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Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada

CRIMINAL LAW

# compelling appearance, interim release and pre-trial detention

Working Paper 57

Canada

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**COMPELLING APPEARANCE,  
INTERIM RELEASE AND  
PRE-TRIAL DETENTION**

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COMPELLING APPEARANCE,  
INTERIM RELEASE AND  
PRE-TRIAL DETENTION

1988

## Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will form part of its new Code of Criminal Procedure to be presented in a Report to the Minister of Justice and Parliament after the Commission has taken into account comments received from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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## Introduction

This Working Paper examines several important questions about criminal procedure. How should police or courts compel accused persons or witnesses to attend court for trial? When should police or courts grant “interim release” — popularly known as “bail” — to these persons? When should they impose detention instead of release prior to trial? What should be done to ensure a person’s right to make full answer and defence while in such detention?

The answers to these questions are deduced from general principles governing criminal procedure. These principles evoke a criminal process which seeks fairness yet promotes efficiency, which uses restraint yet protects society, and which seeks clarity and accountability.

The *Bail Reform Act*,<sup>1</sup> proclaimed in 1972 and since amended, is the centrepiece of the present law. That *Act* radically restructured the law of interim release. It promoted fairness by requiring release unless detention was justified. Yet it also promoted efficiency and public safety — the former by ensuring sufficient means to compel an accused to attend court and the latter by ensuring detention where necessary to protect the public.

The purpose of this Working Paper is to promote reform in the spirit of the principles underlying the *Bail Reform Act*. Hence, it examines the present law, exposes any defects that arise by reason of inconsistency with general principles of criminal procedure, and proposes a comprehensive scheme of interim release which properly balances these principles.

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1. R.S.C. 1970 (2nd Supp.), c. 2.

## CHAPTER ONE

### The Present Law

#### I. Police Authority to Compel Appearance, Grant Interim Release or Detain Accused Persons

Traditionally, an accused could be compelled to appear in court to answer a charge in two ways — by means of an arrest, with or without warrant, or by means of a summons. The only power which police had to compel the appearance of the accused without the intervention of a judicial officer was the power to arrest without warrant.<sup>2</sup> A summons and warrant of arrest were issued only after the police laid an information before a justice and the justice decided that a sufficient case had been made out for compelling the accused's attendance in court.

Generally, under the *Criminal Code*, a peace officer can arrest without warrant (a) for indictable offences only, a person who has committed a crime or who the peace officer believes, on reasonable and probable grounds, has committed or is about to commit a crime and (b) for indictable and summary conviction offences, any person who the peace officer finds committing a crime.<sup>3</sup> There is also a power to arrest a person without warrant where the peace officer believes, on reasonable and probable grounds, that a warrant of arrest or committal for that person is in force within the territorial jurisdiction in which the person is found.<sup>4</sup>

While the *Code* provides these broad powers of arrest without warrant, it was for many years silent as to any powers which police might have to release after arrest. The result was that most Canadian police believed that once the accused was arrested and a

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2. At common law, peace officers generally had no power to arrest without warrant for a misdemeanour not involving a breach of the peace. However, where the peace officer believed on reasonable and probable grounds that a person had committed a felony or found a person committing a misdemeanour involving a breach of the peace, there was a power of arrest without warrant. See H.L. Wilgus, "Arrest Without Warrant" (Pts 1-3) (1923-24) 22 Mich. L. Rev. 541 at 703-709 and 673-684. Also, see H.E. Taschereau *The Criminal Code of the Dominion of Canada as Amended in 1893* (Toronto: Carswell, 1893), recently reprinted with a Foreword by the Honourable Fred Kaufman (Toronto: Carswell, 1980), at 618-626.

3. *Criminal Code*, R.S.C. 1970, c. C-34, paras. 450(1)(a), (b) [hereinafter *Code*].

4. *Code*, para. 450(1)(c).

charge was pending, there was no discretion to release prior to first appearance before a justice.<sup>5</sup>

Subsequent legislation,<sup>6</sup> in particular the *Bail Reform Act*, changed all that. Within limits, it created a complex hierarchical scheme of police powers to compel an accused's appearance instead of or after arrest.

The first rung of this hierarchical ladder essentially concerns the investigating peace officer. A peace officer who, in the circumstances, can arrest without warrant is now, for some crimes, under a duty not to arrest rather than arrest and may instead issue an appearance notice.<sup>7</sup> The appearance notice is a document setting out the accused's name and the substance of the alleged crime, and requiring the accused to attend at a specified time and place and to attend thereafter as required by the court.<sup>8</sup> Its issuance is limited to the following crimes: "(a) an indictable offence mentioned in section 483 [namely one which falls within the absolute jurisdiction of a provincial court judge], (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction or (c) an offence punishable on summary conviction."<sup>9</sup> Moreover, the duty not to arrest arises only where, on reasonable and probable grounds, the public interest (including the need to establish the accused's identity, to secure or preserve evidence of the crime or to prevent the continuation or repetition of the crime or the commission of another crime) may be satisfied by non-arrest *and* there are no reasonable grounds to believe that, if not arrested, the accused will fail to attend in court to be dealt with according to law.<sup>10</sup> In

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5. The view was that the prisoner had to be brought before a justice, where there might be a possibility of bail. It was generally thought that a police officer who released a prisoner who was not "bailable" was punishable at common law for a negligent escape or an offence against the provisions of the *Code* concerning bail. See E. Armour, "Bail in Criminal Cases" (1927) 47 C.C.C. 1 at 14. By contrast, in England the custom evolved whereby police might grant bail. See, for example, P. Devlin, *The Criminal Prosecution in England* (London: Oxford University Press, 1960) at 71 and M.L. Friedland, *Detention before Trial* (Toronto: University of Toronto Press, 1965) at 66-68.

6. For example, before the passage of the *Bail Reform Act*, the *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 31 provided that the arresting peace officer could, before delivering the person to a justice within the required period, release the person either unconditionally or with the intention of compelling appearance by way of summons.

7. *Code* subsection 450(2) provides that a peace officer "shall not arrest a person without warrant" who is believed to have committed hybrid offences, or summary conviction offences or indictable offences triable only by a provincial court judge. Section 451 provides that the peace officer may issue an appearance notice instead. Of course, the peace officer may instead decide to seek the issuance of a summons.

8. *Code*, subs. 453.3. These same matters appear on the promise to appear given to, or a recognizance entered into before, an officer in charge. In addition, by *Code* subs. 453.3(3), these documents may require, where the accused has allegedly committed an indictable offence, that he or she appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* (i.e. for fingerprinting or photographing). Subsection 453.3(4) also provides, in relation to these documents, that the accused shall be requested to sign the document in duplicate. However, if the accused fails to do so, the lack of the signature does not invalidate it. But one of the duplicates must be given to the accused.

9. *Code*, s. 451.

10. *Code*, paras. 450(2)(d), (e).



effect, the peace officer is justified in making the arrest unless he is reasonably satisfied that arrest is not necessary.<sup>11</sup>

Even when the peace officer does arrest a person in relation to this category of crimes, he or she is under a duty to release the person “as soon as practicable” either by issuing an appearance notice or with the intention to compel attendance by means of a summons.<sup>12</sup> The peace officer shall release unless there are reasonable and probable grounds to believe that it is necessary in the public interest (defined in the same way as above) to detain the accused or to have the matter of release dealt with by another provision of interim release under Part XIV or that, if released, the accused will fail to attend in court to be dealt with according to law.<sup>13</sup> Here, the onus shifts upon the peace officer to justify custody after arrest.<sup>14</sup>

However, where a peace officer arrests without warrant a person “about to commit an indictable offence,” he or she is under a duty to release the person unconditionally “as soon as practicable” once satisfied that detention is no longer necessary to prevent commission of the crime.<sup>15</sup>

The second rung of this hierarchical ladder concerns the “officer in charge.” Even if the arresting officer does not release, an “officer in charge” can do so where the accused has not yet been taken before a justice.<sup>16</sup> This is “the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest,” or a peace officer so designated by him or her who is in charge of such place.<sup>17</sup> The officer in charge is under a duty to release not only in relation to those crimes for which a peace officer is obliged to release a person, but also in relation to any other indictable offence punishable by imprisonment for five years or less.<sup>18</sup> The officer in charge may release either with the intention of summoning the person or upon the person giving or entering into: (a) a promise to appear in court, (b) a recognizance without sureties of no more than five hundred dollars without deposit, or (c) if the person is not ordinarily resident in the province or within two hundred kilometers of the place of custody, a recognizance without sureties of no more than five hundred dollars which can include a monetary or other valuable security deposit up to five hundred dollars.<sup>19</sup> The officer in charge shall release unless he or she has reasonable grounds to believe that it is necessary in the public interest (defined in the same way as for arresting peace officers) to detain or to have the matter of release dealt with by another provision of Part XIV or that, if released, the accused

11. For a discussion of the “on-the-spot” nature of issuing an appearance notice instead of making an arrest, see J. Scollin, *Pre-trial Release*, 2nd ed. (Toronto: Carswell, 1977) at 22-23.

12. *Code*, paras. 452(1)(a) — (e).

13. *Code*, paras. 452(1)(f), (g).

14. See Scollin, *supra*, note 11 at 27.

15. *Code*, subs. 454(3). This also applies to an officer in charge, to be discussed later in this Working Paper.

16. *Code*, subs. 453(1). This also applies where a private citizen arrests a person pursuant to s. 449, and forthwith delivers him or her to a peace officer.

17. *Code*, s. 448.

18. *Code*, para. 453(1)(d).

19. *Code*, paras. 453(1)(e), (f), (g), (h).

will fail to attend in court.<sup>20</sup> Where the arrest is made with warrant for these same crimes and the justice has so endorsed on the warrant, the officer in charge may also release the accused upon the accused's giving a promise to appear or entering into a recognizance.<sup>21</sup>

Although this hierarchical scheme imposes a duty either not to arrest or to release after arrest, a failure to adhere to it does not jeopardize the authority of the peace officer. Where the peace officer or officer in charge fails to release in accordance with these duties, he or she is nonetheless deemed to be acting in the execution of duty so as to avoid criminal, if not necessarily civil, liability.<sup>22</sup> Moreover, the duty to release does not apply where a peace officer arrests a person without warrant for a crime described in subsection 454(2) of the *Code*, that is, an indictable offence allegedly committed in Canada outside the province in which he or she was arrested.<sup>23</sup> Such a person must be taken before a justice within whose jurisdiction the accused was arrested.<sup>24</sup>

In essence, the scheme described above couples a power to arrest with reciprocal duties either not to arrest or to release after arrest, with the scope of these duties hinging on two critical factors: (a) the status of the peace officer either as a peace officer or an officer in charge and (b) the type of crime alleged to have been committed. If this were all that is involved in the scheme, it would be clearly understandable as one which confers on more senior police officials exclusive competence to deal with release in relation to more serious crimes.

However, the *Code* injects further complexity into this scheme by providing for an apparently broad discretionary power to release which blurs the distinction between a peace officer and officer in charge and the distinction between less serious and more serious crimes. Paragraph 454(1)(d) and subsection (1.1) appear to permit a peace

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20. *Code*, paras. 453(1)(i), (j).

21. *Code*, s. 453.1.

22. *Code*, subs. 450(3), 452(3), 453(3). These identical provisions deal respectively with the peace officer who arrests without warrant instead of issuing an appearance notice, the peace officer who after arresting without warrant does not issue an appearance notice, and the officer in charge who refuses to release. They provide that a peace officer who fails to release in accordance with his or her duties under those sections "shall be deemed to be acting lawfully and in the execution of his duty" for the purposes of: (a) any proceedings under the *Code* or any other act of Parliament, and (b) any other proceedings unless the person alleges and establishes that the peace officer did not comply with those statutory requirements.

23. *Code*, subs. 452(2), 453(2).

24. *Code*, subs. 454(2). If not satisfied that there are reasonable and probable grounds to believe that the arrested person is the person alleged to have committed the crime, the justice must release. If satisfied that such grounds exist, the justice has two options. He or she may remand the arrested person to the custody of a peace officer to await execution of a warrant of arrest. But if no warrant is executed within six days after the time of remand, the peace officer having custody of the arrested person must release him or her. Or, with the consent of the prosecutor, the justice may order release of the arrested person pending execution of the warrant either unconditionally or pursuant to an undertaking or recognizance that a justice may order pursuant to paras. 457(2)(a) to (d) with such conditions described in subs. 457(4) as the justice considers desirable and to which the prosecutor consents.

officer or officer in charge to release a person arrested with or without warrant unconditionally or conditionally in relation to any crime except a section 427 crime.<sup>25</sup>

In the event that the accused is not released by the police, a judicial determination of release or detention must be promptly made. Thus, where the accused has been arrested by or delivered to a peace officer, the peace officer must cause him or her to be detained and taken before a justice: (a) where a justice is available within twenty-four hours after arrest by or delivery to a peace officer, without unreasonable delay and in any event within the twenty-four-hour period, or (b) where a justice is not available within those twenty-four hours, as soon as possible,<sup>26</sup> unless the accused has been otherwise released.<sup>27</sup>

## II. Judicial Authority to Compel Appearance, Grant Interim Release or Detain Accused Persons

Generally, judicial authority to compel appearance arises after a person (usually a peace officer) lays an information before a justice.<sup>28</sup> Traditionally, after the information was laid and a case was made out for issuing process at an *ex parte* hearing,<sup>29</sup> a justice

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25. For a discussion of the complexities and ambiguities of these subsections, see S. Cohen and P. Healy, "A Technical Note on Subsection 454(1.1) of the Criminal Code and the Release Powers of Peace Officers" (1981-82) 24 *Crim. L.Q.* 489.

26. *Code*, paras. 454(1)(a), (b).

27. *Code*, paras. 454(1)(c), (d).

28. *Code* s. 455 provides that "[a]ny one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information ...." Nevertheless, police officials interviewed by the principal consultant indicate that the vast majority of informations are sworn by peace officers.

29. The procedure regulating the laying of informations and the issuance of process is not set out in great detail in the *Code*. The *Code* merely states, in subs. 455.3(1), that the justice "shall ... hear and consider, *ex parte*, (i) the allegations of the informant, and (ii) the evidence of witnesses, where he considers it desirable or necessary to do so ...." The use of the Latin phrase *ex parte*, of course, means that the justice need only hear one side of the complaint — the allegations from the informant and supporting witnesses. Nevertheless, the courts require certain minimum standards of procedural fairness. The receipt of the information has been held to be the exercise of a ministerial rather than a judicial function, so that in accordance with the literal wording of section 455 "the justice shall receive the information" and may not refuse to do so. *R. v. Jean Talon Fashion Centre Inc.* (1975), 22 C.C.C. (2d) 223 (Qué. Q.B.). This may inhibit justices from bowing to improper pressures to prevent the commencement of a criminal proceeding, and may be thought to be an element in the democratic safeguard of the private prosecution. Perhaps more importantly, the decision whether or not to issue process has been held to be the exercise of a judicial function, even if on an *ex parte* basis. *R. v. Coughlan, ex parte Evans* (1969), [1970] 3 C.C.C. 61 (Alta. S.C.); *R. v. Allen* (1974), 20 C.C.C. (2d) 447 (Ont. C.A.). A justice's refusal to issue process based on extraneous considerations or the failure to hold a hearing may give rise to judicial review by virtue of a prerogative writ. *Re Blythe and The Queen* (1973), 113 C.C.C. (2d) 192 (B.C.S.C.); *Re Swan and Tavrydas and the Queen, ex parte Syme* (1979), 48 C.C.C. (2d) 501 (Ont. H.C.).

could issue either a summons or warrant to compel appearance.<sup>30</sup> However, the *Bail Reform Act* changed this. First, it created a separate route for laying informations where a peace officer or officer in charge issued an appearance notice, promise to appear or recognizance. Second, it created a system that imposed on the justice more precise rules governing the manner of compelling appearance (i.e. summons or warrant), release, or detention.

