
IN THE MATTER OF AN APPLICATION BY THE
 ATTORNEY GENERAL OF CANADA FOR THE
 GRANT OF WRITS OF ASSISTANCE MADE PUR-
 SUANT TO SECTION 143 OF THE CUSTOMS ACT,
 IN THE MATTER OF AN APPLICATION BY THE
 ATTORNEY GENERAL OF CANADA FOR THE
 GRANT OF WRITS OF ASSISTANCE MADE PUR-
 SUANT TO SECTION 78 OF THE EXCISE ACT,
 IN THE MATTER OF AN APPLICATION BY THE
 MINISTER OF NATIONAL HEALTH AND WEL-
 FARE FOR THE ISSUE OF WRITS OF ASSISTANCE
 MADE PURSUANT TO SUBSECTION (3) OF SEC-
 TION 10 OF THE NARCOTIC CONTROL ACT,

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 May 6

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AND IN THE MATTER OF AN APPLICATION BY
 THE MINISTER OF NATIONAL HEALTH AND
 WELFARE FOR THE ISSUE OF WRITS OF ASSIST-
 ANCE MADE PURSUANT TO SUBSECTION (3) OF
 SECTION 36 OF THE FOOD AND DRUGS ACT.

Practice—Crown—“Writs of Assistance”—Applications for the grant of Writs of Assistance—Attorney General of Canada—The Customs Act, R.S.C. 1952, c. 58, s. 143—The Excise Act, R.S.C. 1952, c. 99, s. 73—Minister of National Health and Welfare—The Narcotic Control Act, S. of C. 1960-61, c. 35, s. 10—The Food and Drug Act, S. of C. 1960-61 as amended, c. 38, s. 36(3)—Judge of the Exchequer Court of Canada—“May grant”—“Shall grant”—“Officer”—“Peace officer”.

Writs known as “Writs of Assistance” have issued out of the Exchequer Court of Canada as a matter of course almost since the creation of the Court. Being statutory writs they are, in effect, search warrants unrelated to any particular suspected offence and are issued to members of the R.C.M.P. and other officers in the service of the Government of Canada to have effect as long as the holder continues to hold the position by virtue of which the writ was issued to him.

In view of the extraordinarily wide powers so conferred by statute upon the holder of the writ and of its continuing operation, the Court considered that it was of some importance to examine with care the circumstances in which one of these writs should be issued and the form which it should take, so the official advisers of the Crown were asked to submit their views on these two points.

Held: That under the *Excise Act*, the *Narcotic Control Act* and the *Food and Drugs Act* the issuance of writs of assistance is mandatory upon a judge of the Exchequer Court of Canada on the specified application without any other material except material to show that the person to whom the writ is to issue is an appropriate officer.

2. That under the *Customs Act*, having regard to the fact that the writ of assistance confers authority upon the person named therein to exercise the wide powers of search throughout the whole of his career and without limit as to place, it is very difficult, if not impossible, to conceive of any basis upon which a judicial discretion might be exercised. What advantage does it serve to determine that, at the time of the issuance of the writ, the officer is an appropriate person in whom to vest such extraordinary powers, when, by the terms of the statute, he is to continue to have the powers for a period that may extend to twenty or thirty years? Similarly, it is not possible for the Court to exercise a discretion as to whether the particular circumstances in which the powers of search are to be used are appropriate for the exercise of such wide powers of search.
3. That there being no difference between the desirability of such writs being issued under the *Customs Act* and the desirability of their issuance under the other Acts there is a duty upon a judge of the Exchequer Court, upon receipt of an application from the Attorney General of Canada under section 143 of the *Customs Act* for the issuance of a writ of assistance, to issue the writ of assistance in accordance with the application conditioned only upon his satisfying himself that the person named in the application is an “officer”.

4. That the legislation having ordained that the authority conferred upon a person holding a writ of assistance shall be evidenced in the form of a writ issued out of the Exchequer Court of Canada and the Court having to bow to such statutory direction, nevertheless care must be taken to insure that the writs do not say anything other than that which Parliament has directed and does not contain anything that is calculated to mislead the reader into thinking that the writ is anything other than that which the terms of the legislation require.
5. That, subject to certain changes to be made in the documents, the applications are granted.

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APPLICATIONS by the Attorney General of Canada for the grant of Writs of Assistance pursuant to section 143 of the *Customs Act*.

The applications were heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

D. S. Maxwell, Q.C. and *D. H. Christie* for the application.

The facts and questions of law raised are stated in the reasons for judgment.

JACKETT P. now (May 6, 1965) delivered the following judgment:

These applications for the issuance of Writs of Assistance raise certain questions concerning the documents known as "Writs of Assistance" which issue out of the Exchequer Court of Canada. To my knowledge, such Writs of Assistance have issued out of this Court as a matter of course for many years. Statutes, having their origins in Imperial legislation of the seventeenth century, have required such Writs to be issued by this Court almost since the creation of the Court.

