CODIFICATION: CLARITY AND CONFUSION IN THE LAW
The Standard for a Search[1]

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INTRODUCTION

As with most things progressive, codification is paradoxical in nature. Clarity in the law is sought through codification. While it is generally achieved, some confusion inevitably results. This is particularly true when codification is preceded or superseded by other sources of law.

There are three primary sources of criminal law in Canada: the common law; the ***Criminal Code of Canada*** (the ***Criminal Code***);[3] and the ***Canadian Charter of Rights and Freedoms*** (the ***Charter***). The latter of these sources was proclaimed in force in 1982 as part of the ***Constitution Act***.[4] The last quarter century has witnessed the courts struggle with the significant challenge of interpreting the ***Charter***, as well as determining whether it can be reconciled, in full, in part, or at all, with other existing sources of law. Concurrent with this struggle, further codification has taken place.

Judicial efforts at interpretation and reconciliation make for interesting reading. Recent decisions from the Supreme Court of Canada have historical and philosophical overtones, and are typically dozens of pages in length.[5] While ground is sometimes gained on the path to uniformity, clarity in the law remains elusive.

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[1] Some of the paragraphs in this paper were adapted from ***The Law of Knowns and Unknowns: R. v. Chesson Revisited***, a paper presented by the author at the Wiretap Workshop, 2007 Crown Counsel Conference, Whistler, B.C.

[2] The views expressed in this paper are those of the author and do not necessarily reflect those of the British Columbia Ministry of Attorney General.

[3] ***Criminal Code***, R.S.C. 1985, c. C-46.

[4] ***Constitution Act***, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[5] Examples of such decisions are ***R. v. Hebert***, [1990] 2 S.C.R. 151; ***R. v. Oickle***, [2000] 2 S.C.R. 3; and ***R. v. Singh***, 2007 SCC 48, cases in which the court has reconciled the common law confessions rule with the right to silence encompassed in section 7 of the ***Charter***.

The law on search and seizure, including the standard for a search, is a case in point. The common law, the search related provisions in the ***Criminal Code***, and the ***Charter*** have converged to provide the basis for extensive litigation in which the relationship between these three sources of law has been examined. The cases are necessarily complex, and the courts continue to be challenged in this task. A remaining issue, however, is whether anything further can be done to clarify the law for those who must enforce it, and for those who it is designed to protect.

THE STANDARD FOR A SEARCH: THE COMMON LAW; THE *CRIMINAL CODE*; AND THE *CHARTER*

The Common Law

The common law standard for a search had its origins in property rights, which found protection in the law of trespass. Intrusions on to property could be sanctioned only upon the demonstration of "strong cause" for a belief that stolen goods would be found upon it. Absent authorization based on such belief, entry on the property would be regarded as a trespass.[6] This standard emerged as a significant building block in the later codification of the law.

The *Criminal Code*

The starting point for an examination of the codification of the law of search and seizure is section 487(1) of the ***Criminal Code***. The section provides:

> Information for search warrant – A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
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> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have

[6] ***Hunter et al. v. Southam Inc.***, [1984] 2 S.C.R. 145 at p. 158.

> committed an offence, against this Act or any other Act of Parliament,
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> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
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> (c.1) any offence-related property,
>
> May at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
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> (d) to search the building, receptacle or place for any such thing and to seize it, and
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> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, to make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

Although there are a number of provisions in the ***Criminal Code*** that provide a judicial officer with the authority to authorize a search, section 487(1) may be regarded as the basic one. First enacted in 1892, it provides a useful yardstick against which the other provisions may be measured.[7] Evident in the section is the requirement for a belief on reasonable grounds that something connected to an offence will be found at the location of the search.

The *Charter*

Section 8 of the ***Charter*** provides:

> 8. Search or seizure – Everyone has the right to be secure against unreasonable search or seizure.

The section was put to an early test in the seminal case of ***Hunter et al. v. Southam Inc.***[8] A constitutional challenge was mounted against two sections of

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[7] ***Criminal Code***, 1892, c. 29.
[8] ***Hunter et al. v. Southam Inc.***, *supra* note 6.

the ***Combines Investigation Act***. It was argued that the provisions offended section 8 on a number of fronts, including its standard, which required only that the director believe "that there may be evidence relevant to the matters being inquired into."[9]

The court found the sections to be unconstitutional, and therefore of no force and effect. Acceding to the respondent's position on this issue, the court found that the standard was too low. Dickson J., speaking for the court, stated: "This is a very low standard which would validate intrusion on suspicion, and authorize fishing expeditions of considerable latitude."[10]

The constitutional standard was established after a review of common law principles and their codification. The court stated:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure.[11]

With this statement, the courts were provided with their frame of reference for the determination of whether or not legislation complies with the minimum constitutional standard required by section 8 of the ***Charter***.

Proceeding on the basis that clarity in the law is desirable, the appeal of the case lay in large part in its reconciliation of the common law, the ***Criminal Code***, and the ***Charter***. The court considered cases decided hundreds of years apart. The court found the conceptual underpinnings of the standard for a search at common law and the ***Charter*** standard to be different: the former being grounded in property rights; the latter in privacy rights. Notwithstanding these historical and philosophical divides, the court distilled a single standard common to three sources of law. The identification of a common standard in the ***Charter***

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[9] ***Combines Investigation Act***, R.S.C. 1970, c. C-23, s.10.
[10] ***Hunter et al. v. Southam Inc.***, *supra* note 6 at p. 167.
[11] *Ibid*. at p. 168.

and the ***Criminal Code***, in particular, circumvented what might otherwise have been a significant fracture in this area of the law.