A summons or warrant used to serve as the first notice an accused had of the charge against him or her after the laying of the information. However, when the *Bail Reform Act* introduced the new police means of compelling attendance by way of an appearance notice, promise to appear, or recognizance, this process was reversed. The appearance notice, etc. gives the accused first notice of the time and place of attendance *before* the information is laid. Thus, the *Code* provides that where these documentary notices have been issued, the peace officer must lay an information relating to the crime allegedly committed or to an included or other crime allegedly committed by the accused before a justice “as soon as practicable thereafter and in any event before the time stated” for attendance in court in the documentary notice.<sup>31</sup> Failure to comply with the time limits for laying the information renders the previous documentary notice ineffective, so that no adverse legal consequences arise from failure to comply with these documentary notices.<sup>32</sup>

Of course, a peace officer may decide to compel appearance by using the traditional route of laying an information before a justice, who then decides, if a case is made out, whether to issue a summons or warrant. The *Code* now provides a strict rule governing the issuance of a summons or warrant of arrest. A summons<sup>33</sup> must be

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30. Prior to the *Bail Reform Act*, para. 454(1)(b) of the *Code* provided that a justice who received an information “shall ... issue, where he considers that a case for so doing is made out, a summons or warrant, as the case may be, to compel the accused to attend before him.” No other criteria for issuing these documents, especially for preferring a summons over a warrant, existed in the statute. Nonetheless, it was “clear law that a justice should not issue a warrant of arrest when a summons would be sufficient.” See Friedland, *supra*, note 5 at 21.

31. *Code*, s. 455.1.

32. Thus, where the information is not laid within these time limits, a failure to appear in contravention of these documentary notices will not render the accused liable for failure to appear under subs. 133(5) of the *Code*, and will not support the issuance of a bench warrant under subs. 456.1(2). However, the information itself remains valid so that, should the accused appear in court in response to the unconfirmed notice, the court gains jurisdiction to hear the case. See, e.g., *R. v. Naylor* (1978), 42 C.C.C. (2d) 12 (Ont. C.A.); *R. v. Wetmore* (1976), 32 C.C.C. (2d) 347 (N.S.S.C. App. Div.).

33. Section 455.5 of the *Code* sets out what the summons must contain and the manner of its service. In short, it shall be directed to the accused, set out briefly the crime the accused is charged with and require the accused to attend court at a time and place stated therein and to attend thereafter as the court requires. It may, where a person is charged with an indictable offence, require that person’s attendance at a time and place for the purposes of the *Identification of Criminals Act*. A peace officer must serve the summons either personally on the accused, or, if that person cannot conveniently be found, leave it at that person’s last or usual place of abode with a person there who appears to be at least sixteen years old.

used instead of a warrant<sup>34</sup> unless there are reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant of arrest.<sup>35</sup> As noted earlier, where the warrant of arrest relates to a crime for which an officer in charge could release, the justice may endorse the warrant to authorize such release by the officer in charge.<sup>36</sup>

There are also other *Code* provisions dealing with the use of a summons or warrant to compel appearance. Where notice of the recommencement of proceedings has been given following a stay, or an indictment has been filed with the court before which the proceedings are to commence or recommence, the court, if it considers it necessary, may issue a summons or warrant to compel the accused's attendance.<sup>37</sup> In addition, subsection 455.3(8) provides a justice with the power to compel the accused's attendance by summons or warrant where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered. There is also a "residual" arrest warrant power that provides that, even though the accused has been compelled to appear by methods of compelling appearance other than a summons or warrant of arrest (for example, an appearance notice, promise to appear, or recognizance or the issuing of a summons), a justice can issue a summons or warrant of arrest where there are reasonable and probable grounds to believe that it is necessary in the public interest to do so.<sup>38</sup>

The *Code* also provides for the issuance of a warrant by a provincial coroner after the coroner's inquest, in provinces where coroners still exercise powers under the appropriate provincial legislation.<sup>39</sup> Where the verdict of a coroner's inquest alleges that a person has committed murder or manslaughter, the coroner must either (a) direct by warrant that the person be taken into custody and taken before a justice as soon as possible or (b) direct the person to enter into a recognizance before him or her, with or without sureties, to appear before a justice.<sup>40</sup>

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34. Subs. 456(1) of the *Code* provides that a warrant shall order that the accused be arrested forthwith and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law. It must name or describe the accused, and set out briefly the crime that the accused is charged with. By subs. 456(2), a warrant remains in force until executed.

35. *Code*, subs. 455.3(4).

36. *Code*, subs. 455.3(6), s. 453.1.

37. *Code*, subs. 507.1(1). Where the Attorney-General directs a stay of proceedings, a notice of recommencement must be given within the appropriate time limits. By subs. 507.1(2), the provisions of Part XIV apply *mutatis mutandis* to the issuance of such a summons or warrant.

38. *Code*, subs. 456.1(1).

39. The office of coroner is a venerable institution at common law, the purpose of which is to enquire into causes of death where the circumstances indicate foul play or potential criminal responsibility. See Sir J.F. Stephen, *A History of the Criminal Law of England* (1883, reprinted New York: Burt Franklin, 1964), vol. I, at 216-219. While some provinces still have coroners (e.g. Ontario), others now have the functions of coroner carried out by persons entitled "medical examiners" (e.g. Alberta). See the *Coroner's Act*, R.S.O. 1980, c. 93 and the *Fatality Inquiries Act*, R.S.A. 1980, c. F-6.

40. *Code*, s. 462. By subs. 462(2), once the coroner has so directed, he or she shall transmit to the justice the evidence taken before him or her in the matter.

The *Bail Reform Act* also created more precise rules imposing upon justices, for the most part, a duty to release unless detention is shown to be justified. The basic thrust of the scheme is as follows.

First, a justice having appropriate jurisdiction, usually a provincial court judge, should decide whether to release for all crimes other than section 427 crimes.<sup>41</sup> For these section 427 crimes — that is to say murder, treason, piracy, and the other crimes listed therein — only a judge of or presiding in a superior court of criminal jurisdiction for the province in which the accused is charged can decide whether or not to release.<sup>42</sup>

Second, unless the accused pleads guilty and the plea is accepted, the justice must order the accused released upon the accused's giving an undertaking without conditions unless the prosecutor, having been given a reasonable opportunity to do so, shows cause why the detention of the accused is justified, or why an order for release upon giving an undertaking with conditions or entering into a recognizance should be made.<sup>43</sup> The justice has jurisdiction to hear the interim-release application even though the accused is detained in custody on another matter although, if release is ordered, it must be a release upon conditions.<sup>44</sup> However, the scheme changes when an accused is charged (a) with an indictable offence, other than one listed in section 427, allegedly committed while he or she was already on release pursuant to the general release scheme or pending appeal in respect of another indictable offence, (b) with an indictable offence, other than one listed in section 427, when not ordinarily resident in Canada, (c) with one of the crimes under *Code* subsections 133(2) to (5) governing breach of the interim-release provisions allegedly committed after being released pursuant to the general release scheme or pending appeal or (d) with having committed or conspiring to commit the crimes in section 4 or 5 of the *Narcotic Control Act*<sup>45</sup> (namely trafficking, or exporting or importing). In these cases, the justice must order the accused's detention unless the accused shows cause why his or her detention is not justified.<sup>46</sup>

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41. See *Code* subs. 457(1) which excepts an accused charged with a crime listed in s. 427 from the general provisions of judicial interim release laid down in s. 457.

42. *Code*, s. 457.7.

43. *Code*, subs. 457(1). By subs. 457(5), where the justice orders the detention of the accused, he or she must include in the record a statement of the reasons for making the order. By subs. 457.3(2), where the justice accepts the guilty plea of the accused, he or she may make any order provided by Part XIV for the release of the accused until sentence is imposed.

44. Prior to the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, subs. 457(1) exempted from its ambit a person "who is not required to be detained in custody in respect of any other matter." As a result, cases were divided as to whether a justice had any jurisdiction at all to hear an application for interim release where the accused was in custody on another charge. Eventually, courts of appeal resolved the issue by holding that a justice had jurisdiction to hear an application for interim release subject to the caveat that he or she could not release the accused unconditionally. See, e.g., *R. v. Adams* (1978), 6 C.R. (3d) 257 (B.C.C.A.); *R. v. Bazouzi* (1983), 33 C.R. (3d) 272 (Ont. C.A.). Subs. 84(1) of the *Criminal Law Amendment Act 1985* clarified subs. 457(1) by deleting the above wording and providing instead that "where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice."

45. R.S.C. 1970, c. N-1.

46. *Code*, subs. 457(5.1). Where the accused does show cause why detention is not justified, and is thereby released, the justice must include in the record a statement of his or her reasons for making the order.

Even if the prosecutor convinces the justice not to release the accused on an undertaking without conditions, the *Code* provides for a variety of flexible interim-release terms. Subsection 457(2) provides the following release mechanisms that the justice may order the accused to enter into:

- (a) an undertaking with such conditions as the justice directs;
- (b) a recognizance without sureties or deposit but in such amount and with any conditions as the justice directs;
- (c) a recognizance with sureties in such amount and with any conditions as the justice directs but without deposit;
- (c.1) with the consent of the prosecutor, a recognizance without sureties but in such amount and with such conditions and a deposit as the justice directs; or
- (d) if the accused is a non-resident of the province, or not ordinarily resident within two hundred kilometres of the place of custody, a recognizance with or without sureties, with a deposit and with such conditions and in such amount as the justice directs.

By subsection 457(3), the justice shall not make an order under paragraphs 457(2)(b) to (d) unless the prosecutor shows cause why an order under “the immediately preceding paragraph” should not be made. Thus, these provisions are known as the “ladder” provisions, because the prosecutor must show cause why the lowest rung of the ladder (the least severe release mechanism) is not appropriate for release before proceeding to the higher rungs of the ladder (the more severe release mechanisms).<sup>47</sup>

Of course, the prosecutor can instead show cause why the detention of the accused is justified. A justice shall order detention of an accused only on two grounds:

- (a) the primary ground that detention is necessary to ensure the accused’s attendance in court in order to be dealt with according to law; or
- (b) if the primary ground is not satisfied, on the secondary ground that the accused’s detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or an interference with the administration of justice.<sup>48</sup>

By contrast, the *Bail Reform Act* created less stringent rules governing interim release for judges of the superior courts of criminal jurisdiction who hear applications for release from those charged with section 427 crimes. Two major differences stand out. First, the onus is on the accused to prove that his or her detention is not justified under the primary and secondary grounds given above.<sup>49</sup> Courts are divided over

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47. See, e.g., *R. v. Horvat* (1972), 9 C.C.C. (2d) 1 (B.C.S.C.); *R. v. Thompson* (1972), 7 C.C.C. (2d) 70 (B.C.S.C.).

48. *Code*, subs. 457(7).

49. *Code*, subs. 457.7(2).

whether this offends the *Canadian Charter of Rights and Freedoms*.<sup>50</sup> Second, even if the accused does prove this, the judge still has a discretion not to release.<sup>51</sup>

By section 457.2, the justice may, upon the application of the accused, order a temporary ban on the publication of the evidence taken, or reasons given by the justice, during the show-cause hearing. Section 457.3 permits broad scope to hear evidence. These same provisions generally apply to show-cause hearings held before a judge for section 427 crimes.<sup>52</sup> A justice may make inquiries, on oath or otherwise, about the accused "as he considers desirable."<sup>53</sup> The prosecutor may lead relevant evidence which includes evidence about the accused's previous convictions or crimes under section 133, charges not yet tried, or the circumstances of the alleged crime as they relate to the probability of conviction.<sup>54</sup> By recent amendment, the justice may now clearly receive evidence obtained from a wiretap under Part IV.1 of the *Code*, even though the accused receives no notice as otherwise required by subsection 178.16(4).<sup>55</sup> However, no one shall examine or cross-examine the accused as to the crime with which he or she is charged.<sup>56</sup> On its face, this provision prevents defence counsel from examining their own clients. This gives rise to constitutional difficulties. In *R. v. Millar*,<sup>57</sup> it was held that this violated section 7 of the *Charter* because it contravened the fundamental principle of justice that a person should be allowed to state his or her case (namely the *audi alteram partem* rule).

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50. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. For example, *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.) and *R. v. Dubois (No. 2)* (1983), 8 C.C.C. (3d) 344 (Qué. S.C.) have both found that the reverse onus provision in effect for "major" crimes did not offend the "reasonable bail" and other *Charter* guarantees. By contrast, *R. v. Pugsley* (1982), 2 C.C.C. (3d) 266 (N.S.S.C., App. Div.) found that it violated the "reasonable bail" guarantee.

51. Subs. 457.7(1) provides that the judge of a superior court of criminal jurisdiction "may release the accused" [emphasis added]. Cases interpreting the precursor to this subsection, which also used the words "may release," held that there is a residual discretion given to such judges not to release even when the accused shows that his or her detention is not otherwise justified within the meaning of subs. 457(7). See *R. v. Smith* (1973), 13 C.C.C. (2d) 374 (N.B.S.C. App. Div.); *R. v. West* (1972), 9 C.C.C. (2d) 369 (Ont. C.A.).

52. *Code*, subs. 457.7(3).

53. *Code*, para. 457.3(1)(a).

54. *Code*, para. 457.3(1)(c).

55. *Code*, para. 457.3(1)(d.1).

56. *Code*, para. 457.3(1)(b).

57. (1983), 7 C.C.C. (3d) 286 (Qué. S.C.).



### III. Continuation, Variance and Review of Police and Judicial Interim Release or Detention

There is a limited judicial review of police authority to compel attendance by way of an appearance notice, promise to appear, or recognizance. To be effective, these documentary notices must be confirmed by a justice in an *ex parte* hearing.<sup>58</sup> If no case is made out for requiring the accused to attend, the justice must cancel the previous documentary notice and cause the accused to be notified of this forthwith.<sup>59</sup> If a case is made out, the justice must either confirm the previous notice,<sup>60</sup> or cancel it and instead issue a summons or warrant of arrest.<sup>61</sup> However, there is no judicial power to review the conditions of a recognizance entered into before an officer in charge.

Where an accused has not been taken into custody or has been released from custody because of the interim-release provisions outlined earlier, the appearance notice, summons, promise to appear, undertaking or recognizance generally continues in force until the completion of the trial and sentencing, if any, for crimes which are not section 427 crimes, and until the completion of the trial for section 427 crimes.<sup>62</sup> These documentary notices also govern compelling appearance in respect of a new information which charges the same or an included crime.<sup>63</sup>

Nonetheless, the prosecutor or accused can apply to an appropriate justice, judge or court to have the previous order vacated and a new one substituted.<sup>64</sup> This is done where circumstances coming to light after the original release or detention order is made throw its effectiveness into doubt.<sup>65</sup> An order to vacate is made only on "cause being shown."<sup>66</sup>

Moreover, where one of the parties is dissatisfied with the original judicial order or order to vacate and wishes to challenge it, the *Code* provides a review procedure.

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58. *Code*, para. 455.4(1)(a).

59. *Code*, para. 455.4(1)(c).

60. *Code*, subpara. 455.4(1)(b)(i).

61. *Code*, subpara. 455.4(1)(b)(ii).

62. *Code*, subs. 457.8(1).

63. *Code*, subs. 457.8(1), (1.1).

64. *Code*, subs. 457.8(2). The application may be made before the court, judge or justice at any time during trial, before the justice on completion of the preliminary inquiry on any "ordinary" offence where the accused is ordered to stand trial, or, generally, with the consent of the prosecutor and the accused, at any time (a) where an "ordinary" offence is charged, before the justice who made the order or any other justice, (b) where a section 427 offence is charged, before a judge of a superior court of criminal jurisdiction for the province, or (c) before the court, judge or justice before whom the accused is to be tried.

65. *R. v. Morgan, Trevors, Gingras & Kocaj* (1978), 4 C.R. (3d) 248 (Qué. S.C.); *R. v. Braithwaite* (1980), 57 C.C.C. (2d) 351 (N.S.S.C., App. Div.).