Unlike the common law Writ of Assistance which was a writ in aid of execution, statutory Writs of Assistance are, in effect, search warrants unrelated to any particular suspected offence and of continuing operation, which are issued to members of the Royal Canadian Mounted Police and other officers in the service of the Government of Canada to have effect as long as the holder continues to hold the position by virtue of which the writ was issued to him.

Having regard to the extraordinarily wide powers which are conferred by statute upon the holder of a Writ of Assistance and to the fact that, by statute, such a writ, once issued, continues in effect during the whole of the career of

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the officer to whom it is issued, it is of some importance to consider with care the circumstances in which one of these writs should be issued and the form which the writ should take.

While, as I have already indicated, search warrants in the guise of Writs of Assistance have their origin in Imperial legislation of some antiquity, the Parliament of Canada has enacted legislation for the issuance of Writs of Assistance out of the Exchequer Court of Canada during the present decade. Being contemporary Canadian legislation, it may be interpreted in accordance with the language employed by Parliament without seeking assistance from statutory history.

The legislation authorizing or requiring the issuance of Writs of Assistance may be summarized briefly as follows:

(1) THE CUSTOMS ACT, R.S.C. 1952, CHAPTER 58:

Section 143 provides that a judge of the Exchequer Court of Canada "may grant a writ of assistance to an officer" upon the application of the Attorney General of Canada and that "such writ shall remain in force for as long as the person named therein remains an officer, whether in the same capacity or not". Section 2 defines an "officer" to mean a person employed in the administration or enforcement of the *Customs Act* and to include any member of the Royal Canadian Mounted Police. Section 137 provides that under "the authority of a writ of assistance" any officer "may enter" at any time in the day or night "any building or other place" and "may search for and seize and secure any goods which he has reasonable grounds to believe are liable to forfeiture" under the *Customs Act* and it further provides that "in case of necessity" such officer may break open any doors and any chests or other packages for that purpose.

(2) THE EXCISE ACT, R.S.C. 1952, CHAPTER 99:

Section 78 provides that a judge of the Exchequer Court of Canada "shall grant a writ of assistance" upon application made to him by the Attorney General of Canada and that such writ shall remain in force so long as any person named therein remains an "officer" whether in the same capacity or not. Section 79 provides that a writ of assistance addressed to a collector

or any superior officer shall have full force and effect in the hands of any officer to whom he delegates his authority. Section 2 defines "officer" to include, in addition to excise officers, any member of the Royal Canadian Mounted Police. Section 76 provides that under "authority of a writ of assistance", any officer "may enter" in the night time, if accompanied by a peace officer, and in the day time without being so accompanied, "any building or other place" and that he may "search for, seize and secure any goods or things liable to forfeiture under this Act" and that he may "in case of necessity" break open "any entrance or other doors, walls, floors, windows or gates and any chests or other packages for that purpose". Section 76 further provides that an officer having a writ of assistance "may arrest and detain any person whom he detects in the commission of any offence" declared by the *Excise Act* to be an indictable offence.

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(3) THE NARCOTIC CONTROL ACT, CHAPTER 35 OF THE STATUTES OF 1960-61:

Section 10(3) provides that a judge of the Exchequer Court of Canada "shall, upon application by the Minister, issue a Writ of Assistance" authorizing and empowering the person named therein, aided and assisted by such person as he may require, "at any time" to enter "any dwelling house" and "search for narcotics". Section 10(1) provides that a peace officer may "at any time" under "the authority of a Writ of Assistance" enter and search "any dwelling house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed". Section 10(4) provides that, for the purposes of exercising his authority under section 10, a "peace officer" may, with such assistance as he deems necessary, "break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing".

(4) THE FOOD AND DRUGS ACT, STATUTES OF 1952-53 CHAPTER 38, AS AMENDED BY CHAPTER 37 OF THE STATUTES OF 1960-61:

Section 36(3) provides that a judge of the Exchequer

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Court of Canada “shall, upon application by the Minister, issue a Writ of Assistance” authorizing and empowering the person named therein, aided and assisted by such person as he may require, “at any time”, to enter “any dwelling house” and “search for controlled drugs”. Section 36(1) provides that a peace officer may “at any time” under “the authority of a Writ of Assistance” enter and search “any dwelling house in which he reasonably believes there is a controlled drug by means of or in respect of which an offence under this Part has been committed”. Section 36(4) provides that, for the purpose of exercising his authority under section 36, a “peace officer” may, with such assistance as he deems necessary, “break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing”.