THE STANDARD FOR A SEARCH: VARIATIONS, EXCEPTIONS, AND DIFFERENT TERMINOLOGY

Variations

The ability of the court in ***Hunter et al. v. Southam Inc*.** to distil a single standard was not impeded by the various phrases employed in its expression. In this respect, Dickson J. noted the use of "strong reason to believe" in the common law, "reasonable grounds to believe" in the ***Criminal Code***, and "probable cause" in the ***American Bill of Rights***. The court found the essence of each standard to be identical, notwithstanding the variations in the manner in which it was stated.[12]

The variations in the expression of the standard have persisted since the court made its observation in ***Hunter et al. v. Southam Inc.*** Of interest is that, while some of them can be attributed to having their origins in different sources or jurisdictions, this is not true of all of them. There are variations to be found between the ***Charter*** and the ***Criminal Code*** as well as within the ***Criminal Code***. It falls to the courts to determine whether these variations are of any significance. Two examples illustrate this point.

a. Reasonable and Probable Grounds / Reasonable Grounds

In ***Hunter et al. v. Southam Inc.***, the court endorsed a standard based on "reasonable and probable grounds." This expression of the standard continues to be evident in judicial references to the constitutional standard. However, the search related provisions in the ***Criminal Code*** require only a belief on "reasonable grounds."

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[12] *Ibid*. at p. 167.

The two phrases were considered by the Supreme Court of Canada in ***Baron v. Canada***.[13] It had been argued that the standard of "reasonable grounds" was lower than the constitutional standard, and therefore, contrary to it. After considering conflicting decisions on this point, the court found the distinction between "reasonable and probable grounds" and "reasonable grounds" to be a variation without meaning. Both were found to require the same standard, that being one of a "credibly based probability."[14]

b. Evidence / Information

Section 184.2 of the ***Criminal Code*** was enacted in response to the Supreme Court of Canada's decision in ***Duarte v. The Queen.***[15] In that case, the court found that the unauthorized and surreptitious recording of private communications at the behest of the police offended section 8 of the ***Charter***, notwithstanding that the recording was done with the cooperation and consent of one of the parties to it. The authorizing section provides:

> (3) Judge to be Satisfied – An authorization may be given under this section if the judge to whom the application is made is satisfied that
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> (a) there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
>
> (b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
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> (c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

Of note is the use of the word "information" rather than the word "evidence" in subsection (c).

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[13] ***Baron v. Canada***, [1993] 1 S.C.R. 416.
[14] *Ibid*. at p. 446.
[15] ***Duarte v. The Queen***, [1990] 1 S.C.R. 30.

The constitutionality of section 184.2 was challenged in the case of ***R. v. G.L.***[16] The attack was based on section 8 of the ***Charter***, and was two pronged. The second prong asserted that the use of the word "information" rather than "evidence" was contrary to the standard established by the court in ***Hunter et al. v. Southam Inc.***[17]

The legislation was found to be valid. With respect to the argument based on the variation in the expression of the standard, the court stated:

> Given the scope of s. 487(1)(b) of the Code, and, in particular, the inclusion of the term "anything" in the definition of "evidence," there is no meaningful distinction between "information" and "evidence" of the Code. Although the term "information" in s. 184.2 is in Part VI of the Code and relates to the use of electronic surveillance by the state, it is not a term that provides a significant increment to the term "evidence." The "information" contemplated by the impugned section is "information concerning the offence." It is not "information" at large. The nexus to the offence is the critical component of the analysis, whether the nexus be with "information" or "evidence." Thus, these terms are more or less co-extensive, or interchangeable with one another. Any additional scope that might exist through the use of the term "information" does not render the section unconstitutional…[18]

Of some assistance to the court was the expansive definition given to the word "evidence" by the Supreme Court of Canada in ***CanadianOxy Chemicals Ltd. v. Canada (A.G.)***.[19]

This variation is not found only between the constitutional standard and section 184.2 of the ***Criminal Code***. Some of the search related provisions in the ***Criminal Code*** refer to the discovery of "evidence," such as section 186(1) (Authorization), section 487(1) (Search warrant), section 487.05(1) (DNA warrant), and section 487.012(3) (Production order). Other sections refer to the

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[16] ***R. v. G.L.***, [2004] O.J. No. 5675.
[17] *Ibid*. at para. 86.
[18] *Ibid*. at para. 93.
[19] ***Canadian Oxy Chemicals Ltd. V. Canada (A.G.)***, [1999] 1 S.C.R. 743.

discovery of "information," such as section 487.01 (General warrant), section 487.013(4) (Production order), and section 492.1 (Tracking warrant).

Exceptions

Much of the court's analysis in ***Hunter et al. v. Southam Inc.*** was retrospective in nature. However, a significant concession was made, prospective in nature. Upon its endorsement of a standard based on reasonable and probable grounds, the court stated the following: "Where the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one."[20]

Understandably, the two exceptions noted were stated in broad terms, and, clearly, the court did not intend an exhaustive recitation of possible exemptions. The language seems to suggest that, with respect to matters of State security, a lower standard might be appropriate, while, with respect to matters of bodily integrity, a higher standard might be appropriate. This does not necessarily seem to have been the case.[21] However, the simpler and more immediate point is that, while laying the groundwork for the consistent application of a single standard, the court opened the door for some legally permissible departures from it.