66. *Code*, subs. 457.8(2). If the previous order is vacated, the justice, judge or court, as the case may be, may make any order for release or detention provided for in the scheme of judicial interim release that he or she considers to be warranted.

But there are two different review procedures: one for crimes other than section 427 crimes; the other for section 427 crimes.

For other than section 427 crimes the prosecutor or accused has, if he or she so chooses, an automatic right to a review of a justice's order before a judge at any time before the trial of the charge.<sup>67</sup> The applicant must give prior notice to the other party, and show cause why the application should be allowed.<sup>68</sup> A judge who allows the application has the same power to make an order as a justice at first instance.<sup>69</sup> Once the decision is reviewed, thirty days must pass before another application for review is made, except with leave of a judge.<sup>70</sup>

For section 427 crimes, the decision of the judge may be reviewed by the court of appeal upon the direction of the chief justice.<sup>71</sup> Thus, there is no automatic right to a review here as there is for "ordinary" crimes. If review is granted and if the court of appeal does not confirm the previous decision, it may vary it or substitute such other decision as, in its opinion, should have been made.<sup>72</sup>

A controversy has arisen as to the nature of the review of the justice's order for release or detention in relation to all crimes other than section 427 crimes. One view is that the hearing is in the nature of an appeal "on the record." This restricts the judge's power to vacate the order to those occasions when the justice erred in law or in principle.<sup>73</sup> The second view is that the hearing is a *de novo* proceeding in which additional evidence may be tendered. Here, the judge may simply substitute his or her discretion for that of the justice.<sup>74</sup> A third view is that the hearing is a "hybrid," basically in the nature of an appeal but having qualities of a *de novo* hearing. This requires the judge not to substitute his or her discretion for that of the justice unless the justice has erred in law, exceeded his or her jurisdiction, or seriously erred in his or her appreciation of the facts, but the petitioner may present new evidence or suggest inferences which may not have been put before the justice.<sup>75</sup> No uniform resolution of this controversy has yet been attained.<sup>76</sup> By contrast, where the court of appeal reviews

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67. *Code*, ss. 457.5, 457.6. Section 448 defines a "judge" for the various provinces and territories.

68. *Code*, subs. 457.5(2), para. (7)(e); subs. 457.6(2), para. (8)(e).

69. *Code*, paras. 457.5(7)(e); 457.6(8)(e).

70. *Code*, subs. 457.5(8); 457.6(9).

71. *Code*, subs. 608.1(1).

72. *Ibid.*

73. *R. v. Lesage* (1975), 25 C.C.C. (2d) 173 (Qué. Ct. of Sessions of the Peace); *R. v. DiMatteo* (1981), 60 C.C.C. (2d) 262 (B.C.C.A.); *Hunter v. R.* (1973), 24 C.R.N.S. 197 (Ont. Co. Ct.).

74. *Re Powers and the Queen* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.); *R. v. Thompson* (1972), 7 C.C.C. (2d) 70 (B.C.S.C.); *R. v. Carrier* (1979), 51 C.C.C. (2d) 307 (Man. C.A.); *R. v. Avadluk* (1979), 24 A.R. 530 (N.W.T. S.C.).

75. *R. v. Dickie* (1979), 14 C.R. (3d) 110 (Qué. Ct. of Sessions of the Peace); *R. v. Ghannime* (1980), 18 C.R. (3d) 186 (Qué. S.C.); *A.G. Canada v. Bradley* (1977), 1 C.R. (3d) 28 (Qué. S.C.).

76. For a discussion of this controversy, see P. Béliveau, J. Bellemare and J.-P. Lussier, *On Criminal Procedure*, trans. J. Muskatel (Cowansville: Éditions Yvon Blais, 1982) at 261-262.

an order of a superior court judge in relation to a section 427 crime, the review is in the nature of an appeal on the record. While there is no right to submit additional evidence, the court may permit a party to submit new evidence.<sup>77</sup>

#### IV. Review of Detention Because of Delay of Trial

Where an accused charged with a crime other than a section 427 crime is detained in custody and is not required to be detained in respect of any other matter and the trial has not commenced (a) for an indictable offence, within ninety days or (b) for a summary conviction offence, within thirty days,<sup>78</sup> the person having custody of the accused must apply to an appropriate judge to have a date fixed for a hearing to determine whether continued detention is justified.<sup>79</sup> At this hearing, the judge may consider whether the prosecutor or accused has been responsible for any unreasonable delay of the trial.<sup>80</sup> If not satisfied that continued detention is justifiable on the primary and secondary grounds outlined earlier, the judge must order release by way of an undertaking with conditions or a recognizance, with such conditions as considered desirable.<sup>81</sup> Whether the accused is released or not, the judge must give directions for expediting the trial.<sup>82</sup>

Subject to this one mandatory requirement to give directions for expediting the trial, a court, judge or justice before whom an accused appears pursuant to Part XIV *may* give directions for expediting the proceedings.<sup>83</sup> This appears to apply to all crimes, whether or not the accused is detained. However, for section 427 crimes, there is no automatic right similar to section 459 to a review of detention where trial is delayed.

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77. See, e.g., *R. v. West* (1972), 9 C.C.C. (2d) 369 (Ont. C.A.); *R. v. Smith* (1973), 13 C.C.C. (2d) 374 (N.B.S.C. App. Div.).

78. These periods begin to run from (a) the day on which the accused was taken before a justice under s. 454 (i.e. the date of first appearance) or (b) the day on which the accused was taken into custody pursuant to an order for detention made under ss. 457.6 or 458 of the *Code* (i.e. where detention is ordered following a hearing for review of a justice's order applied for by the prosecutor or one for the accused's failure to abide by the terms governing his or her initial release).

79. *Code*, subs. 459(1).

80. *Code*, subs. 459(3).

81. *Code*, subs. 459(4).

82. *Code*, subs. 459(9).

83. *Code*, s. 459.1.

## V. Release and Detention After Trial

For indictable offences, a person convicted at trial who seeks release pending appeal must apply to a judge of the court of appeal.<sup>84</sup> The judge has a discretionary power to release.<sup>85</sup> Where the appeal or application for leave to appeal is against conviction, the judge may only release if the appellant establishes that: (a) the appeal or application for leave to appeal is not frivolous, (b) he or she will surrender into custody as required, and (c) detention is not necessary in the public interest.<sup>86</sup> Where the appeal is against sentence, one ground of appeal is altered. Instead of establishing non-frivolity, the appellant must establish that the appeal has sufficient merit that, in the circumstances, custody would cause unnecessary hardship.<sup>87</sup> Where the judge refuses to release the applicant, he or she may give such directions as thought necessary to expedite the hearing of the appeal.<sup>88</sup> The judge's decision may, upon the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court.<sup>89</sup>

For summary conviction crimes, a person who seeks release pending appeal of conviction or sentence may, except where otherwise provided by law, apply to the "appeal court."<sup>90</sup> The appeal court can order a variety of release mechanisms.<sup>91</sup> Although the *Code* does not provide guidelines as to when release should be ordered, the case-law has held that the judge should apply the principles provided in section 608 for indictable offences, although given the less serious nature of summary conviction offences it may be more appropriate to apply them liberally.<sup>92</sup> Where a convicted person is detained in custody pending the hearing of the appeal and the hearing has not commenced within thirty days of the day on which notice of appeal was given, the person having custody of the appellant must, forthwith upon the expiration of those thirty days, apply to the appeal court to fix a date for the hearing.<sup>93</sup> The appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing and give such directions as thought necessary for expediting the appeal.<sup>94</sup> Where a party believes that a conviction, judgement, verdict of acquittal or other final order or determination of a summary conviction court is erroneous in law, is in excess

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84. *Code*, s. 608.

85. Section 608 provides that the judge of the court of appeal "may ... release" [emphasis added].

86. *Code*, subs. 608(3).

87. *Code*, subs. 608(4).

88. *Code*, subs. 608(10).

89. *Code*, s. 608.1.

90. *Code*, ss. 748, 752. Section 747 defines an "appeal court" for the various provinces and territories.

91. See *Code*, s. 752. The appeal court can order release of the person in custody upon his or her giving an undertaking, with or without conditions, to surrender into custody in accordance with the order, to enter into a recognizance without sureties in such amount, with any conditions, but without deposit, as the appeal court directs, or to enter into a recognizance with or without sureties in such amount, with any conditions, and with a deposit as the appeal court directs.

92. *R. v. Simpson* (1978), 44 C.C.C. (2d) 109 (Ont. Co. Ct.)

93. *Code*, s. 752.3.

94. *Ibid.*

of jurisdiction, or constitutes a refusal or failure to exercise jurisdiction, he or she may summarily appeal on a transcript or an agreed-upon statement of facts to the superior court of criminal jurisdiction for the province.<sup>95</sup> For this summary appeal, the previous provisions generally apply.<sup>96</sup>

For indictable offences, where the Supreme Court of Canada or the court of appeal orders a new trial or hearing, or the minister of Justice directs a new trial or hearing or refers the matter to the court of appeal pursuant to section 617 of the *Code*, the person seeking release has the onus of establishing the same conditions as a person seeking release who appeals against conviction to the court of appeal.<sup>97</sup> For summary conviction crimes, if the appeal court orders a new trial, it has the discretion to make any order of release or detention as a justice may make under the general scheme of interim release.<sup>98</sup>

## VI. Means of Ensuring Compliance with the Scheme of Interim Release

The *Code* has several means available to ensure compliance with the scheme of interim release, once a decision has been made to release the accused.

What happens when there has been a breach, or apprehended breach, of interim-release provisions? The person on release may be (a) guilty of a crime, (b) subject to arrest, or (c) for recognizances, subject to forfeiture of any money pledged in order to ensure compliance with the conditions of the recognizance.

First, subsections 133(2) to (5) of the *Code* make it a crime to fail, without lawful excuse, the proof of which lies upon the accused, (a) to attend court pursuant to an undertaking or recognizance entered into before a justice or judge or, having appeared before a court, justice, or judge, to attend as thereafter required, (b) to comply with a condition of such an undertaking or recognizance given to or entered into before a justice or judge or (c) to appear at a time and place for the purposes of the *Identification of Criminals Act* (namely for fingerprinting or photographing for an indictable offence) where so required by a summons, or an appearance notice, promise to appear or recognizance entered into before a peace officer or officer in charge confirmed by a justice, or to attend court in accordance therewith.

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95. *Code*, ss. 761, 762.

96. Section 763 provides, in relation to this summary appeal, that ss. 752, 752.1, 752.3 and 757 apply, with such modifications as the circumstances require, except that, in the case of a person having custody of an appellant detained for more than thirty days who applies to have a date appointed for the hearing of an appeal, that appeal court, after giving the prosecutor a reasonable opportunity to be heard, shall give such directions as it thinks necessary for expediting the hearing of the appeal.

97. *Code*, subs. 608(7).

98. *Code*, subs. 755(3).

Second, the *Code* has numerous arrest provisions. Some of these relate to specific breaches of interim release. A justice may issue a warrant of arrest (a) for failure to appear at a time and place for purposes of the *Identification of Criminals Act* where so required by a summons or by the documentary notices issued by the police and confirmed by a justice<sup>99</sup> or (b) for failure to appear in court in accordance with a summons or the confirmed documentary notices issued by the police or for avoiding service of the summons.<sup>100</sup> Where an indictment has been preferred against a person who is at large, and that person does not appear or remain in attendance for his or her trial, the court may also issue a warrant of arrest.<sup>101</sup> When an accused or prosecutor applies for a review of a justice's order to release or detain, the judge may order that the accused be present at the hearing.<sup>102</sup> If the accused fails to do so, the judge may issue a warrant of arrest.<sup>103</sup>

In addition, the *Code* has other general powers to arrest an accused who has been placed on interim release. A justice may issue a warrant of arrest where there are reasonable and probable grounds to believe that an accused (a) has violated or is about to violate any summons, appearance notice, promise to appear, undertaking or recognizance or (b) has committed an indictable offence after being issued or entering into any of these documents.<sup>104</sup> On the same grounds, a peace officer may arrest without warrant.<sup>105</sup> These same arrest powers apply where the accused, initially detained, is released after a review of detention where trial is delayed<sup>106</sup> or pending appeal.<sup>107</sup>

After arrest on the grounds given immediately above, the accused is taken before a justice, or, for section 427 crimes, a judge of the superior court of criminal jurisdiction, where the accused must show cause why his or her detention is not justified.<sup>108</sup> If the accused does satisfy that onus, the justice must release, or the judge may release, under any of the methods provided by the judicial interim-release scheme as the justice or judge considers desirable, except for an undertaking without conditions.<sup>109</sup> This rule as to judges also applies where a person is brought before a judge after being arrested on these grounds after release because of undue delay of trial<sup>110</sup> or while an appeal is pending.<sup>111</sup>

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99. *Code*, ss. 453.4, 455.6.

100. *Code*, subs. 456.1(2).

101. *Code*, s. 526.

102. *Code*, subs. 457.5(3); 457.6(3).

103. *Code*, subs. 457.5(5); 457.6(5).

104. *Code*, subs. 458(1).

105. *Code*, subs. 458(2).

106. *Code*, subs. 459(5), (6).

107. *Code*, subs. 608(6) for indictable offences and s. 752(2) for summary conviction offences.

108. *Code*, subs. 458(3), (4), (5).

109. *Code*, subs. 458(4.1), (5.1).

110. *Code*, subs. 459(7).

111. *Code*, subs. 608(6) for indictable offences; subs. 752(2) for summary conviction offences.

Third, by entering into a recognizance, a person admits being liable to pay a specific sum of money to the Sovereign unless he or she complies with the conditions in it, such as attending for trial.<sup>112</sup> The *Code* now provides two kinds of recognizances. The traditional recognizance, a written form of which is outlined in Form 28, is merely an acknowledgement of indebtedness made before the court.<sup>113</sup> Thus, it does not itself create the debt. By contrast, the new recognizance only entered into before the officer in charge seems to be of a different nature.<sup>114</sup>

The justice or judge may require that the accused obtain sureties before being released on recognizance. If there are sureties, they will forfeit their own money in the amount agreed upon should the accused fail to comply with the recognizance to the degree that they are at fault.<sup>115</sup> The *Code* provides measures by which the surety can take action to be relieved of his or her obligations. The surety can apply to the court and receive from it an order for committal of the person to prison which must be carried out before the surety is discharged.<sup>116</sup> Or, he or she can render that person into the custody of the court which then commits that person to prison.<sup>117</sup> In either case, the court may instead substitute new sureties.<sup>118</sup> If this is done, the original surety is discharged, but otherwise the recognizance and the order for judicial interim release which resulted in the recognizance are not affected.<sup>119</sup> If committed to prison, the accused must be brought forthwith before a justice or judge for a new judicial interim-release hearing.<sup>120</sup> In the case of default, the *Code* authorizes a hearing in which the principal or surety must show cause why forfeiture is not required.<sup>121</sup> The judge has the discretion to make any order that he or she considers proper.<sup>122</sup> There is no right of appeal from this decision.<sup>123</sup>

If the Crown stays proceedings, any recognizance entered into by the accused is vacated.<sup>124</sup> If the Crown later revives proceedings following a stay or an indictment has

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112. See *Bietel v. Ouseley* (1921), 35 C.C.C. 386 (Sask. C.A.).

113. See Sir W. Blackstone, *Commentaries on the Laws of England* (1769, reprinted London: Dawson of Pall Mall, 1966), vol. 2, at 341; *R. v. Pellerin* (1981), 62 C.C.C. (2d) 411 (B.C. Prov. Ct.).

114. Form 8.3, that for a recognizance entered into before an officer in charge, is phrased as the debtor would speak, "I hereby acknowledge that I owe," and provides a space for the signature of the accused. This is unlike the traditional recognizance which is phrased in the words of the judge or justice. It is not necessary that the debtor sign the recognizance entered into before an officer in charge for it to be effective. That peace officer need only give a copy of it to the accused. See *Code* subs. 453.3(4).

