation” (wiretap authorizations) is mandatory or permissive or whether “endorsement” is required to be executed in a different “territorial division” within the province;
 - Instances where endorsing justice/judge looked beyond whether warrant was valid on its face and found that the warrant should not have been issued.

Does the endorsement process serve a compelling purpose?

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- To protect privacy and property rights ?
 - If endorsement is administrative in nature, there should be no consideration beyond ensuring that the warrant is valid on its face.
- To assist in ensuring that local processes are properly followed?
 - Local law enforcement (either alone or with visiting police officer) executing the warrant in receiving jurisdiction would be aware of local protocols.

Does the endorsement process serve a compelling purpose? (cont.)

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- To ensure easier enforcement against a reluctant third party?
 - The “assistance order” was created to assist police officer to execute warrant by compelling third parties to carry out the order;
 - If endorsement requirements were removed for out-of-province warrants, third party would still be compelled;
 - Could include on form that order is valid in their province.
- To allow for better accessibility to the warrant in the executing jurisdiction?
 - Endorsement order filed in receiving jurisdiction unlikely to be sufficient to challenge search or to recover seized property.

Options for Reform

- A. Remove endorsement requirements and provide that Part VI and XV warrants and s. 11 CDSA warrant have effect anywhere in Canada
- B. Remove the endorsement requirements and provide that only warrants issued by a superior court judge 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
- D. Maintain the status quo but clarify the process for endorsement.

Option B : Remove endorsement and allow only superior court judges to issue out-of-province warrants

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Pros:

- Precedents exist in the *Criminal Code*;
- Could contribute to greater consistency by having one level of judicial officer issuing out-of-province warrant.

Cons:

- Lack of infrastructure of superior courts and added workload could reduce accessibility to superior court judges and impact on efficiencies in the criminal justice system.

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

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Pros:

- Easier to administer, lessens burden on police and judicial resources;
- In line with some cases that indicate endorsement informs a recipient that the warrant was authorized for execution.

Cons:

- Filing notice in courthouse of receiving jurisdiction provides no meaningful or practical purpose in informing intended recipient (e.g., one must actually be aware that notice is filed in courthouse, even if aware, what purpose would it serve?)

Option D : Maintain status quo but clarify process for endorsement 2016ulcc0029

Pros:

- Would eliminate inconsistencies in the *Criminal Code* with various endorsement requirements;
- Would clarify the test for endorsement and clarify that the function is administrative in nature.

Cons:

- Inefficient mechanism to make a warrant valid for execution in another province;
- Requires police and judicial resources in two different jurisdictions to execute an out-of-province warrant.

Recommendation: Option A - Remove endorsement and provide that Part VI and XV warrants and s. 11 CDSA warrant have effect anywhere in Canada

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- Limited task (administrative act) performed by endorsing justice does not add any real value to the process as it does not:
 - protect privacy and property rights;
 - ensure local protocols are followed;
 - ensure easier enforcement against reluctant third party;
 - allow better accessibility to the warrant in any meaningful way.
- Would contribute to streamlining investigative procedures;
- Would save valuable time and police and judicial resources.