Different Terminology

The complexities of the issues change when the standard is expressed in altogether different terms. They change yet again when the meaning of identical terms differ, depending on the context of their codification. The example provided is in respect of the phrase "best interests of the administration of justice." In section 186(1) of the ***Criminal Code*** the phrase imports the constitutional standard, whereas in section 487.052 it does not. In section

[20] ***Hunter et al. v. Southam Inc.***, *supra* note 6 at p. 168.
[21] See, for example, ***R. v. S.A.B.***, [2003] 2 S.C.R. 678 at para. 55.

487.01(1), the constitutional standard is expressed twice, each time in different terms.

a. Different Terms; Same Standard

The constitutionality of Part IV.I of the Criminal Code was challenged in ***R. v. Finlay and Grellette***.[22] It was argued that the legislation governing the interception of private communications did not meet the constitutional standard of reasonableness. Martin J.A. disagreed. Martin J.A.'s conclusion in this respect turned on his interpretation of the phrase "best interests of the administration of justice" in section 178.13 (now section 186(1)), which provides:

> 186. (1) Judge to be satisfied - An authorization under this section may be given if the judge to whom the application is made is satisfied
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> (a) that it would be in the best interests of the administration of justice to do so; and
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> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Martin J.A. held that two components are to be extracted from the correct interpretation of the phrase "in the best interests of the administration of justice": first, the judge must be of the view that the authorization will further or advance the objectives of justice; and, second, the judge must balance the interests of law enforcement with the interest of the individual in privacy.[23] It is in respect of the second component that Martin J.A. found the minimum constitutional standard to be satisfied. He stated:

> It is true that s. 178.13 does not, in express language, require the judge as a condition of granting the authorization to be satisfied that there are reasonable grounds to believe that an offence has been

[22] ***R. v. Finlay and Grellette***, (1985), 23 C.C.C. (3d) 48 (Ont. C.A.).
[23] *Ibid*. at pp. 70-71.

> committed or is about to be committed and that the authorization sought will afford evidence of communications concerning the offence, the standard specified in Title III. The judge must, however, be satisfied that the granting of the authorization would be in the "best interests of the administration of justice". The language used by Parliament, as previously indicated, requires the judge to balance the interests of effective law enforcement against privacy interests, and, in my view, imports at least the requirement that there is reasonable ground to believe that communications concerning the particular offence will be obtained through the interception sought.[24]

Leave to appeal this decision to the Supreme Court of Canada was refused, and Martin J.A.'s analysis was formally adopted by the court in ***R. v. Duarte*** and ***R. v. Garofoli***.[25]

b. Same Terms; Different Standard

In ***R. v. Briggs***, the meaning of the phrase "the best interests of the administration of justice" was the central issue before the court.[26] The accused in the case pled guilty to a number of offences, including robbery. The sentencing judge, exercising his discretion to do so, ordered that a bodily substance be taken from the offender for submission to the National *DNA* Data Bank. In making the order, the court was subject to the statutory obligation in section 487.052(1) of the ***Criminal Code*** that it be "satisfied that it is in the best interests of the administration of justice to do so."

The offender appealed the order on the basis of legislative non-compliance with section 7 and section 8 of the ***Charter***. Relying on ***Hunter et al. v. Southam Inc.***, the appellant argued that the constitutional standard should apply, that is, what was required was satisfaction of a "likelihood that an offender has committed or will commit an offence in the future and that a sample of his DNA

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[24] *Ibid*. at pp. 71-72.
[25] [1986] 1 S.C.R. ix; ***Duarte***, *supra* note 15 at p. 45; ***R. v. Garofoli***, [1990] 2 S.C.R. 1421 at pp. 1443-44.
[26] ***R. v. Briggs*** (2001), 157 C.C.C. (3d) (Ont. C.A.) at para 5; leave to appeal refused [2002] S.C.C.A. No. 31.

will afford evidence of commission of that crime."[27] Relying on a number of cases, including ***R. v. Finlay and Grellete***, the appellant argued that the requirement should be imported into the phrase "in the best interests of the administration of justice." [28]

The court rejected the appellant's position. The court found that to read the constitutional requirement into the phrase would undermine some of the purposes of the legislation. These purposes, numbering at least six, extended beyond the matter of law enforcement.

In making its ruling, the court made a number of points and observations, which included the following:

- The court in ***Hunter et al. v. Southam Inc.*** "acknowledged that the standard of reasonable and probable grounds might not always be appropriate";[29]

- The DNA warrant legislation (section 487.05) requires that a judge be satisfied of the existence of reasonable grounds and that the issuance of the warrant is in the best interests of the administration of justice, the implication of which is that the latter requirement means something other than reasonable and probable grounds;[30]

- As a matter of elementary statutory interpretation, the "same phrase should be given the same meaning respecting the same subject matter";[31]

- By inference, "the omission of the words reasonable and probable grounds from section 487.052 was deliberate";[32]

- The court in ***Hunter et al. v. Southam Inc.*** acknowledged that "the reasonableness standard under s.8 of the ***Charter*** fluctuates with context";[33]

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[27] *Ibid*. at para. 23.
[28] *Ibid*. at para. 45.
[29] *Ibid*. at para. 21.
[30] *Ibid*. at para. 31.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*. at para 32.