115. See *R. v. Andrews* (1975), 34 C.R.N.S. 344 (Nfld. S.C.); *R. v. Southampton Justices, ex parte Green* (1975), [1976] Q.B. 11 (C.A., per Lord Denning); *R. v. Sandhu* (1984), 38 C.R. (3d) 56 (Qué. S.C.).

116. *Code*, s. 700.

117. *Code*, s. 701.

118. *Code*, subs. 701.1(1).

119. *Code*, subs. 701.1(2).

120. *Code*, s. 703.

121. *Code*, s. 705.

122. *Code* subs. 705(2) states that "the judge may ... in his discretion grant or refuse the application and make any order ... that he considers proper."

123. See, e.g., *R. v. Coles* (1982), 2 C.C.C. (3d) 65 (B.C.C.A.).

124. *Code*, subs. 508(1).

been filed with the court before which proceedings are to commence or recommence, the court, if it considers it necessary, may issue a summons or warrant of arrest to compel the attendance of the accused.<sup>125</sup>

## VII. Conditions of Pre-trial Custody in Aid of Full Answer and Defence

Police custody prior to first appearance serves two purposes. First, it is valuable for police investigation. During this period, police regularly question and search the accused or conduct a variety of investigative tests.<sup>126</sup> Second, it protects the public from persons, who it is believed, would jeopardize the public interest. It follows logically that police custody must satisfy the need to maintain security and order in the place of custody.

Custody imposed by justices or judges usually differs from police custody in three respects. First, the custody is for a longer period of time.<sup>127</sup> Second, it is more likely that the accused will be taken out of police custody and put into a detention centre or correctional facility where, absent express statutory or regulatory provisions, the unconvicted prisoner may be mixed in with the convicted.<sup>128</sup> Third, there is a lesser need by this time for the police to investigate.<sup>129</sup>

Provincial statutes and accompanying regulations usually set out with reasonable precision standards governing pre-trial custody, at least following judicially imposed custody. These rules address a large variety of issues from a correctional law perspective. These encompass, for example, medical care for the inmate, access to visitors, solicitor-client communications, privileged communications with other persons

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125. *Code*, subs. 508(2); s. 507.1.

126. The Law Reform Commission of Canada [hereinafter LRCC] has already proposed reforms in these areas of police powers. See LRCC, *Questioning Suspects* [Report 23] (Ottawa: Ministry of Supply and Services, 1984); *Search and Seizure* [Report 24] (Ottawa: Ministry of Supply and Services, 1985); *Obtaining Forensic Evidence* [Report 25] (Ottawa: Ministry of Supply and Services, 1985) [hereinafter Report 25].

127. The period prior to first appearance is relatively brief while custody on remand may last for some weeks and, in unfortunate cases, months.

128. For a description of such detention in Ontario see: P. Stanley, *Prisoners Remanded in Custody* (Toronto: Ministry of Correctional Services for the Province of Ontario, 1977) and P.G. Madden, *A Description of Ontario's Jail Population* (Toronto: Ministry of Correctional Services for the Province of Ontario, 1978).

129. There is a distinct shift in the balance of interests concerning the gathering and preserving of evidence from the period of police custody prior to first appearance to that of custody on remand. By the time of first appearance, the information formally commencing the criminal proceeding against the accused has been laid and the Crown must in theory be in a position to try the case or at least go to preliminary inquiry. The police need for investigation involving the accused will usually be greatly reduced, although certainly not eliminated. On the other hand, the constraints of criminal defence practice and the habits of many defence counsel lead seemingly inevitably to the result that as the period of pre-trial custody moves toward the trial date, the pressure on defence counsel to obtain defence evidence with the aid of the accused increases.



such as provincial ombudsmen, and even, in some jurisdictions, the right to segregation.<sup>130</sup>

Unlike correctional law, the law of criminal procedure has a narrower ambit. It is designed to ensure that a person whose liberty is put at risk can have a full and fair trial of the charge made against him or her. In this context, obviously *Charter* and other guarantees are important. For example, the *Charter* provides a right to counsel without delay, the right to be informed promptly of the reasons for detention or arrest, the right to *habeas corpus* and the right not to be subjected to cruel and unusual punishment.<sup>131</sup> Also, in *Solosky v. The Queen*<sup>132</sup>, the Supreme Court of Canada asserted that regulations which authorize the censorship of mail must be interpreted so as to minimize interference with an inmate's right to retain and instruct counsel pursuant to the *Canadian Bill of Rights*.<sup>133</sup>

Nonetheless, to date, the criminal law has been evolving in an *ad hoc* manner to protect the right of an accused in pre-trial custody to make full answer and defence. Unlike correctional law statutes, the *Code* has no rules at all addressing the right of a person in pre-trial custody to make full answer or defence or to substantiate allegations of abuse occurring while in custody.<sup>134</sup>

## VIII. Compelling Appearance, Release and Detention of Witnesses

For any criminal justice system to work, witnesses should attend at court in order to present relevant evidence before it. Usually, the witness attends voluntarily. But there are occasions when a witness chooses not to go to court. Accordingly, our *Code* provides means to compel a witness and, if necessary, to detain him or her.

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130. See, e.g. Québec's *An Act respecting Probation and Houses of Detention*, R.S.Q., c. P-26 and its accompanying *Regulation respecting Houses of Detention*, R.R.Q. 1981, c. P-26, r. 1; Ontario's *Ministry of Correctional Services Act*, R.S.O. 1980, c. 275, and its accompanying R.R.O. 1980, Reg. 649, *Regulation respecting Houses of Detention*.

131. *Charter* paras. 10(a), (b), (c) and s. 12. See, e.g., *R. v. Miller* (1985), [1985] 2 S.C.R. 613 which upheld the use of *habeas corpus* to secure the release of a prisoner from a "Special Handling Unit" into the general prison population. By contrast, in *Collin v. Kaplan* (1982), [1983] 1 F.C. 496 (T.D.), the court declined to rule that temporary "double-celling" violated the no-cruel-and-unusual-treatment-or-punishment guarantee of the *Charter*.

132. (1979), [1980] 1 S.C.R. 821.

133. S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.

134. The line between the accused's legitimate right to gather and preserve evidence for the defence, on the one hand, and tampering with evidence which the Crown may wish to preserve on the other, may at times be a thin one. At present, the detained accused may only be able to accomplish the task of gathering evidence on an indirect basis, through counsel or others he or she is permitted to contact. The common law has not recognized a right of an accused in police custody to contact witnesses or to be visited by medical or other experts who might conduct, on the accused's behalf, the kind of investigative tests that police conduct. At the stage prior to first appearance these matters are within the authorized discretion of the police having custody of the accused.

A subpoena may be issued to a person who is “likely to give material evidence” requiring that person to attend to give evidence.<sup>135</sup> A party to the proceedings — that is either the Crown or the defence — may apply for the issuance of a subpoena. The person to whom it is directed must attend at the time and place stated therein to give evidence and, if required, must bring anything in his or her possession or control relating to the subject-matter of the proceedings.<sup>136</sup> The witness must also stay in attendance throughout the proceedings unless excused by the presiding judge, justice, or provincial court judge.<sup>137</sup> A person who, without lawful excuse, fails to comply with the subpoena is guilty of contempt of court.<sup>138</sup>

Generally, the subpoena must be issued “out of” the criminal court before which the accused is to attend.<sup>139</sup> This means that the subpoena may be signed by either the judge or the clerk of the court.<sup>140</sup> However, where the proceedings take place before a provincial court judge having jurisdiction under Part XVI, a summary conviction court, or in proceedings where a justice has jurisdiction (a) the subpoena must be signed personally by the provincial court judge or justice<sup>141</sup> and (b) if the witness is outside the province, the subpoena must be issued out of a superior court of criminal jurisdiction or a county or district court of the province in which the proceedings were begun<sup>142</sup> pursuant to an order of a judge of the court upon application.<sup>143</sup> A subpoena issued by a provincial court judge or justice has effect anywhere in that province.<sup>144</sup> A subpoena issued by any other criminal court is effective throughout Canada.<sup>145</sup>

Another means of compelling the appearance of a witness is the recognizance. The common law allows courts with inherent jurisdiction to bind over witnesses by means of a recognizance for appearance at a trial adjourned to a later date.<sup>146</sup> The *Code* also provides that a justice on a preliminary inquiry who orders an accused to stand trial may require any witness whose evidence is material to enter into a recognizance

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135. *Code*, subs. 626(1).

136. *Code*, subs. 628(1).

137. *Code*, subs. 628(2).

138. *Code* s. 636 provides that “[a] person who, being required by law to attend or remain in attendance for the purpose of giving evidence fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.” By *Code* subs. 636(2), the person found guilty of contempt under that section is liable to a fine of one hundred dollars or to imprisonment for ninety days or both, and may be ordered to pay the costs incident to the service of any process under Part XIX and to his or her detention, if any.

139. *Code*, subs. 627(1).

140. *Code*, subs. 627(4).

141. *Code*, subs. 627(5).

142. *Code*, para. 627(2)(b).

143. *Code*, subs. 627(3).

144. *Code*, subs. 630(2).

145. *Code*, subs. 630(1).

146. For a brief discussion of the recognizance, see p. 19 of the Working Paper.

and to comply with any reasonable conditions contained in it as the justice considers desirable to secure the attendance of the witness at trial.<sup>147</sup>

Where the witness is already in prison, a judge may order that the prisoner be brought before the court requiring the evidence.<sup>148</sup> For provincial court judges, this power only applies to prisoners confined in a prison in the province in which he or she has jurisdiction.<sup>149</sup>

The court may issue an arrest warrant for a witness where it is made to appear that the witness (a) will not attend in response to a subpoena if a subpoena is issued (in which case a subpoena need not first be issued)<sup>150</sup> or (b) is evading service of the subpoena.<sup>151</sup>

The courts may also issue arrest warrants for defaulting or absconding witnesses. A justice may issue a warrant of arrest where a person is bound by a recognizance to give evidence in any proceedings and the justice is satisfied upon information made in writing on oath that the person is about to abscond or has absconded.<sup>152</sup> The court, judge, justice or provincial court judge before whom the witness is required to attend may issue an arrest warrant where the witness, having been properly served with a subpoena or being bound by recognizance to attend, does not attend nor remain in attendance.<sup>153</sup> In addition, where a witness fails to comply with the conditions of a recognizance to secure attendance at trial ordered by a justice on a preliminary inquiry, the justice may commit him or her to prison until the witness complies or the trial ends.<sup>154</sup>

When a witness who is arrested by warrant is brought before the appropriate judge, the person may (a) be detained in custody or (b) be released on a recognizance in Form 28 with or without sureties, to appear and give evidence when required.<sup>155</sup> A witness cannot be detained for more than thirty days unless prior to the expiration of that period he or she has been brought before a judge of the superior court of criminal

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147. *Code*, subs. 477(1). By subs. 477(3), the justice may, for any reason satisfactory to him or her, require the witness entering into the recognizance to produce one or more sureties in such amount as he or she may direct, or to deposit with him or her a sum of money sufficient in the opinion of the justice to ensure the attendance of the witness.

148. *Code*, para. 460(1)(c). By *Code* paras. 460(1)(a), (b), the same power also applies where the prisoner is required (a) to attend at a preliminary inquiry into a charge against him or her, or (b) to stand trial upon a charge that may be tried by indictment or on summary conviction.

149. *Code*, subs. 460(2).

150. *Code*, para. 626(2)(a), subs. (3).

151. *Code*, para. 626(2)(b).

152. *Code*, subs. 632(1). The warrant directs the arresting peace officer to take the witness before the court, judge, justice, or provincial court judge before whom he or she is bound to appear. By subs. 632(3), the arrested witness is entitled, upon request, to receive a copy of the information upon which the warrant was based.

153. *Code*, s. 633.

154. *Code*, subs. 477(4).

155. *Code*, s. 634.

jurisdiction in the province where detained.<sup>156</sup> A judge who is not satisfied that the continued detention of the witness is justified shall order the witness discharged or released on a recognizance, with or without sureties. If satisfied that detention is justified, the judge may order continued detention until (a) where the witness was committed to prison by a justice at a preliminary inquiry, he or she does what the justice requires, (b) the trial is concluded or (c) the witness gives evidence. But under no circumstances can the total period of detention exceed ninety days.<sup>157</sup>

## IX. The Relationship of *Habeas Corpus* to Interim Release

A writ of *habeas corpus* is the traditional means by which a person can challenge before the courts the legality of his or her detention.<sup>158</sup> Its history is perhaps the most colourful of all the prerogative writs. Its character as a remedy for unlawful detention developed during the seventeenth century — the turbulent years of the struggle between Charles I and Parliament, Cromwell's Protectorate and the restoration of the monarchy. In 1679, Parliament passed the *Habeas Corpus Act*,<sup>159</sup> which has had great influence on Canadian law.<sup>160</sup> Since then, *habeas corpus* has evolved in Canada into a constitutional guarantee. Paragraph 10(c) of the *Charter* provides that a person has the

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156. *Code*, subs. 635(1). By subs. 635(2), where at any time before the end of the thirty-day period the detained witness applies to be brought before the judge, the judge shall fix a time before the end of that period for the hearing of the application, and shall give notice of that time to the witness, the person having custody of the witness and such other persons as the judge may specify.

157. *Code*, subs. 635(3).

158. Two recent Canadian texts give full accounts of the development of *habeas corpus*: R.J. Sharpe, *The Law of Habeas Corpus* (Clarendon Press: Oxford, 1976) and D.A. Harvey, *The Law of Habeas Corpus in Canada* (Butterworths: Toronto, 1974). Because the "writ" of *habeas corpus* is directed to the applicant's gaoler ordering him or her to deliver the applicant to the court with whatever document purports to justify the detention, the writ alone proved insufficient to provide the reviewing court with the record of the proceedings which may have led to the applicant's detention. Thus the writ of *habeas corpus* was, and still is, used in conjunction with another so-called prerogative writ, that of "certiorari." The *certiorari* order enables the reviewing court to demand the record of the proceedings and thereby to make a full investigation of the legality of the whole procedure which led to the applicant's imprisonment rather than to merely examine the face validity of a committal order or warrant, for example. For a full discussion of this procedure, see G. Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (Toronto: Butterworths, 1976) at 239-337.

159. *The Habeas Corpus Act, 1679* (U.K.), 31 Car. II, c. 2.

160. In accordance with British constitutional principle, United Kingdom legislation of general application including the *habeas corpus* acts, were applicable to those colonies which later made up the Canadian federation. For a brief note on the applicability of "imperial" statutes in Canada, see P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1977) at 5. For a history of *habeas corpus* statutes in Canada, see Létourneau, *supra*, note 158 at 14-18. A number of provincial statutes were modelled, with important exceptions, on the English *Habeas Corpus Act, 1679*. These were in fact colonial statutes passed before Confederation by some of those colonies which later became provinces of Canada: Ontario, *An Act for more effectually securing the Liberty of the Subject*, S.O. 1866 c. 45; Québec, *An Act respecting the Writ of Habeas Corpus, Bail and other provisions of law for securing the Liberty of the Subject*, C.S.L.C. 1860, c. 95; New Brunswick, *An Act for better securing the liberty of the Subject*, S.N.B. 1856, c. 42; Nova Scotia, *Of the Liberty of the Subject*, R.S.N.S. 1864, c. 153.

legal right "to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

Historically, there is a close connection between the writ of *habeas corpus* and bail. Under the *Habeas Corpus Act* of 1679, a judge could discharge the prisoner on a recognizance with one or more sureties as needed.<sup>161</sup> However, as Parliament created specific statutory schemes for bail, it included a privative clause denying the *habeas corpus* remedy. Courts viewed those schemes as taking the place of *habeas corpus* while affording the accused the same protection.<sup>162</sup> Accordingly, the *Bail Reform Act* had a proviso that no application be made by way of *habeas corpus* for the purpose of obtaining an order relating to interim release or detention.<sup>163</sup>

Nonetheless, defence counsel increasingly invoked the *habeas corpus* remedy. Given that the new bail scheme imposed a duty upon officials to apply for a mandatory review of detention within specified time limits, it followed that a breach of the duty could raise the spectre of unlawful detention which the writ was designed to remedy. While the courts were divided as to when the *habeas corpus* remedy would be successful,<sup>164</sup> they would not deny the remedy entirely.<sup>165</sup> Thus, Parliament recently repealed the no *habeas corpus* clause, substituting for it a proviso that the court, judge or justice before whom an accused appears pursuant to Part XIV of the *Code* governing interim release may give directions for expediting the proceedings of an accused.<sup>166</sup>

In effect, the present bail reform provisions strike a peaceful co-existence between the interim-release provisions of the *Code* and the *habeas corpus* remedy.