It is to be noted that, while the *Customs Act* provides that a judge of the Exchequer Court “may grant” a Writ of Assistance upon the application of the Attorney General of Canada, the other legislation summarized above provides that a judge of the Exchequer Court of Canada “shall grant” a Writ of Assistance upon the application either of the Attorney General of Canada or the Minister of National Health and Welfare. The first question that arises, therefore, is whether the use of the word “shall” makes it mandatory, in the case of the three statutes, that a judge of the Exchequer Court issue the Writ of Assistance upon the receipt of the specified application without any other material whatsoever except material to show that the person to whom the writ is to be issued is an appropriate officer if the statute limits the issuance of the writ to a specified type of officer. If that be so, and I cannot escape the conclusion that it is so, the further question arises as to whether the use of the word “may” in the corresponding provision in the *Customs Act* means that the statute has conferred a discretion on the Court which must be exercised judicially and which contemplates, therefore, that the application be made upon material which will enable a court to decide, in the case of each application, whether or not the facts are such as to warrant the issuance of the Writ of Assistance. Having regard to the fact that the Writ of Assistance confers authority upon the person named therein to exercise the wide powers of search throughout the whole

of his career and without limit as to place, I find it very difficult, if not impossible, to conceive of any basis upon which a judicial discretion might be exercised. What advantage does it serve to determine that, at the time of the issuance of the writ, the officer is an appropriate person in whom to vest such extraordinary powers, when, by the terms of the statute, he is to continue to have the powers for a period that may extend to twenty or thirty years? Similarly, it is not possible for the Court to exercise a discretion as to whether the particular circumstances in which the powers of search are to be used are appropriate for the exercise of such wide powers of search. Having regard to the extraordinary difficulty, if not impossibility, of exercising any judicial discretion as to whether or not a Writ of Assistance should or should not be issued under the *Customs Act* upon any particular application, and having regard to the fact that the issuance of such writs under the other three statutes referred to above is mandatory upon the specified application, and having regard to my inability to distinguish any difference between the desirability of such writs being issued under the *Customs Act* and the desirability of their issuance under the other Acts, I have come to the conclusion that there is a duty upon a judge of the Exchequer Court, upon receipt of an application from the Attorney General of Canada under section 143 of the *Customs Act* for the issuance of a Writ of Assistance, to issue the Writ of Assistance in accordance with the application conditioned only upon his satisfying himself that the person named in the application is an "officer".

I come now to the question as to the terms which should be employed in framing the Writ of Assistance to be issued pursuant to the various statutes referred to above.

In the first instance, it is to be noted that, if I am right in my construction of the legislation, when a person holding a Writ of Assistance is exercising the powers conferred upon him thereby, he is exercising powers conferred upon him by statute pursuant to designation by the Attorney General of Canada or the Minister of National Health and Welfare, as the case may be, and is not executing an order or judgment of the Exchequer Court of Canada, or a judge thereof. Parliament, in its wisdom, has ordained that the authority conferred upon such officer shall be evidenced in the form of

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a writ issuing out of the Exchequer Court of Canada and the Court must bow to such statutory direction. Nevertheless, in my view, care must be taken to insure that the writs do not say anything other than that which Parliament has directed and does not contain anything that is calculated to mislead the reader into thinking that the writ is anything other than that which the terms of the legislation require.

Accordingly, I am prepared to grant the application for Writs of Assistance under the *Customs Act*, if the body of the writ is revised to read as follows:

You are hereby authorized, pursuant to section 143 of the *Customs Act*, to enter, at any time in the day or night, into any building or other place within the jurisdiction of this Court, to search for and seize and secure any goods which you have reasonable grounds to believe are liable to forfeiture under the *Customs Act*, and, in case of necessity, to break open any doors and any chests or other packages for that purpose.

Witness the President of our Exchequer Court of Canada, at Ottawa, this day of in the year of our Lord one thousand nine hundred and and in the year of our Reign.

and if consequential changes are made in the writ and other documents involved.

In the case of the application under the *Excise Act*, I am prepared to grant the application if the body of the writ is similarly revised to follow closely the language of section 76(1) of the *Excise Act*, and other consequential changes are made.

In the case of the application under the *Narcotic Control Act*, the first paragraph of the body of the writ should be revised to read as follows:

You are hereby authorized and empowered, pursuant to subsection (3) of section 10 of the *Narcotic Control Act*, aided and assisted by such person as you may require, at any time, to enter any dwelling house and search for narcotics.

The second paragraph should correspond to the second paragraph suggested above for the writ under the *Customs Act*. Similarly, the first paragraph of the body of the writ under the *Food and Drugs Act* should follow closely the wording of subsection (3) of section 36 of that Act as amended by the statutes in 1960-61 and other consequential changes made in the documents.

Upon the applications being recast as indicated above, I am prepared to grant the necessary orders.