- A person who has been convicted of an offence has a diminished expectation of privacy, and, consequently, a lesser degree of protection from an interference with bodily integrity;[34]

- The phrase "best interests of the administration of justice cannot be precisely defined," but "it takes its meaning from the context in which it is found";[35] and

- There is a marked difference between the context in which the phrase is found in respect of an authorization to intercept private communications and the context in which it is found in respect of convicted offenders.[36]

Of note is that, in arriving at its decision, the court relied on the principle that the same phrase should be given the same meaning. At the same time, in declining to assign the same meaning to the phrase as that assigned to it in section 186(1) of the ***Criminal Code***, the court implicitly rejected this principle. On the face of it, the reasoning has traces of contradiction. However, the court's qualification of the principle, that is, it applies to the subject matter of the statute rather than the statute itself, appears to be an integral part of its reasoning.

c. Same Standard; Variations and Different Terms (Redundancy)

An interesting addition to the discussion of terminology is ***R. v. Ford***.[37] In that case, a number of general warrants had been issued under the authority of section 487.01(1) of the ***Criminal Code***, which provides as follows:

> 487.01 (1) Information for general warrant – A provincial court judge, a judge of superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if
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> (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or

[34] *Ibid*. at para. 33.
[35] *Ibid*. at para. 48.
[36] *Ibid*.
[37] ***R. v. Ford***, 2008 BCCA 94.

> any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
>
> (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
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> (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

Much of the language that appeared in the general warrants mirrored that found in the statutory provision. However, with respect to the discovery of information or evidence, the words "could be obtained" rather than "will be obtained" were used. One of the arguments advanced by the appellant was that the words "could be obtained" indicated the application by the authorizing judges of a lower standard than that mandated by section 8 of the ***Charter***.[38]

The court dismissed the appellant's arguments. The court considered the definition of the word "could," and noted that it can denote either a possibility or a probability, depending on the context in which it is used. Citing the legal presumption that judges know the law, which presumption applies where ambiguity exists, the court found that the use of the word "could" in the context of the warrants was demonstrative of the constitutional requirement of probability rather than the impermissible standard of possibility.[39]

Of interest to the discussion about terminology is the basis on which the court reached this conclusion. The court pointed to two of the statutory prerequisites as evidence that the warrants had been properly issued. First, the court noted that section 487.01(1)(a) had been considered, which section clearly complies with the constitutional standard for a search. Next, the court pointed to the judges' consideration of the phrase "the best interests of the administration of justice" found in section 487.01(b), and stated:

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[38] *Ibid*. at paras. 30-31.
[39] *Ibid*. at paras. 39, 45-46.

> It is also apparent from the face of the general warrants, that the issuing judges turned their minds to the criterion set out in s. 487.01(1)(b), namely, whether the granting of the warrants was in "the best interest of the administration of justice". The Supreme Court of Canada has held that in the search and seizure context this criterion embraces the constitutional requirement that an issuing judge be satisfied that there are reasonable grounds to believe that the interceptions being authorized will afford evidence of the offences under investigation: ***R. v. Garofoli*** [1990] 2 S.C.R. 1421 at 1444. Once again, this is an aspect of the law well known to the judiciary. [40]

As indicated above, the court applied this presumption, which calls for a resolution in favour of judicial knowledge in cases of ambiguity.

This aspect of the court's reasoning differs from that of the court in ***R. v. Briggs*** in two significant ways. First, unlike the situation in ***R. v. Briggs***, the court did not find that the requirement of reasonable grounds in section 487.01(1)(a) implies that the phrase "best interests of the administration of justice" in section 487.01(1)(b) means something other than reasonable and probable grounds. Second, unlike the situation in ***R. v. Briggs***, the court was satisfied that the Supreme Court's interpretation of the phrase applies in the broad context of search and seizure. The more restrictive view of what constitutes the same subject matter and the constrained contextual analysis are absent in the case.

The two cases present an interesting contrast in reasoning. On the one hand, with the attribution of the same meaning to the same phrase, none of the apparent traces of contradiction present in ***R. v. Briggs*** are discernable in ***R. v. Ford***. On the other hand, in ***R. v. Ford***, the standard finds expression in different terms within the same statutory provision, one of which is necessarily superfluous. This is a result that the court rejected through its reasoning in ***R. v. Briggs***.

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[40] *Ibid*. at para. 44.

THE STANDARD FOR A SEARCH: VARIATIONS, EXCEPTIONS, AND DIFFERENT TERMINOLOGY - IMPLICATIONS

A clearly articulated and transparent standard serves at least two important purposes. First, it makes the task of determining whether a common law principle or a provision of the ***Criminal Code*** comply with the constitutional standard a relatively straightforward one. Second, it provides those who enforce the law with a clear statement to inform their actions. In turn, others may use the same standard to evaluate those actions. Variations from and exceptions to the standard, and fundamentally different statements of it, tend to obscure these purposes.

Variations in the way in which the standard is expressed are understandable when different sources of law are being considered. They are less so when the variations are found within a single code. In either case, in the examples provided above, the Supreme Court of Canada appears to have resolved the issues without particular difficulty. The point to be made, however, is that litigation resulted from distinctions that the courts ultimately found to be without meaning. Meaningless distinctions are confusing, or are at least potentially so.

Not all issues have been as easily resolved. Confusion about the law can create conflict in the law. At present, for example, there exists a conflict in the law about two of the standards in the "wiretap" provisions of the ***Criminal Code***: the constitutional standard in section 186(1); and the standard for naming persons (*knowns*) in an authorization. It is difficult to state with certainty the reason for this conflict. However, it seems that the assignment of a meaning to a phrase other than that which it was intended to have has played a part in it. It seems inevitable that such an assignment will strain the codified language, and translation of the constitutional standard into plain terms may not occur immediately, or at all.