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161. *Supra*, note 159, s. 2.

162. See, e.g., *R. v. Quinby* (1966), [1967] 2 C.C.C. 186 (Alta. S.C.).

163. *Bail Reform Act*, *supra*, note 1, s. 459.1, repealed by S.C. 1985, c. 19, s. 92.

164. In *Ex parte Mitchell* (1975), 23 C.C.C. (2d) 473, the British Columbia Court of Appeal declared this privative clause inoperative because of its conflict with the *Bill of Rights* and discharged an accused who was being held beyond the ninety-day period of *Code* section 459 without benefit of a hearing. However, other courts held that the proper remedy is an order of *mandamus* to require that a review hearing be held, and that in the meantime the accused can be detained in custody by application of the curative provisions of *Code* s. 709. See, e.g., *Ex parte Gooden* (1975), 27 C.C.C. (2d) 161 (Ont. H.C.); *Ex parte Cordes* (1976), 31 C.C.C. (2d) 279 (Alta. S.C., App. Div.).

165. Even those courts which have held that an accused should not be discharged *automatically* for a violation of the right to a hearing where trial is delayed, have suggested that where there is an oppressive or unreasonable delay the *habeas corpus* remedy might be available. See *Ex parte Cordes*, *ibid.*; *R. v. Johnson* (1980), 57 C.C.C. (2d) 49 (Ont. H.C.).

166. The *Criminal Law Amendment Act, 1985*, *supra*, note 44, s. 92.

## CHAPTER TWO

### The Need for Reform

#### I. General Principles

Certain basic principles provide the starting point for developing policies pertaining to the rules of criminal procedure.<sup>167</sup> In seeking a balance among these principles, fairness predominates because it most keenly protects the rights of individuals. Nonetheless, fairness is not an absolute such that it may favour maximum protection of the accused to the serious detriment of society. On occasion, wise policy will dictate that it be outweighed by other competing principles.

When crime is committed, the state must be able to invoke a process whereby the actions of the accused can be judged in a fair and impartial manner. For the process to work, the criminal justice system must have the power to compel the attendance of the accused or of a witness whose evidence is needed.

But this gives rise to several questions. What methods should be used for compelling appearance? When should the accused be released or detained pending trial or even after trial? In short, what balance should be sought among these sometimes contradictory principles?

Fairness requires that detention should be used as a last resort. As the Canadian Committee on Corrections pointed out, unjustified detention shows disregard for human rights. Lack of segregation from those already convicted of crime, stringent security measures, disruption of family and other social contacts — all these can harm the person detained.<sup>168</sup>

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167. Our work in criminal procedure has consistently been characterized by fidelity to certain basic, general principles. We have consciously developed our policies in a manner that has regard to constraints imposed by the principles of fairness, efficiency, restraint, protection of society, clarity, accountability and participation. Our operative philosophy is described more fully in our Report entitled *Our Criminal Procedure* [Report 32] (Ottawa: LRCC, 1988).

168. Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 99-102 [hereinafter the Ouimet Committee].

Thus, detention is justifiable where necessary (a) to compel appearance, or (b) to protect the public.<sup>169</sup> The first purpose promotes and gives expression to the principle of efficiency within the criminal justice system. Without means of compelling appearance, the process itself is rendered useless. The second purpose protects the public even though there may be no need to compel appearance. As the Ouimet Committee argued: “[T]here may ... be sufficient evidence of a clear and present danger to justify interference with the liberty of the accused in order to protect the public until his innocence or guilt is finally established.”<sup>170</sup>

Fairness, of course, should suffuse the entire scheme of compelling appearance. The least intrusive method of compelling appearance sufficient in the circumstances to require the accused or witness to attend in court should be used. Moreover, procedures to determine release or detention should respect the constitutional guarantees of the *Charter* and promote egalitarian procedures so that those in similar circumstances are treated equally.

The fundamental principle of restraint in the application and use of the criminal law is central to the thinking of this Commission and reflects the policy orientation of the Government of Canada.<sup>171</sup> This principle requires that the creation and application of criminal law, including rules of criminal procedure, must be done “*with no more interference with the freedom of individuals than is necessary.*”<sup>172</sup> Thus, police and court procedures must ensure that the process of enforcement will be carried on effectively but with a minimum of interference with the individual. In the context of interim release, this principle, like that of fairness, requires that detention be used as a last resort.

The principle of accountability requires that those exercising procedural power or authority should be accountable for its use so as to inhibit the possibility of abuse. While the law must permit state officials to exercise discretion, it should consciously avoid providing opportunities for the exercise of arbitrary power. Thus, accountability ensures conformity to the rule of law by providing remedies for those affected by the arbitrary exercise of power. In the context of interim release, this principle mandates that where the law imposes duties upon those enforcing interim-release procedures, a failure to adhere to them should give rise to a remedy.

However, as noted, efficiency must also be promoted, especially where to do so would not seriously jeopardize fairness and, in fact, would help promote it. Efficiency requires that the process be timely. It should streamline administrative complexities that lead to delay and ultimately to waste.

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169. *Ibid.* at 99, 108-109.

170. *Ibid.* at 108-109.

171. See LRCC, *Our Criminal Law*, [Report 3] (Ottawa: Supply and Services Canada, 1976); Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Supply and Services Canada, 1982).

172. The Ouimet Committee, *supra*, note 168 at 11.

Coupled with efficiency is the principle of clarity. This is a necessary underpinning to the concept of the rule of law. Ideally, the law should guide others so that one knows what is or is not permissible. Thus, any scheme of interim release, just like any other rule of criminal procedure, must be both comprehensive and understandable. Comprehensive, because otherwise gaps in the law would give rise to confusion about what the law is. Understandable, so that persons may use the law to guide their actions.

The principle of participation acknowledges that citizens should have an opportunity to participate meaningfully in the processes affecting them. In the context of interim release and detention, this means that the law should ensure that the person seeking interim release has sufficient means to present his or her case at the show-cause hearing or on a review of the decision made there and that, if detained in custody, he or she has sufficient means to make full answer and defence in a manner consistent with proper limitations on custody.

The principle of protection of society is surely obvious. The purpose of the criminal law is to denounce acts which violate the fundamental values shared by those within society and by so doing to reaffirm those values.<sup>173</sup> It should protect all members of society, including the offender, from seriously harmful and dangerous conduct.<sup>174</sup> Thus, procedural rules governing interim release must recognize that limitations upon the liberty of individuals are necessary where the failure to do so would jeopardize the protection of the public.

Most of these principles substantially underlie the interim-release provisions of the present *Code*. Fairness, restraint, accountability and protection of the public are largely present in the existing law of bail — for example the use of appearance notices and other documentary notices by the peace officer or officer in charge, the ladder provisions for release, the imposition of detention where necessary for ensuring appearance or to protect the public, and review of detention where trial is delayed. This is not surprising, given that the *Bail Reform Act* was at the vanguard of the bail reform movement then taking place in the United States, Great Britain and Western Europe.<sup>175</sup>

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173. See LRCC, *supra*, note 171 at 27.

174. The Quimet Committee, *supra*, note 168 at 11.

175. For an excellent history of the bail reform movement in the United States, see W.H. Thomas, Jr., *Bail Reform in America* (Berkeley: U. of California Press, 1976). See also J.S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge (Mass.): Ballinger Publishing, 1979), and E.J. Shaughnessy, *Bail and Preventive Detention in New York* (Washington (D.C.): University Press of America, 1982). In the United Kingdom, the ferment concerning bail was evidenced in M. Zander, "Bail: A Re-appraisal" [1967] *Crim. L.Rev.* 25 at 100, 128, M. King, *Bail or Custody*, (London: The Cobden Trust, 1971), and the adoption of the *Bail Act 1976*, U.K. 1976, c. 63 following Great Britain Home Office Report of the Working Party on Bail Procedures in Magistrates' Courts, *Report* (London: H.M.S.O., 1974). For useful Commonwealth developments, see B.H.K. Donovan, *The Law of Bail: Practice, Procedures and Principles* (Sydney: Legal Books, 1981), and the Criminal Law Reform Committee (New Zealand), *Report on Bail* (Wellington, 1982). For European developments, see B. Botein and H.J. Sturz, "Report on Pre-trial Release Practices in Sweden, Denmark, England and Italy to the National Conference on Bail and Criminal Justice" (1964) 5 *International Commission of Jurists Journal* 203; and T.C. Daintith and A.B. Wilkinson, "Bail and the Convention: British Reflections on the Wemhoff and Neumeister Cases" 1970 18 *Am. J. Comp. L.* 326.



Consequently, while this Working Paper advocates reforms in the present law, these reforms, far from reflecting major changes in policy, are designed to achieve a better balance among the principles behind the present scheme of interim release. In general, the balance among the principles of fairness, accountability, and protection of society existing under the *Bail Reform Act* is most satisfactory. Thus, reform to correct defects related to these principles are largely matters of fine-tuning in order to achieve internal consistency and a better affirmation of constitutional guarantees. However, the present law is particularly deficient in its lack of adherence to the principle of clarity and, to some extent, those of efficiency and participation. An overall examination of all of these defects now follows.

## II. Defects in the Present Law

### A. Technicality

Criminal procedure law is, of necessity, somewhat technical because it must carefully delineate the procedures which state officials must follow in order to curtail the liberty of others. However, where technicality is not needed — for example where a multiplicity of procedures exists where one would suffice — the law becomes a “tangled web” that reduces the fairness and efficiency of the process.

Some *Code* provisions on interim release and detention are unduly technical. These include: (a) the use of three different kinds of documentary notice issued by the police, (b) the use by the courts of a “recognizance” as an additional separate release mechanism and (c) the complicated provisions in the present *Code* for laying and receiving an information and issuing process.

The present law distinguishes between three different forms of documentary notice issued by the police — an appearance notice, which the arresting peace officer may issue, and the promise to appear and recognizance, entered into only before an officer in charge. This creates unnecessary duplication and confusion by requiring peace officers to choose among a variety of forms where one would suffice. To overcome this, it is justifiable to collapse the distinction between an appearance notice, promise to appear and recognizance by creating one document and to provide in that document, in addition to the conditions imposed by those previous documents, the power to release on certain added conditions which are discussed within in greater detail.

In a similar vein, at present a justice on an interim-release application may release an accused on an undertaking or on a recognizance. Again, this requires the unnecessary resort to different mechanisms. Merging the recognizance concept with the undertaking would streamline the process.

The present provisions governing the laying and receiving an information and issuing process are unduly complicated. The *Code* in fact has two different procedures. One procedure, set out in sections 455.1 and 455.4, deals generally with the time limits within which an information must be laid following the issuance of an appearance notice and what a justice must do on receiving such an information. However, sections 455 and 455.3 set out the general procedure for issuing and receiving the information and issuing process. To find out what procedure to use, the reader must struggle with different sections that are arranged in a haphazard manner. This complexity is quite unnecessary. There should instead be a procedure for laying and receiving an information and issuing process which is set out in a straightforward, chronological and simplified manner.

## B. Poor Organization

Poor organization prevents a person from obtaining easy access to and a clear understanding of the law and in this area involves several defects: the provisions relating to one central theme are often scattered, difficult to find or follow, unduly repetitive or unnecessarily overlapping with one another. All of these defects are found in the present law on interim release.

Perhaps the most obvious example of poor organization is the failure to deal comprehensively with all matters relating to interim release in one Part of the *Code*. The *Code* addresses interim release and detention of an accused in Part XIV. However, the same issues in respect of witnesses are found in Part XIX. Finally, interim release of an accused pending appeal or where a retrial is ordered is found in Parts XVIII and XXIV. Such disorganization should be avoided. Instead, interim release and detention of an accused or witness at all stages of the criminal process should be dealt with together.

Moreover, the sections are difficult to find or follow. In part, this is due to the confusing use of section numbers which incorporate the number of an earlier section (for example, sections 455, 455.1, 455.2, 455.3). Fortunately, in the latest revision (as yet unpublished) of Canada's statutes this numbering system will disappear. [A table of concordance is provided in Appendix B of this paper in order to assist the reader who may wish to consult the newly numbered provisions. All references in this paper are to the section numbers which were obtained prior to the latest revision.] More confusing, however, is the constant use within sections of cross-references to other sections which makes it exceedingly difficult for the reader to understand the meaning of the section. These recommendations seek to avoid these deficiencies to the extent possible.

Repetition of phraseology is also evident. For example, several sections about police means of compelling appearance repeat the phrase "appearance notice, promise to appear or recognizance."<sup>176</sup> This recurrent repetition adds confusion when consulting the *Code*. The creation of just one interim-release document to be issued by the police

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176. See, e.g., *Code*, ss. 455.4(1), 456.1(1), 458.

— that is the appearance notice — should coincidentally have the effect of eliminating much of the repetition.

Also, the *Code* has two separate long sections concerning the right of a review from a justice's decision to release or detain — one for the accused, the other for the prosecutor.<sup>177</sup> Except for minor differences, these sections are almost identical in content. In our view it is logical to combine these procedures into one concise section that avoids long-winded repetition.

There is also, on occasion, unnecessary overlap in the sense that two different vehicles seek to achieve the same objective. For example, the *Code* presently contains specific powers for police to arrest without warrant where the accused has violated or is about to violate the provisions of interim release. Subsections 458(2) and 459(6) of the *Code* provide in almost identical language that the peace officer may arrest without warrant a person who he or she believes on reasonable and probable grounds has violated or is about to violate the provisions of interim release or who has committed an indictable offence after obtaining interim release. Also, by section 133 of the *Code*, failure to appear or to comply with conditions of judicial interim release is a hybrid crime.<sup>178</sup> Consequently, the peace officer's general powers of arrest without warrant where a crime is committed would apply. Similar defects concern the use of warrants of arrest where the accused has failed to appear in accordance with the conditions of his or her release. The recommendations which follow avoid such overlap.

### C. Ambiguity

The wording of statute law should be reasonably precise so as to avoid ambiguity. When persons cannot be sure what the law means, disputes over procedures, which must finally be resolved by courts, are often the result. This in turn contributes to frustration, delay and added expense in the criminal justice system. The present law is in need of clarification at numerous points.

One such matter concerns the nature of a review of a justice's order for release and detention. Is this review to be a hearing *de novo* or an appeal, or a hybrid possessing elements of both? The resolution of this has important implications. For example, does the reviewing judge have the power to substitute his or her discretion for that of the original justice? Do the applicants have the right to introduce evidence? As noted, the case-law has not produced a uniform response to this issue. We present a proposal on this issue consistent with our view that the *Code*'s interim-release scheme should permit detention only when necessary.

Another example of ambiguity is found in the wording governing the justice's discretion to issue process. The present *Code* in section 455.3 only provides that process shall issue where "a case for so doing is made out." But what precisely does

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177. *Code*, ss. 457.5 and 457.6.

178. *Code*, subs. 133(2), (3), (4) and (5).

this mean? That a *prima facie* case must be made out? Or a more stringent test? A more precise standard is needed.

One aspect of the present *Code* “ladder” provisions relating to the justice’s power to release remains unclear. Section 457 lists a variety of release orders which a justice can make. Subsection 457(1) requires that the accused be released on an undertaking without conditions unless a more severe order should be made or detention is justified. By subsection 457(2) a variety of other release orders can be made<sup>179</sup> but due to deficiencies in the wording employed it is unclear what the prosecutor’s actual responsibilities are.<sup>180</sup> This is obviously a matter calling for clarification through legislative amendment.

Another example of ambiguity is the present “public interest” ground for detention set out in subsection 457(7). In our Report 29 entitled *Arrest*, this phrase, used in the context of the issuance of warrants of arrest, was criticized as providing no basis on which to make a reasoned decision in accordance with law.<sup>181</sup> What is the relationship between the phrase “public interest” and “the protection or safety of the public” which is also used in the legislation? Arguably, in most cases, “protection or safety of the public” would cover much the same ground as “public interest”.<sup>182</sup> But, in theory, even if detention is not required for the protection or safety of the public, a person could be detained on the loose basis of a public perception that detention is required.<sup>183</sup> “Public interest” is too broad and open-ended a standard to ensure restraint in the use of detention.

Also defective is the present test for issuing subpoenas or for seeking the arrest of a reluctant or recalcitrant witness by warrant pursuant to *Code* section 626. The test is that the person must be likely to give “material” evidence. But what does “material” mean in this context? Is it the same as “relevant”? Or is it a higher standard? The law should clearly indicate the basis upon which this significant power to compel or detain is to be employed.

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179. These release orders range from an undertaking with conditions in paragraph 457(2)(a) to, by paragraph 457(2)(d), a recognizance with or without sureties and with any conditions and with a deposit as the justice directs where the accused is, generally, not ordinarily resident in the province.

180. By subs. 457(3), it is provided that a “justice shall not make an order under any of paragraphs (2)(b) to (d) unless the prosecutor shows cause why an order under the immediately preceding paragraph should not be made.” But the question arises: What is “the immediately preceding paragraph”? Is it subs. 457(1)? Or para. 457(2)(a)? Or is it para. 457(2)(b) if consideration is given to a release pursuant to 457(2)(c) and so on? In *R. v. Thompson*, *supra*, note 47, it was held that the words “the immediately preceding paragraph” referred to para. 457(2)(a), with paragraphs (b) to (d) of section 457(2) being treated as one paragraph.

181. LRCC, *Arrest* [Report 29] (Ottawa: LRCC, 1986) [hereinafter Report 29].

182. See, e.g., *R. v. Groulx* (1974), 17 C.C.C. (2d) 351 (Qué. S.C.); *Pearson v. R.* (No. 2) (1979), 9 C.R. (3d) 229 (Qué. S.C.).

183. See, e.g., *Re Powers and the Queen* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.); *R. v. Demyen* (1975), 26 C.C.C. (2d) 324 (Sask. C.A.); *R. v. Kingswatsiak* (1976), 31 C.C.C. (2d) 213 (N.W.T. C.A.), where “public interest” is defined to include the “public image” of the *Code* or public confidence in the administration of justice.

Finally, *Code* subsection 626(2) provides that a warrant of arrest for a witness may be issued “where it is made to appear” that the person will not attend in response to a subpoena or is avoiding service of a subpoena. Presumably, because the warrant authorizes the arrest of a witness as opposed to an accused, there should be a reasonably high burden that the person seeking the issuance of the warrant should meet, yet the law is not clear on this point. A better approach might be to use a term known to criminal law which does clearly create such a burden, such as the term “established”.<sup>184</sup>

#### D. Incoherence

Ambiguity is related to incoherence, yet is not strictly speaking the same thing. Ambiguity leads to confusion in meaning. By incoherence we mean the failure of the law to be internally consistent. Of course, there may be justifiable reasons for the law to create separate and distinctly different procedures to accomplish the same apparent objective. For example, the *Young Offenders Act*<sup>185</sup> is designed to ensure special, perhaps fairer treatment to young persons caught up in the criminal justice system. But, in general, absent sound policy reasons for such distinctions, the failure to apply rules consistently to similar issues or to create parallel structures for the treatment of the same or similar problems raises reasonable concerns that the system is unfair or inefficient. Unfortunately, the present *Code* is noticeable for its lack of parallel structure in the area of interim release and pre-trial detention.

A striking example of lack of parallel structure is the failure to apply the present scheme of interim release in relation to accused persons equally to witnesses. For example, the *Code* sets out a carefully crafted scheme to ensure that discretion to detain or release an accused person is properly exercised. Thus, an accused person must be released by a justice upon a simple undertaking without conditions unless more onerous forms and mechanisms for release such as conditions or a recognizance are warranted. However, a witness can only be released upon entering into a recognizance, with or without sureties.<sup>186</sup> Thus, the present *Code* in fact treats witnesses in a markedly different fashion and, on occasion, more harshly than accused persons. As a minimum, a reformed interim-release scheme should ensure that both accused persons and witnesses are treated equally. Also, it should be recognized that it may be appropriate, in certain instances, to single out witnesses for more favourable treatment.

Lack of parallel structure is also apparent in the limitation upon the power of police to issue their own documentary notices to compel appearance. As mentioned, we believe that the documentary notices known as the appearance notice, promise to appear or recognizance issued by a peace officer or officer in charge as the case may be should be combined into a single document known as an appearance notice. But when should the police be able to issue it? Under present law, the power of police to

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184. *R. v. Appleby* (1971), [1972] S.C.R. 303.

185. S.C. 1980-81-82-83, c. 110.

186. *Code*, para. 634(b).

compel appearance by these documents is limited only to minor crimes.<sup>187</sup> Why should such a restriction exist on this power? Given that we propose clearly outlined grounds for detention by which a police officer may detain a person in custody, it seems equally logical that where trained police officers do not feel detention is justified they should have the power to release by way of an appearance notice. We make proposals to this effect in the recommendations that follow.

An absence of parallel structure is also apparent in the statutory distinctions pertaining to the release powers of the arresting peace officer, the officer in charge and the justice. Under present law, an arresting peace officer cannot release a person on pecuniary conditions while an officer in charge can. An officer in charge is in turn constrained and cannot release a person if certain non-pecuniary conditions are to be imposed — for example depositing a passport, not communicating with a person — whereas a justice can. A more consistent and rational approach would attempt to provide more uniform powers of release, and would seek the elimination of unnecessary distinctions.

The present procedure governing court jurisdiction over show-cause hearings also lacks internal consistency. At present the *Code* requires an accused charged with a section 427 crime (such as murder, treason and piracy) to go before a judge of a superior court of criminal jurisdiction to have the issue of detention or release determined. Implicit in this requirement is the assumption that those judges are better qualified to make judgements on interim release where really serious, important crimes are involved. Yet, provincial court judges preside over show-cause release hearings for many other serious crimes (such as manslaughter and aggravated assault). Moreover, these same provincial court judges have considerable expertise in the area of interim release, since they already make the vast majority of interim-release decisions. Therefore, it is logical to ask, as we have, why provincial court judges should not be competent to hear all applications for interim release.

Other related examples of incoherence exist. The present scheme provides a mandatory requirement of release where the statutory conditions for detention are not satisfied in relation to most crimes. But for section 427 crimes, a judge of a superior court of criminal jurisdiction still has a “residual” discretion to refuse release even when the accused has shown that the statutory grounds for detention do not apply under the circumstances.<sup>188</sup> A rational scheme of interim release should strive for consistency, both in the formulation of standards and in their application.

Nor does the present law provide for a right of review in *all* cases of any decision directly or indirectly affecting interim release. There is an automatic right of review from a decision of a justice in relation to “ordinary” crimes. But there is no automatic right of review from a decision of a judge of a superior court of criminal jurisdiction (that is to say where the crime is a section 427 crime) or of a decision of a judge of a

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187. See, e.g., *Code*, ss. 451, 452, and 453.

188. See *R. v. Smith*, *supra*, note 51.

court of appeal concerning interim release pending appeal.<sup>189</sup> There is no review at all of a judge's decision to order forfeiture of money in the event of a person's failure to abide by the conditions of a recognizance.<sup>190</sup> Whether the law should provide for a right of review in all cases is a subject addressed by the recommendations for reform.

Also, lack of parallelism exists in relation to the power to issue subpoenas. The present law distinguishes, for no convincing reason, between the power to issue a subpoena out of higher courts of criminal jurisdiction on the one hand, and out of a criminal court before a provincial court judge acting under Part XVI, a summary conviction court, or proceedings in which a justice has jurisdiction, on the other. For the latter, where the person whose attendance is required is out of the province, the subpoena must be issued out of a superior court of criminal jurisdiction or county or district court of the province in which proceedings were instituted. Moreover, for the higher courts of criminal jurisdiction, the subpoena may be signed either by the judge or the clerk of the court. By contrast, a subpoena issued by a justice or provincial court judge must be signed by the justice or the provincial court judge.<sup>191</sup> This scheme obviously lacks uniformity and can lead to unnecessary delay. The law should provide a uniform power to all judges, in the exercise of a carefully defined and structured discretion, to issue Canada-wide subpoenas subject to appropriate safeguards of the kind developed in our proposals.

The *Code* provisions governing release pending appeal also manifest a degree of incoherence. While, for indictable offences, section 608 provides a series of grounds which the person in custody must satisfy in order to be released, there are no similar provisions outlining these grounds in relation to summary conviction crimes. As a result, the courts have had to incorporate these grounds through case-law.<sup>192</sup> A statutory scheme of release pending appeal ought not to possess gaps of this nature.

Finally, incoherence is also evident in the treatment afforded costs in relation to the issuance of a bench warrant. At present, the presiding justice or judge may issue a bench warrant for failure of an accused or witness to appear. Of course, there are costs incurred by issuing and serving a "bench warrant" upon the person to compel attendance. However, at present, *Code* section 636 allows these costs only as regards witnesses. Why, as a matter of policy, ought not the same rule to govern both accused persons and witnesses?

## E. Constitutional Problems

It is self-evident that any statutory régime of interim release and detention must accord with the constitutional guarantees of the *Charter*. In the context of interim release and detention, several legal guarantees have application depending on the circumstances: (a) the right to life, liberty, and security of the person and the right not

189. *Code*, s. 608.1.

190. See *Code*, s. 705; *R. v. Coles*, *supra*, note 123.

191. *Code*, s. 627.

192. See *R. v. Simpson*, *supra*, note 92.

to be deprived thereof except in accordance with the principles of fundamental justice, (b) the right not to be arbitrarily detained or imprisoned, (c) the right to reasons on arrest or detention, (d) the right to counsel on arrest or detention, (e) the right to reasonable bail, (f) the right to trial within a reasonable time, (g) the presumption of innocence until proven guilty in a fair and public hearing, (h) no cruel or unusual treatment or punishment, (i) mobility rights, (j) equality rights and (k) the right to *habeas corpus*.<sup>193</sup> Of course, these rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>194</sup>

The degree to which these legal guarantees affect the present law of interim release is still uncertain. For example, courts are divided over the constitutionality of the existing division between section 427 crimes and all others insofar as the former category of crimes places the onus upon the accused to prove why detention is not justified.<sup>195</sup>

Clearly, the law of interim release and detention should, whenever possible, avoid such uncertainty. For purposes of policy formulation, the best means to achieve this is to interpret the *Charter* in a liberal manner. This approach achieves consistency with the spirit and intent of the *Charter* by affirming its specific legal guarantees rather than avoiding them by resort to limitations of questionable legality. Moreover, it is also a practical approach since a statutory scheme infused with a broad interpretation of these guarantees should not be open to successful challenge on the basis that they have been contravened. It therefore avoids the cost to the criminal justice system of lengthy *Charter* challenges.

Interpreting the legal guarantees of the *Charter* in this manner, one may regard the following aspects of the present law as potential problem areas that a new scheme of interim release and detention should strive to correct.

The present law, in a variety of instances, not only as regards section 427 crimes but also with respect to crimes under the *Narcotic Control Act*, crimes in relation to or following interim release and all other crimes where the accused is a non-resident, places the onus on the accused to seek release rather than on the prosecutor to show cause why detention is justified. “Reverse onus” clauses have been attacked successfully in other contexts as contravening the *Charter*, most noticeably in *R. v. Oakes*,<sup>196</sup> a case dealing with procedure for the trial of drug trafficking offences under the *Narcotic Control Act*. Here, the issue is simply whether the fact that the accused has committed a specific type of crime is, in itself, sufficient reason to place the onus on the accused to show cause why detention is not justified. The Commission, in the pursuit of fairness and consistency with *Charter* values, believes that the reversal of the ordinary burdens of proof is unjustified whether at the trial or pre-trial stages of the

193. These rights are listed in ss. 6, 7, 9, 10, 11, 12 and 15 of the *Charter*. Also, the preamble to the *Charter* recognizes that it is founded upon principles that recognize the rule of law.

194. *Charter*, s. 1.

195. See *R. v. Pugsley*, *supra*, note 50 which held that this existing division was unconstitutional. By contrast, *R. v. Bray* and *R. v. Dubois (No. 2)*, *supra*, note 50 have upheld this division.

196. (1986), [1986] 1 S.C.R. 103, 50 C.R. (3d) 1.



process. Moreover, requiring the prosecutor to show cause why detention is justified does not place an onerous burden on the Crown nor does it pose a threat to public safety.

Also, when the court of appeal or Supreme Court of Canada orders a new trial or hearing or the minister of Justice, pursuant to section 617, has directed a new trial or hearing, subsection 608(7) requires that the person has the onus of justifying his or her release. While it may appear reasonable for a person already convicted to have the onus of justifying release pending appeal, is the justification equally strong where the appeal court has ordered a new trial? Our detailed proposals concerning all of these reverse onus situations are set forth in the recommendations that follow.

Other provisions in the present law, criticized and discussed earlier in this chapter, also arguably offend the equality guarantee of the *Charter*. This argument appears strongest in relation to the treatment of witnesses but may also have application to inconsistencies in procedure between courts.

In one respect, it also appears that the present procedure on show-cause hearings violates the principles of fundamental justice. The *Code* states that “the accused shall not be examined or cross-examined by the justice or any other person as to the offence with which he is charged, and no inquiry shall be made of him as to that offence.”<sup>197</sup> But what if the attorney for the accused wishes to examine his or her client as to the facts or circumstances concerning the crime? In *R. v. Millar*,<sup>198</sup> the Québec Superior Court held that this provision, by preventing an attorney from examining his or her client, violated section 7 of the *Charter* by contravening the *audi alteram partem* rule. Our proposals explore whether a new scheme of interim release and detention should enable defence counsel to examine his or her client as to the facts and circumstances concerning the crime and what countervailing rights, if any, this should give rise to in the prosecution.

Finally, in some areas, the *Code* fails to provide the accused or other interested parties with adequate notice of the crime charged or of the reasons for arrest or detention. Paragraph 455.4(1)(b) permits a justice to confirm an appearance notice following the laying of an information whether the information relates to the crime alleged in the appearance notice or to an included or other crime. Where the appearance notice is confirmed in relation to an included or other crime, there is no statutory requirement that the accused be notified of this change. Should the law not provide specifically that an appearance notice may be confirmed in relation to a different charge or, indeed, even to a change in time, date and place of appearance, provided that the accused receives notice of such changes? Similarly, where the accused is ordered detained, the justice must include in the record a statement of the reasons for making the order,<sup>199</sup> yet there is no similar statutory requirement to give reasons for detention when a witness is ordered detained. There is also no statutory requirement that the

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197. *Code*, para. 457.3(1)(b).

198. *Supra*, note 57.

199. *Code*, subs. 457(5).

warrant of committal for a person detained contain a statement of reasons for the detention. Such provisions would be useful to correctional officials in determining appropriate requirements for detention. More difficult is the question whether there should be a statutory requirement to give reasons why conditions are imposed on an accused or witness given interim release. On the one hand, the justice or judge has ordered release. On the other hand, because some conditions might involve a deprivation of liberty, a failure to give reasons for the conditions may not accord with principles of fundamental justice. Our revised scheme of interim release attempts an equitable resolution of these problems.