The conflict arises with respect to the relationship between the constitutional standard and the standard governing *knowns*. On the one hand, there is support

for the proposition that the two legal standards co-exist, and that no inconsistency arises from the application of both standards within the context of a single authorization. On the other hand, some authorities suggest, directly or indirectly, that the standard governing *knowns* has been subsumed by the constitutional standard, or that its significance is minimal, and is limited to the supporting affidavit.

As indicated, the constitutional standard is grounded in section 186(1) of the ***Criminal Code***, and, specifically, in the words "best interests of the administration of justice." The statutory provisions in which the law relating to *knowns* is grounded are section 185(1)(e) and section 186(4)(c) of the ***Criminal Code***. Section 185(1)(e) provides for the mandatory inclusion of the following information in the affidavit accompanying the application for an authorization:

> (e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used.

Section 186(4)(c) provides for the mandatory inclusion of the following information in an authorization given under section 186:

> (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used.

It is section 185(1)(e) (previously section 178.12(1)(e)) that provided the Supreme Court of Canada with its starting point when establishing what has proven to be an authoritative and enduring definition of a known person.

The issue before the court in ***Vanweenan and Chesson v. The Queen*** (***R. v. Chesson***) was whether one of the appellants, Lorelei Vanweenan, should have

been included with the other four persons named in an authorization granted on June 29, 1983.[41] The Crown was relying largely on private communications intercepted pursuant to the authorization in support of a charge of conspiracy to commit robbery against Vanweenan and others. In its reasons with respect to this issue, the Supreme Court of Canada stated the following:

> How is it to be decided whether a particular person is known or unknown for the purpose of Part IV.I of the Code? In my opinion, the answer to this question is to be found in Part IV.I itself. The starting point is s. 178.12(1)(e) of the Code, which sets out two preconditions to be met before a person may be lawfully identified and named in an authorization and thus be a known person. The first and most obvious condition is that the existence of that person must be known to the police. Second, and equally important, however, is the additional requirement that the person satisfy the standard of being one "whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence". If, at the time the police apply for a judicial authorization a person meets both these criteria, he will be a known person and therefore, if the interceptions of his communications are to be admitted against him, he must be named in the authorization as a target for interception. If he is not his interceptions are not receivable since there is no authority to make them. A "known" person, then, for the purposes of Part VI.I of the Code is one who satisfies the two criteria in s. 178.12(1)(e).[42]

In reversing the court of appeal's ruling on this point, the Supreme Court emphasized that the obligation to name a person is engaged on the basis of possibility: "All that was required to include her in the application was reasonable and probable grounds that her communications *may* assist."[43]

Twenty years later, the definition of a known person provided by the Supreme Court in ***R. v. Chesson*** continues to be relevant. It was this definition that the Supreme Court of Canada referred to when considering whether a person ought to have been named along with others in an authorization in ***R. v. Chow***.[44] It was this definition that recent appellate court decisions relied on as authority for

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[41] ***Vanweenan and Chesson v. The Queen***, [1988] 2 S.C.R. 148 (***R. v. Chesson***).
[42] *Ibid*. at p. 164.
[43] *Ibid*. at p. 167.
[44] ***R. v. Chow***, [2005] 1 S.C.R. 384.

the proposition that the standard for naming a person in an authorization is a low one: ***R. v. Schreinert; R. v. Winter***; ***R. v. Nugent***.[45]

It seems clear that, when making the decision to ground the constitutional standard in the phrase "best interests of the administration of justice," the court in ***R. v. Finlay and Grellette*** saw no contradiction with the co-existence of two standards within the legislative scheme. In ***R. v. Finlay and Grellette***, the focal point of the appellant's attack was the language in s. 178.12(1)(e) (now section 185(1)(e)), that is, "the names, addresses and occupations, if known, of all persons, the interception of whose private communications may assist the investigation of the offence…" It was conceded by counsel for the Attorney General of Ontario that, standing alone, this standard was not sufficient to satisfy the requirements of ***Hunter et al. v. Southam Inc.***[46] Martin J.A. agreed with the submission that the provisions should be read in their entirety, noting that it is section 178.13 (now section 186), and not section 178.12 (now section 185), on which the decision to grant the authorization is based.[47]

There was no indication by the court that, with the delineation of the constitutional standard, the standard governing the naming of known persons became obsolete. Of note is that the Supreme Court of Canada provided its definition of a known person in ***R. v. Chesson*** after it refused leave to appeal in ***R. v. Finlay and Grellette***. A recent example of a judicial reconciliation of the two standards is found in ***R. v. Ciancio***.[48] The reconciliation proceeds on the basis that the constitutional standard in section 186(1) requires a judge to assess an authorization in its entirety, while the assessment called for by section 185(1)(e) and its corollary provision in section 186(4)(c), although not unrelated, is a separate and "discrete issue." [49]

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[45] ***R. v. Schreinert; R. v. Winter*** (2002), 165 C.C.C. (3d) 295 (Ont. C.A.); ***R. v. Nugent*** [2005] O.J. No. 141 (Ont. C.A.).
[46] ***Finlay and Grellette***, *supra* note 22 at p. 71.
[47] *Ibid*. at p. 72.
[48] ***R. v. Ciancio*** (2006), 72 W.C.B. (2d) 126.
[49] *Ibid*. at paras. 11-17.