#### F. Incompleteness

To the extent possible laws should be comprehensive and complete. An incomplete scheme, by definition, contains gaps with which we must struggle and which later may require rectification through legislative amendment. This creates confusion and delay in the uniform application of the rules and so leads to inefficiency.

The present scheme of interim release and detention, while complete in most respects, does not address adequately certain relevant matters. One example of incomplete coverage in the present criminal procedure law is the absence of specific rules governing conditions of pre-trial detention. In order to make full answer and defence or to substantiate allegations of abuse while in detention, to what extent should an accused or witness, when detained, be afforded the right to counsel, to medical treatment, to communications with family or to legal or other material? What limitations should be put on these rights? At present, many of these issues are largely unresolved by the case-law. A new scheme of interim release and detention ought to clearly address such issues by providing rules governing such conditions.

Also, the present law relating to bench warrants is incomplete. There is a bewildering variety of bench warrant provisions scattered throughout the *Code*, some relating to compelling attendance of an accused person, others relating to compelling attendance of a witness. But curiously, nowhere does the *Code* provide a definition of what a bench warrant is. Our proposals provide a useful definition of bench warrant and integrate bench warrant powers in one comprehensive provision. This should make it easier in future for policy makers to differentiate the bench warrant from an ordinary arrest warrant when providing for means of compulsory process in legislation.

Other evidence of incompleteness also appears in the *Code*. For example, section 457.6, the provision which outlines the procedure for the prosecutor's seeking a review of interim release, provides that the accused may be ordered to be present at the hearing and his or her failure to do so may result in a warrant of arrest being issued. But the section does not provide a mechanism such as a summons by which the order is communicated to the accused so as to compel appearance. Such a notification device is needed. Once it is provided, a warrant later issued by a judge for the person's failure to attend at the hearing would clearly be a bench warrant.

Finally, other Commission proposals also demonstrate incompleteness in the *Code*. Two proposals for reform made in other Reports ought to be incorporated in a comprehensive section of the *Code* dealing with interim release and detention.

In our Report 25, we advanced proposals for a procedural statutory scheme to govern obtaining forensic evidence from an accused person in the course of a criminal investigation. To supplement this approach, our Report 29 proposed (at 21, 28) that one ground for the police detention of an accused person or for the issuance of a warrant should be to enable investigative procedures in respect of the person to be conducted where authorized by statute. The *Code* presently is silent as to the powers which peace officers have in this regard. In our view, the scheme of interim release and detention should clearly specify that, subject to necessary safeguards or limitations, conducting statutorily authorized investigative procedures in respect of the person is a proper ground for both police and judicially imposed custody.

### G. Other Defects

There also exist a number of defects in the present law which are difficult to fit into the previous categories. These are addressed here.

First, there is the provision for a coroner's warrant following a coroner's verdict alleging murder or manslaughter. This now appears anachronistic<sup>200</sup> and, arguably, is an inappropriate use of criminal procedure law to supplement the powers of a person presiding at what is, in essence, a civil inquiry.<sup>201</sup> Consequently, in this Working Paper we consider the advisability of abolishing the coroner's warrant.

In Report 29, we recommended that specific grounds be provided for police detention after arrest without warrant or for issuing a warrant.<sup>202</sup> These grounds should largely be incorporated into the scheme of interim release and detention and should also replace the grounds for detention now set out in subsection 457(7). The proposals which follow set out these grounds in such a manner.

The present law is also defective in its treatment of the person arrested without warrant on the ground that he or she was about to commit a crime. At present, paragraph 450(1)(a) provides that the person may be so arrested where it is reasonably believed that he or she is about to commit an indictable offence. This is too broad. Consistent with our Report 29, this power should be restricted to those occasions where

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200. Some provinces, such as Alberta and Nova Scotia, use a "medical examiner" system. See *Fatality Inquiries Act*, R.S.A. 1980, c. F-6; *Fatal Injuries Act*, R.S.N.S. 1967, c. 100. Other provinces, like Ontario and Québec, preclude the use of this provision by specifically forbidding findings which indicate legal responsibility. See, e.g., *Coroner's Act*, R.S.O. 1980, c. 93, s. 31. *An Act respecting the Determination of the Causes and Circumstances of Death*, R.S.Q., c. R-0.2, s. 4. Thus, the coroner's warrant has limited effect across Canada.

201. See, e.g., *Batary v. Attorney-General for Saskatchewan* (1965), [1965] S.C.R. 465; 46 C.R. 34.

202. Report 29 at 21, 28.

a peace officer reasonably believes that a person is about to commit a crime likely to cause personal injury or damage to property.<sup>203</sup>

In addition, the *Code* presently provides that even where custody is justified a witness cannot be detained for a total period in excess of ninety days. But this cap on detention does not distinguish between indictable and summary conviction crimes.<sup>204</sup> In principle, where a witness is detained in respect of a summary conviction crime, should not the total period of detention be less than that provided in respect of an indictable crime?

Another defect concerns the present limits upon the pecuniary conditions which can be imposed by the officer in charge. The limit of five hundred dollars has not changed since the introduction of the *Bail Reform Act*. Clearly, a revised scheme of interim release should take into account inflation over the years.

Under the present law, a variety of provisions exist which exempt a peace officer from any liability under federal statutes, and, to a more limited extent, provincial statutes where the peace officer is given a specific duty to release but fails to do so.<sup>205</sup> In this Working Paper we have asked whether such a blanket protection is appropriate in a régime which is designed to ensure maximum adherence to its rules.

Also, there is the present distinction between “primary” and “secondary” grounds for detention in subsection 457(7). That subsection provides that the primary ground for detention is that it is necessary to ensure the attendance in court of the accused. However, there are also secondary grounds for detention, which are to be considered only if it is determined that the primary ground does not apply. This emphasis upon “primary” as opposed to “secondary” grounds is fictitious in that in practice these are treated as merely different grounds for detention. The removal of the “primary” and “secondary” ground distinction coupled with a listing of specific grounds of detention would accord with the realities of present practice while remaining faithful to the underlying theme of restraint.

Finally, the power given to justices to endorse a warrant for arrest with an authorization to release once the arrest has been effected is too narrow. By subsection 455.3(6), a justice is authorized to endorse a warrant in this manner only in relation to those crimes for which, under the present law, an officer in charge may release a

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203. *Ibid.*, at 21, 23. In addition, this Working Paper proposes that this power of arrest be extended to cover occasions where a person is reasonably believed about to commit a crime against the compelling appearance interim-release provisions of the *Code*. Also, we proposed in Report 29, at 34-35, changes to *Code* subs. 454(2) and (2.1) governing interim release of a person arrested on a reasonable belief that there is a warrant outstanding for such person originating in a territorial jurisdiction other than the one in which the person was arrested. These changes were designed to ensure a fairer treatment of such a person more in accordance with the general scheme of interim release. The following recommendations are consistent with that approach.

204. See LRCC, *Classification of Offences* [Working Paper 54] (Ottawa: LRCC, 1986), concerning our proposals to reclassify crimes and abolish the use of the terms summary convictions and indictable offences.

205. *Code*, subs. 450(3), 452(3), 453(3), 454(4).

person. Again, limiting this power to a narrow category of crimes is inconsistent with a policy of interim release unless detention is clearly justified. Amendments to the law are required.

Given these defects, it is apparent that some, not insubstantial, reform of the present law is necessary. These reforms will make the law of interim release less technical, more understandable, and better able to withstand *Charter* challenges. Our recommendations for reform, with accompanying commentary, now follow.

## CHAPTER THREE

### Recommendations for Reform

#### I. Police Authority in Compelling Appearance and Interim Release of Accused Persons

##### A. Issuance of Appearance Notices

#### RECOMMENDATION

**1. The present distinctions between an appearance notice, a promise to appear and a recognizance should be abolished. Instead, these documents should be consolidated into one form of documentary notice called the appearance notice.**

#### Commentary

This recommendation merges all the documentary notices issued by the arresting peace officer or officer in charge into one document — an appearance notice. This eliminates the unnecessary multiplicity of forms which arises under the present law. By Recommendation 11, peace officers will be able to impose pecuniary or non-pecuniary conditions in an appearance notice. The inclusion of “pecuniary conditions” in an appearance notice would replace the function presently performed by the “recognizance”. This would simplify the present law. To avoid the imposition of unduly coercive conditions, Recommendation 43(4) permits a review of these conditions.

#### RECOMMENDATION

**2. A peace officer may issue an appearance notice to a person who the officer believes on reasonable grounds has committed a crime.**

#### Commentary

This recommendation provides the authority for police to compel appearance by means of an appearance notice without seeking prior judicial authority. It no longer ties the issuance of an appearance notice to any particular class of crimes. Instead, it is

generally available for all crimes in situations where the police reasonably believe that the person has committed a crime. This would allow police to compel the accused's attendance by way of an appearance notice without taking him or her into custody. This will not unduly affect public safety because the police will have authority to take a person into custody where necessary. These grounds for detention are set out in Recommendation 7.

This recommendation provides a comprehensive statement of principle: a peace officer may compel the appearance of a person by way of an appearance notice whenever there are reasonable grounds to believe that the person has committed a crime. Underlying this principle are two major objectives. First, the police should use an appearance notice as much as possible to compel the appearance of an accused instead of devices which are more liberty-intrusive. This is also reflected in Recommendation 5. Second, the police may use an appearance notice as soon as they have a reasonable belief that the person has committed a crime and need not wait to determine if the accused is detained or arrested before issuing the notice. Thus, this rule avoids the undue complexity of the present *Code* which distinguishes between a person released by way of an appearance notice instead of arrest and a person released by way of an appearance notice after arrest.

#### RECOMMENDATION

**3. (1) An appearance notice shall:**

- (a) be in writing and in Form 1;**
- (b) set out the name of the accused;**
- (c) set out briefly the crime the accused is alleged to have committed;**
- (d) require the accused to attend in court at a specific time and place and to attend thereafter as required by the court;**
- (e) require the accused to notify a designated peace officer or other person of any change in the accused's address, employment or occupation; and**
- (f) contain a warning to the accused that failure to abide by the requirements set out in the appearance notice is a crime and may result in a warrant for the arrest of the accused being issued and set out the text of the Code provision creating that crime.**

**(2) In addition, an appearance notice may:**

- (a) require a person accused of an indictable offence [or a crime punishable by more than two years imprisonment, or by two years or less imprisonment where legislation provides for an enhanced penalty upon a second conviction,] to attend at a specific time and place for the purposes of the *Identification of Criminals Act* [or for fingerprinting or photographing for identification purposes]; or**
- (b) require the accused to comply with any conditions of release set out in the appearance notice as are authorized by statute.**

## Commentary

This recommendation outlines the mandatory and discretionary requirements of an appearance notice. Paragraphs (1)(a), (b), (c) and (d) carry out the function of formally notifying the accused of the crime charged and ordering attendance in court. Paragraph (1)(e) outlines a standard requirement to notify police of a change in address, employment, or occupation. Paragraph (1)(f) informs the accused of the crime of failure to comply with the appearance notice or a judicially imposed undertaking set out in our proposed Criminal Code.<sup>206</sup> It is an important means by which to inform the person of his or her obligation to adhere to the terms of interim release. The first part of paragraph (2)(a) in square brackets corresponds with our recommendation in Working Paper 54 on *Classification of Offences*<sup>207</sup> for compelling appearance for the purposes of the *Identification of Criminals Act*. The second part of that paragraph in square brackets corresponds with our view in Report 25 that police power to fingerprint or photograph a suspect for identification purposes should be governed by its scheme for investigative procedures in respect of the person, not by the *Identification of Criminals Act*.<sup>208</sup> Paragraph (2)(b) reflects a major change in the substance of an appearance notice. By Recommendation 1, the appearance notice would fulfill the function of all the documentary notices issued by the peace officer and officer in charge. Henceforth, it would contain conditions such as depositing one's passport with a peace officer or abstaining from communicating with any person. These conditions are provided in Recommendation 11.

## RECOMMENDATION

**4. (1) The peace officer shall:**

- (a) give the accused a duplicate of the appearance notice; and**
- (b) certify that the accused was given a duplicate.**

**(2) Where a peace officer seeks to impose conditions of an accused's release in the appearance notice, the officer shall have the accused sign the appearance notice.**

**(3) The conditions shall be effective only if the accused signs the appearance notice.**

**(4) A peace officer shall warn a person that a failure to sign may result in detention.**

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206. LRCC, *Recodifying Criminal Law — Revised and Enlarged Edition of Report 30* [Report 31] (Ottawa: LRCC, 1988) [hereinafter Code] Recommendation 25(7)(a) at 120.

207. *Supra*, note 204.

208. See Report 25 at 41-42. Unlike the *Identification of Criminals Act*, the Commission's proposal would require that the police believe on reasonable grounds that the fingerprinting or photographing is necessary to identify the suspect.



## Commentary

This recommendation concerns the manner of issuance of an appearance notice. In all cases, the issuing peace officer must give the accused a duplicate of the appearance notice and certify that a duplicate was given to the accused. Whether or not the accused must sign the appearance notice depends upon whether the requirements of the appearance notice are in the nature of agreements or orders. Any conditions of an appearance notice, as set out in Recommendation 11, are in the nature of agreements. They will take effect only if the accused signs the appearance notice. But the standard requirements of an appearance notice as set out in Recommendation 3(1) and (2)(a) are in the nature of orders. They will remain valid whether or not the accused signs. This poses no practical problem for the police since, if the accused refuses to sign, the peace officer would probably have reasonable grounds to believe that the accused's detention is necessary to ensure attendance and so could detain him or her. To ensure that an accused understands that his or her liberty is at risk, subsection (4) requires the peace officer, in those circumstances, to warn the person of the likelihood of detention. As noted earlier, to avoid the imposition of unduly coercive conditions upon an accused who does not wish to be detained, Recommendation 43(4) provides a mechanism to review the appropriateness of such conditions.

## B. Preference for Appearance Notices and Summonses

### RECOMMENDATION

**5. A peace officer shall, wherever possible, issue an appearance notice or seek the issuance of a summons rather than detain an accused person in custody.**

## Commentary

Instead of issuing an appearance notice, a peace officer under present law may also compel the attendance of a person by seeking the issuance of a summons. Use of a summons injects flexibility into the scheme of interim release. Occasions can arise where the peace officer may not initially issue an appearance notice. For example, the peace officer may not be certain which crime to charge. Or, the peace officer may have released the person in the mistaken belief that he or she did not commit a crime only to discover later that the person released is the prime suspect. In these circumstances, the police could later seek the issuance of a summons from a justice rather than serve an appearance notice upon the accused which would have to be subsequently confirmed by a justice. Either method is an alternative to detaining the accused in custody. Recommendation 5 ensures that the peace officer must use either an appearance notice or seek the issuance of a summons to compel the appearance of an accused unless, in the circumstances, a detention in custody is required. The precise rules governing the issuance of a summons are found in Recommendations 13 to 18.

### C. Arrest Without Warrant

#### RECOMMENDATION

**6. A peace officer may arrest without warrant:**

**(1) a person who the officer believes on reasonable grounds has committed or is committing a crime;**

**(2) a person for whom the officer has reasonable grounds to believe there is an arrest warrant in force that may be executed in the territorial jurisdiction in which the person is found; or**

**(3) a person who the officer believes on reasonable grounds is about to commit:**

**(a) a crime that is likely to cause harm to a person or damage to property; or**

**(b) a crime against the compelling appearance and interim-release provisions of the Code.**

#### Commentary

For the most part, this recommendation repeats our proposals in Report 29. But two points need to be emphasized. First, the use of the phrase “a crime that is likely to cause harm to a person” in paragraph (3)(a), though not the precise wording used in the *Arrest* Report, reflects consistency with the wording outlined in our proposed Code.<sup>209</sup>

Second, paragraph (3)(b) of this recommendation is an addition to our previous proposals. The law should permit preventive action by the police prior to the commission of a crime only when there are reasonable grounds to do so. In addition to crimes that are likely to cause harm to a person or damage to property, it is justifiable to authorize arrest without warrant where there are reasonable grounds to believe that a person is about to commit a crime against the compelling appearance and interim-release provisions of our proposed Criminal Code. The person in question has already been granted interim release. If there are reasonable grounds to believe that such a person is about to abscond or in some other way breach conditions of interim release, it is proper to arrest the accused in order to make the person comply with the interim-release order or bring the person before a court for a reconsideration of his or her release. This replaces the specific power of arrest without warrant now provided for by *Code* subsections 458(2) and 459(6).