Nevertheless, the distinction between the two standards has become increasingly blurred with the passage of time. A parallel line of authorities has developed in which the courts have applied the higher, constitutional standard in assessing whether a person was properly named in or omitted from an authorization. This is the crux of the conflict in this area of the law. These cases include: ***R. v. Shayesteh***; ***R. v. Lee***; ***R. v. Adam et al.***; and, more recently, ***R. v. Lepage***.[50]

What is of interest about this line of authorities is that, with the exception of ***R. v. Adam et al.***, in none of these rulings on this issue was there a consideration of the definition of a known person as provided by Supreme Court of Canada in ***R. v. Chesson***. This omission is notable in ***R. v. Shayesteh***, where the admissibility of evidence was challenged on the basis that the affiant had not applied the requisite constitutional standard with respect to one of the persons named in the second of a series of authorization; an argument that was centered on the affiant's use of the words "may assist."[51] This omission is particularly notable in ***R. v. Lepage***, where the tension between the two standards had been squarely before the courts in the trial proceedings.

On August 30, 2000, an authorization was granted in respect of the offences of murder and conspiracy to commit murder. Gerard Morin (Morin) was one of the persons named in the authorization. Communications intercepted pursuant to this and subsequent authorizations led to two separate legal proceedings in which a total of ten persons were charged with a number of drug related offences.

In both cases, which proceeded before different judges, the accused sought to exclude the evidence of the intercepted communications on the basis that Morin had been improperly named in the authorization. A constitutional challenge was made to section 185(1)(e) of the ***Criminal Code***. The challenge was based in

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[50] ***R. v. Shayesteh*** (1996), 111 C.C.C. (3d) 225 (Ont. C.A.); ***R. v. Lee*** (2000), 59 W.C.B. (2d) 206; ***R. v. Adam et al.***, 2006 BCSC 126; ***R. v. Lepage***, 2008 BCCA 132.
[51] ***Shayesteh***, *supra* note 50 at p. 236.

large part on the comparably low standard required by the section, that is, "may assist." The challenge did not succeed in either proceeding, ***R. v. Oliynyk et al.*** and ***R. v. Adam et al.***[52] However, in ***R. v. Adam et al.***, the court interpreted the law in a manner favourable to the accused, stating that "s. 186(4)(c) imposes a higher standard for the naming of known persons in an authorization than is required for the naming of known persons in an application for an authorization under s. 185(1)(e)."[53]

In considering whether Morin had been properly named in the authorization granted on August 30, 2000, both courts considered the definition of a known person provided by the Supreme Court of Canada in ***R. v. Chesson***. The definition was assessed in the light of the court's ruling in ***R. v. Chow***. In ***R. v. Oliynyk et al.***, the court found that, in ***R .v Chow***, the court affirmed the authority of ***R. v. Chesson***.[54] In ***Adam et al.***, the court noted that ***R. v. Chesson*** "did not consider s. 8 of the Charter," and found that the use of the word "would" in ***R. v. Chow*** signalled a modification of the test in ***R. v. Chesson***.[55]

It is against this backdrop that the issue of whether Morin had been properly named in the authorization was before the court of appeal in ***R. v. Lepage***. The court summarized the issue as follows:

> It is asserted that in assessing the validity of the authorization granted by Grist J., the trial judge applied a standard of "may" or "could" afford evidence, a standard less than that constitutionally mandated by the cases of ***Duarte*** and ***Garofoli***. It is fair to observe that there seems to have been some confusion as to the proper test in the argument and discussions before the learned trial judge. The judge did, on the ruling concerning the cross-examination of Cpl. Gresham, correctly advert to the proper test for review as articulated in ***Garofoli***. However, it does appear she may have erroneously considered the lesser standard of "may" in her consideration of the appropriateness of including Morin as a named party in the authorization granted by Grist. J. The proper test is

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[52] ***R. v. Oliynyk et al.***, 2005 BCSC 1895; ***Adam et al.***, *supra* note 50.
[53] ***Adam et al.***, *supra* note 50 at para. 21.
[54] ***R. v. Oliynyk***, 2005 BCSC 938 at para. 12.
[55] ***R. v. Adam et al.***, *supra* note 50 at paras. 24-25, 33-34.

> whether the interception of private communications will afford evidence of the offences being investigated.[56]

As indicated, the court resolved this issue without reference to ***R. v. Chesson***. The issue was resolved on the basis of a finding that, had the trial judge applied the correct test, the result would have been no different.

While the court may have been fair in its observation that there was confusion surrounding the proper test, also fair is an observation that this confusion is a reflection of the state of the law in this area. As noted above, it is difficult to state the exact source of this confusion, although it seems to have had its origins in the initial efforts of the judiciary to reconcile the constitutional standard for a search with the pre-existing statutory provisions. Whatever the exact source, statutory interpretation of the provisions has been strained, and the reconciliation of the ***Charter*** with the ***Criminal Code*** has not been seamless.

Some of the statements in ***R. v. Shayesteh*** and ***Adam et al.*** carry with them some interesting implications for police officers. For example, in ***Shayesteh***, the court offered this benign criticism:

> In any event, in this case, I question whether it is wise to place so much reliance on the police officer's choice of words. The use of the word "may" as opposed to "would" in the affidavit may well have been dictated by the very words of the Criminal Code. The relevant portions of the officer's cross-examination on the *voir dire* certainly reveal reluctance on his part to depart from the wording of his affidavit. The extent to which one should conclude by his choice of words that he did or did not in fact believe that he had reasonable and probable grounds to seek the authorization is another matter.[57]

The issue was ultimately resolved with the finding that, although the subjective belief of the affiant is of some relevance, it is the judge's determination with respect to the sufficiency of grounds that is determinative of the issue.

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[56] ***Lepage***, *supra* note 50 at para. 15.
[57] ***Shayesteh***, *supra* note 50 at p. 245.

The court in ***Adam et al.*** relied on the reasoning in ***Shayesteh***, and, in a similar vein, found that the determinative assessment of the constitutional standard is that made by the authorizing judge. The court concluded:

> Based on my review of relevant case law, and with particular focus on the foundational principles expressed in Hunter, Duarte and Garofoli, I find that the test for naming a known person whose communications are to be targeted in an authorization under s.186(4)(c) is:
>
> 1. The existence of that person must be known to the police;
> 2. There are reasonable and probable grounds to believe that intercepting the person's private communications will assist the investigation of the offence.
>
> When applying for an authorization, however, peace officers and public officers need only meet the requirements under s. 185(1)(e) for naming a known person, namely, "all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offense…[58]

There can be no issue taken with the central point made, that is, it is the judge's satisfaction with respect to the standard that is of paramount importance, particularly when the critical role of prior judicial authorization in the constitutional context is considered. It is nonetheless desirable that all participants in the criminal justice system bring to it a common understanding of the provisions of the ***Criminal Code***, and that they proceed on the same footing with respect to them. It is problematic if the affiant cannot resort to the provisions of the ***Criminal Code*** to inform his or her acquisition of reasonable grounds; it is also problematic if the affiant and the authorizing judge apply different standards to what is, in essence, the same statutory requirement.

It should also be noted that, in spite of its prominence in section 8 jurisprudence, prior judicial authorization is not without its limits. As pointed out by the court in ***R. v. Ford***, a judge is presumed to know the law and to apply it. However, the

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[58] ***Adam et al.***, *supra* note 50 at paras. 35-36.

ease with which this presumption operates is commensurate with the clarity in the law known and applied.

The implications discussed above might be fairly narrow in their sweep if confined to just a few provisions of the ***Criminal Code***. However, recent years have seen a proliferation in the number of legislative initiatives in the area of search and seizure, which, to name a few examples, include: section 184.2 (Interception with consent); section 487.01 (General warrant); sections 487.012 and 487.013 (Production orders); section 487.05 (*DNA* warrant); sections 487.051 and 487.052 (DNA orders); and section 492.1 (Tracking warrant). Some of these examples have been in response to judicial pronouncements; others have been as a result of advancements in the scientific and technical fields.

When this proliferation is juxtaposed against variations, exceptions, and different terminology, the result becomes evident. The uniform standard that emerged from ***Hunter et al. v. Southam Inc.*** dissolves into a quagmire of questions:

- Does the statutory provision in question meet the constitutional standard?;
- Is constitutional compliance apparent from a plain reading of the statutory provision?;
- Is there a variance in the manner in which the statutory provision states the constitutional standard, and, if so, is it of any significance?;
- If constitutional compliance is not apparent on the face of the provision, can its expression be found in different terms?;
- Can any inferences be drawn from the use of those same terms elsewhere in the ***Criminal Code***?; and,
- If the statutory standard is other than the one stated in ***Hunter et al v. Southam Inc***., does it fall within one of the broad exemptions recognized by the court in the case?

While the courts may be challenged by these questions, the likelihood of these issues being made plain to those operating outside of the judicial arena becomes increasingly diminished.

CONCLUSION

Summary of Proposition

It has been proposed that codification produces both clarity and confusion in the law. The example of the standard for a search has been provided. However, the proposition is general in nature.

Relative to this proposition, the issue of whether anything further can be done to clarify the law has been raised. Given the complexity of the task of codification, some confusion is inevitable. This is particularly true when a legal system is comprised of more than one source of law. However, the foregoing suggests that there are lessons to be learned from the Canadian experience, and that it is possible to obtain greater clarity in the law.

Recommendations and Observations

a. Consistent Use of Terms

Synonyms are not well suited to codification. If two words are used interchangeably within a code, such as in the case of “evidence” and “information,” and no meaningful distinction exists between them, then the use of one of the words should be dispensed with. This is likely a matter for statutory reform.

Where an inconsequential variation in language exists between a code and another source of law, such as in the case of “reasonable grounds” and “reasonable and probable grounds,” then consistency may be more difficult to achieve. In this example, the ***Criminal Code*** could be adapted to reflect the preferred language of the judiciary. Alternatively, the courts could acknowledge the ruling of the Supreme Court of Canada on this issue, and implement it in a practical way. In either case, however, the use of “reasonable and probable grounds,” with its permanent entrenchment in ***Hunter et al. v. Southam Inc.***, is likely to persist, at least in some measure.

At first blush, a recommendation for consistency in language may appear unduly concerned with minutiae. However, in a forum where a premium is placed on linguistic precision, distinctions seldom go unnoticed. Judicial pronouncements on these issues belie their true cost. Underlying these pronouncements are police investigations, applications for prior judicial authorization, legal arguments, and the use of the courts' resources.

b. Same Terms to be Assigned the Same Meaning

It is recommended that the same meaning be attributed to the same phrase regardless of where it may appear in a code. The courts have often resisted rigidity in the application of the law, and, instead, have emphasized the importance of a contextual analysis. For example, in declining to establish "bright-line" rules, the courts have sometimes observed that "they are ill-suited to address the myriad of circumstances and contexts in which these encounters [between the police and citizens on city streets] occur."[59] However, the case for a contextual analysis is less compelling when it comes to codification. The attribution of meaning to a precise phrase within the fixed confines of a code is not the same as the application of a legal principle to undetermined future events, many of which may be unforeseeable.

The assignment of a different meaning to the same phrase has generated some confusion in Canada. No easy answer presents itself to the question of whether the status quo should be maintained, or whether a resolution should be sought. However, this question aside, this recommendation may be of some value to those just now embarking on the endeavour of codification.

[59] ***R. v. Grant***, [2006] O.J. No. 2179 at para. 14.

c. Reconciliation by the Judiciary

Reference has been made to the role of the judiciary in reconciling the ***Charter*** with the common law and the provisions of the ***Criminal Code***. A recent example of this process is found in ***R. v. Singh***.[60] In ***R. v. Singh***, the Supreme Court examined the "intersection" between the common law voluntary confessions rule and the principle of the right to silence in section 7 of the ***Charter***.[61]

The appellant, Jagrup Singh, was arrested for murder in connection with a shooting. While in police custody, he exercised his constitutional right to consult with counsel, and he asserted his right to remain silent. This was a right he eventually asserted eighteen times. However, the police were persistent in their efforts to interview the appellant, and, during the first of two interviews, he made some statements that were probative of the issue of identity. The appellant was subsequently charged with murder. He was convicted of the charge by a jury, which conviction was upheld by the court of appeal.

The voluntariness of the statements was never in issue. The appellant argued that his right to silence, which is extended through section 7 of the ***Charter***, had been breached. In particular, the appellant took issue before the Supreme Court with the approach taken by the court of appeal, in which "a double-barrelled test of admissibility" was rejected. The appellant argued that, with the approach taken, the ***Charter*** was subsumed by the common law, and the right to silence was rendered virtually meaningless.[62] The court therefore directed much of its focus on the relationship between the common law and the ***Charter***.

The court's analysis of this relationship is of interest in that it provides an example of how the interpretation and development of the common law affects

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[60] ***Singh***, *supra* note 5.
[61] *Ibid*. at para. 1.
[62] *Ibid*. at para. 8.

the interpretation and development of the ***Charter***, and vice versa. Some of the observations made by the court in this respect include the following:

- The right to silence existed prior to the Charter, and was "embraced in the common law confessions rule";[63]
- In ***R. v. Hebert***, the Supreme Court's analysis of the right to silence in section 7 of the Charter was "largely informed by the confessions rule";[64] and
- In ***R. v. Oickle***, the Supreme Court's restatement of the rule was, "in turn, largely informed by a consideration of *Charter* principles."[65]

The court's analysis of this relationship is also of interest because, in dismissing the appellant's argument, the court reconciled entirely the common law confessions rule and the right to silence under the ***Charter*** in the case of a detainee:

> The Court of Appeal's impugned comment on the interplay between the confessions rule and s. 7 of the Charter merely reflects the fact that, in the context of a police interrogation of a person in detention, where the detainee knows he or she is speaking to a person in authority, the two tests are functionally equivalent. It follows that, where a statement has survived a thorough inquiry into voluntariness, the accused's Charter application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed. Conversely, if circumstances are such that the accused can show on a balance of probabilities that the statement was obtained in violation of his of her constitutional right to remain silent, the Crown will be unable to prove voluntariness beyond a reasonable doubt.[66]

The court nonetheless found the right to silence in section 7 to contain a residual protection, thus leaving it with some substance independent of the confessions rule.

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[63] *Ibid*. at para. 24.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*. at para. 8.

In ***R. v. Singh***, therefore, the court merged principles from different sources of law to produce a uniform inquiry. Such uniformity is likely to be free of some of the confusion that can arise from a multi-faceted one. However, this result was not produced instantaneously. The process was a lengthy one, and it was evolutionary in nature; it called for a continual reassessment of one principle in the light of changes in the other.

The standard for a search gives rise to a number of issues, and the legal analysis of these issues has not been exhausted. There is room for further examination of the relationship between the common law, the ***Criminal Code***, and the ***Charter***. How the judiciary responds to the challenges attendant with the examination of these issues is not something that lends itself to recommendations. However, there is a role for counsel to play in identifying areas of conflict, delineating the issues, and marshalling the cases necessary for a full examination of them. It is in everyone's interest to facilitate decisions that will assist in bringing clarity to the law. This can only serve to benefit a legal system that has as one of its objectives the promotion of a common understanding of it by a broad spectrum of society.

Closing Comments

Those who are involved with the administration of justice may be understandably concerned by some of the current themes that dominate public discussion of the law. In Canada, the national police force is facing open criticism of it, and it appears to be in crisis.[67] Nationally and internationally, debates above privacy focus on its erosion and a dubious ability to protect what remains of it.[68] Criticism of the legal system extends beyond the issue of its accessibility to the public to the issue of its relevance to it.[69]

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[67] See, as one of example of many, Jonathon Gatehouse & Charlie Gillis, ***What's Really Killing the Mounties***, November 26, 2007, *Macleans*.

[68] See, as one example of many, James Kosa, ***Indexing of personal information puts privacy at risk***, May 30, 2008, *The Lawyers Weekly*, vol. 28, no. 5.

[69] See, as one example of many, Darrell Roberts, ***Unnecessary complexity and expense*** (*Soundoff*), April 30, 2008, *The Vancouver Sun*.

Like others have at different points in history, many may perceive the rule of law to be at a critical juncture. Codification can be instrumental in setting the direction in which to proceed; it serves as a compass for the criminal law. With codification, there is some certainty of direction, as the interpretation and application of the law become less susceptible to changes that might otherwise come with shifts in political climate or popular sentiment. However, what is also required at this juncture is some commonality of direction, brought about by the articulation of principles in a way that that makes it clear to those who enforce the law, as well as to those it protects, the standards that must be adhered to. How to best bring this about is a subject that is worthy of the continuing attention of legal reformists.