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209. For example, the Code creates the crime of “assault by harming” (Rec. 7(2) at 62). The concept of “likely to cause harm” would encompass crimes such as murder and endangering. It corresponds in substance to the wording used in our Report 29 at 21, i.e. a crime “likely to cause personal injury.”

#### D. The Duty to Release After Arrest

#### RECOMMENDATION

**7. (1) A peace officer who arrests a person without warrant, or into whose custody an arrested person is delivered, shall release the person as soon as practicable, unless the officer has reasonable grounds to believe that proceedings should be instituted against the person and that continued custody is necessary:**

- (a) to ensure that the person will appear in court;**
- (b) to establish the identity of the person;**
- (c) to conduct investigative procedures in respect of the person authorized by the Code of Criminal Procedure in order to prevent loss or destruction of evidence;**
- (d) to prevent interference with the administration of justice;**
- (e) to prevent the continuation or repetition of the crime for which the person has been arrested; or**
- (f) to ensure the protection or safety of the public.**

**(2) Where the accused is in custody only on grounds (1)(b) or (1)(c), the authorities shall promptly conduct the inquiries necessary to determine identity or the investigative procedures in respect of the person and release the accused immediately upon their completion.**

**(3) Where a peace officer arrests a person who was about to commit a crime likely to cause harm to a person or damage to property or against the compelling appearance or interim-release provisions of the Code, the person shall be released unconditionally as soon as practicable after the officer is satisfied that continued custody is no longer necessary to prevent the commission of the crime.**

#### Commentary

This recommendation, for the most part, repeats a similar recommendation in Report 29 (at 21). However, four aspects of this recommendation need to be discussed further.

First, the phrase “unless the officer has reasonable grounds to believe that proceedings should be instituted against the person” ensures that all arrested persons need not be charged. Where a mistake has been made and the person appears innocent, where the matter is a trivial prank, or a decision has been made for some other reason not to prosecute, the person should simply be released.

Second, while the recommendation does not prohibit the police from asking questions of a suspect, it does prohibit detention solely for the purpose of questioning. However, there must be some flexibility to enable police to ask questions in order to determine whether detention is necessary on the grounds specified herein. This

flexibility is provided by the proviso that the police shall release the person "as soon as practicable." Under our proposed scheme for questioning suspects, the police officer cannot question a suspect unless that person has first been given a warning to the effect that he or she has the right to remain silent.<sup>210</sup> If the suspect refuses to answer questions, as is the right of this person, the police must release him or her unless there are other grounds for detention. If the suspect volunteers to answer questions despite such a warning, the coercive element of the custody is lacking, and so the police can continue to ask questions.

Third, subsection (2) is an addition to our previous recommendation in Report 29. Where the suspect is detained solely for the purpose of establishing identification or for conducting investigative procedures in respect of the person authorized by the Commission's forthcoming Code of Criminal Procedure<sup>211</sup> where loss or destruction of evidence is feared, the police should promptly conduct their inquiries or investigative procedures in respect of the person and then release immediately once they are completed unless they reveal new grounds for detention. The term "investigative procedures in respect of the person" means fingerprinting or photographing of an accused or judicially authorized investigative procedures proposed in our Report 25.

Fourth, subsection (3) places clear limits on detention when a person is arrested on the ground that he or she is about to commit a crime outlined therein. This is consistent with the present law as described in subsection 454(3) of the *Code*.

## RECOMMENDATION

**8. Where a person has been arrested with a warrant, a peace officer may release the person if the justice who issued the warrant authorized the accused's release by making an endorsement to that effect on the warrant.**

### Commentary

This recommendation expands the power to release beyond what the present law provides for in section 453.1 and subsection 455.3(6) of the *Code*. Currently, this power to release applies only to the officer in charge in relation to those limited crimes for which he or she could otherwise release. This recommendation applies this power to release to *all* crimes where the accused has been arrested by a peace officer on the basis of a warrant which the justice has endorsed with a direction to release.

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210. See LRCC, *Questioning Suspects*, *supra*, note 126.

211. Our forthcoming Code of Criminal Procedure (to be published in 1989) will contain our recommendations on the general principles of criminal procedure already described in LRCC, *Our Criminal Procedure*, *supra*, note 167.

## RECOMMENDATION

**9. The present distinction between the arresting peace officer and the officer in charge should be abolished. The power to release should be given uniformly to all officers who have custody of an arrested or detained person and should include the power to release upon conditions.**

### Commentary

This recommendation removes the concept of an officer in charge from the *Code*. All peace officers, whether making an arrest at the scene or dealing with the suspect at the station-house, would have the power to compel appearance by way of an appearance notice with or without conditions and would be governed by the general duty to release set out in Recommendation 7. This eliminates undue technicality and assists in promoting efficiency within the criminal justice system. This change is also justified from both a policy and practical viewpoint. The contention that all peace officers should have equal broad power to release — which may already be reflected at least in part by *Code* paragraph 454(1)(d) and subsection 454(1.1) — is consistent with the use of detention as a last resort. Moreover, it removes the fictitious distinction that arises in small police forces where the arresting officer and the officer in charge are often the same person. Of course, police bureaucracies may have internal guidelines to structure the exercise of the discretion to release. However, it is not proper for the *Code* to make a rule that cuts off totally the exercise of such discretion.

## RECOMMENDATION

**10. A peace officer who arrests a person without warrant or into whose custody an arrested person is delivered may compel the person's attendance in court:**

- (a) by way of an appearance notice; or**
- (b) by seeking the issuance of a summons.**

### Commentary

This recommendation reminds a peace officer of the discretionary options available when faced with the decision of how to compel the appearance of a person whom the officer decides it is necessary to release. If there is some reason why it is impracticable to issue an appearance notice to such a person, there is always the possibility of using a summons.

E. Conditions of Release

**RECOMMENDATION**

**11. A peace officer who issues an appearance notice and who believes on reasonable grounds that it is necessary in order to achieve any of the purposes listed in subsection 7(1) may require the accused:**

- (a) to deposit the accused's passport, if any;**
- (b) to remain within a specified territorial jurisdiction;**
- (c) to abstain from communicating with any person expressly named;**
- (d) to abstain from attending at a specified place;**
- (e) to agree to forfeit, but without deposit of money or valuable security, an amount not to exceed two thousand dollars in the event of the accused's failure to fulfil any of the requirements of the appearance notice; or**
- (f) if the accused is not ordinarily resident in the province or does not ordinarily reside within two hundred kilometres of the place of trial, to agree to forfeit, with or without deposit of money or valuable security, an amount not to exceed two thousand dollars in the event of the accused's failure to fulfil any of the requirements of the appearance notice.**

Commentary

This recommendation lists the conditions which can be imposed by the peace officer in an appearance notice. Linked with this proposal is Recommendation 9 which would abolish the present distinction between the officer in charge and the issuing peace officer and give the peace officer power to compel appearance upon conditions. Because these conditions are potentially severe — they include non-pecuniary conditions such as depositing passports, remaining within the jurisdiction, non-contact with others, and pecuniary conditions up to a two thousand dollar limit — there should be a review procedure to prevent the arbitrary imposition of these conditions. As noted earlier, this is taken up in Recommendation 43(4).

**II. Judicial Authority in Compelling Appearance  
of Accused Persons**

**A. Laying an Information [Charge Document]**

**RECOMMENDATION**

**12. (1) Anyone who believes on reasonable grounds that a person has committed a crime may lay an information [charge document] in writing and**

**under oath before a justice and the justice shall receive the information [charge document] if it alleges that the person named in it committed a crime.**

**(2) Where an appearance notice has been issued, an information [charge document] shall be laid before a justice as soon as practicable and in any event before the time of appearance in court stated in the appearance notice.**

**(3) An information [charge document] shall be in writing and in Form 2.**

### Commentary

*Code* section 455 provides a general rule that a person who, on reasonable grounds, believes a person has committed an indictable offence may lay an information before a justice. *Code* section 455.1 provides that where the accused has been released on an appearance notice, promise to appear or a recognizance issued by a peace officer or officer in charge, the information must be laid within specific time limits. This recommendation combines these two separate sections in a more concise and simpler manner. By subsection (1), anyone who on reasonable grounds believes that a person has committed a crime may lay an information before a justice. This includes a peace officer who seeks to lay an information after having issued an appearance notice. The word “charge document” is provided in square brackets because our Working Paper entitled *The Charge Document in Criminal Cases* recommends that a single document known as the charge document should replace the information or indictment presently used to commence criminal proceedings.<sup>212</sup> Subsection (2) makes it clear that when an appearance notice has been issued, the information must be laid before the justice as soon as practicable and in any event before the time of appearance stated in the appearance notice.

*Code* paragraphs 455(a) to (d) provide that an information may be laid before a justice where: (a) the person has committed an indictable offence anywhere triable within the province and is, or is believed to be, or resides, or is believed to reside, within the territorial jurisdiction of the justice, (b) the person has committed an indictable offence within the territorial jurisdiction of the justice, (c) the person has unlawfully received anywhere property that was unlawfully obtained within the territorial jurisdiction of the justice, or (d) the person has in his or her possession stolen property within the territorial jurisdiction of the justice. The recommendation does not propose changes to these provisions. These are issues of territorial jurisdiction which will be addressed by the Commission in its future work.

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212. LRCC, *The Charge Document in Criminal Cases* [Working Paper 55] (Ottawa: LRCC, 1987), at 15-16 [hereinafter Working Paper 55].

B. Procedure for Issuance of Process

**RECOMMENDATION**

**13. (1) After an information [charge document] has been laid, a justice shall, before determining whether to confirm an appearance notice or issue a summons or warrant, consider *ex parte*:**

- (a) the allegations of the informant; and**
  - (b) the evidence of other witnesses where the justice considers it desirable or necessary to do so.**
- (2) A justice who hears oral evidence shall:**
- (a) take the evidence upon oath; and**
  - (b) cause the evidence to be taken down in accordance with the procedures applicable to preliminary inquiries, with such modifications as the circumstances require.**

Commentary

This recommendation largely integrates the present procedure for obtaining evidence to determine whether process should issue as found in *Code* paragraph 455.4(1)(a) and subsection (2).

**RECOMMENDATION**

**14. (1) After an information [charge document] has been laid, a justice, who has reasonable grounds to believe that the person named in the information [charge document] has committed a crime, may:**

- (a) confirm the appearance notice as to any crime specified therein, or as to any other crime charged in the information [charge document], and shall endorse the information [charge document] accordingly;**
- (b) confirm the appearance notice as to the time, date and place of appearance specified therein, or as to any other time, date or place, and shall endorse the information [charge document] accordingly;**
- (c) cancel the appearance notice and issue a summons or warrant, and shall endorse the summons or warrant accordingly; or**
- (d) where no appearance notice has been issued to the accused, issue a summons or warrant to compel the accused to attend court to answer the charge set out in the information [charge document].**

**(2) Where satisfied that there are insufficient grounds for believing that the accused has committed the crime, the justice shall cancel the appearance notice with the intention of issuing no other process.**



**(3) A justice shall, as soon as practicable, give notice to an accused in writing and in Form 3 of:**

- (a) the confirmation of an appearance notice in relation to a charge other than that set out in the appearance notice, or a time, date or place of appearance other than that set out in the appearance notice; or**
- (b) the cancellation of the appearance notice with the intention of issuing no other process.**

### Commentary

This recommendation unites in one section the grounds and procedures for issuance of process now found in *Code* paragraph 455.3(1)(b), and section 455.4 in a concise and straightforward manner. The recommendation now makes it clear that the justice can only confirm an appearance notice or issue a summons or warrant where the justice has reasonable grounds to believe that the person named in the information has committed the crime. Paragraph (1)(a) deals with confirming the crime specified in the appearance notice or any other crime specified in the information, while paragraph (1)(b) deals with confirming the appearance notice as to the time, date and place of appearance specified in it or any other time, date, or place. Paragraph (1)(c) provides the justice power to cancel the appearance notice and issue a summons or warrant instead. Paragraph (1)(d) provides the general power of a justice to issue a summons or warrant. Subsection (2) authorizes the justice to cancel the appearance notice where there are insufficient reasonable grounds to believe that the accused committed the crime. Subsection (3) requires the justice to give notice to the accused of a change in the charge, time, date or place of appearance as set out in the appearance notice, or of a decision to cancel the appearance notice with no intention of issuing other process.

### C. Recommencement and Subsequent Proceedings

#### RECOMMENDATION

**15. (1) Where recommencement of proceedings occurs following the entry of a prosecutorial stay, or where an indictment [charge document] has been filed with the court, the court, if it considers it necessary, may compel the accused to attend before it by way of a summons or a warrant of arrest.**

**(2) Where, as a result of an appeal, review or a direction of the minister of Justice, proceedings against the accused person are continued or a new trial or a new hearing is ordered, a justice may issue either a summons or a warrant for arrest in order to compel the accused to attend at such proceedings.**

**(3) The release or detention of the person under this recommendation shall be determined in accordance with the general scheme of interim release or detention.**

## Commentary

This recommendation provides the procedure to be followed where proceedings are recommenced following a stay or are commenced following the preferring of an indictment or after an appeal court or the minister of Justice has ordered or directed a new trial or hearing. Subsections (1) and (2) retain present *Code* section 507.1 and subsection 455.3(8) which respectively give the courts or justices additional power to issue a summons or warrant to compel the accused's attendance in court. However, subsection (3) effects a reform in the present law. By this provision, the release or detention of the accused must be determined in accordance with the general scheme of interim release or detention which follows. In other words, the onus would be on the prosecutor to show cause before a provincial court judge or specially designated justice why the detention of the accused is necessary. Thus, this provision would effectively repeal that part of present *Code* subsection 608(7) which provides that where a court of appeal or the Supreme Court of Canada orders a new trial or hearing or the minister of Justice gives a direction under section 617 (but not a reference under section 617), the person is to be treated in the same manner as a person seeking release pending appeal against conviction — that is to say with the onus being placed upon the person seeking release to show cause why detention is not necessary. Additional comments are provided in the recommendations about interim release pending appeal.

### D. Issuing Warrants for Arrest

#### RECOMMENDATION

**16. (1) A justice shall not issue a warrant for the arrest of an accused person unless the justice has reasonable grounds to believe that the warrant is necessary:**

- (a) to ensure the accused's attendance in court;**
  - (b) to locate the accused whose whereabouts are unknown;**
  - (c) to conduct investigative procedures in respect of the person authorized by the Code of Criminal Procedure in order to prevent loss or destruction of evidence;**
  - (d) to prevent interference with the administration of justice;**
  - (e) to prevent the continuation or repetition of the crime for which the person has been charged; or**
  - (f) to ensure the protection or safety of the public.**
- (2) Before determining whether to issue a warrant for arrest, a justice shall:**
- (a) examine the information [charge document] or cause it to be read;**
  - (b) inquire as to the reasons advanced by the applicant for resorting to the use of a warrant rather than a summons or an appearance notice. Reasons may be provided orally or by an affidavit in Form 4 and in any event the**

**justice may question the applicant orally concerning the necessity for the issuance of the warrant; and**

**(c) consider whether to authorize the arresting officer to release the accused by making an endorsement to that effect on the warrant.**

**(3) Where a justice authorizes the release of an accused by making an endorsement to that effect on a warrant, the appearance notice issued pursuant to the endorsement need not be confirmed by a justice.**

**(4) Upon application by a peace officer, a justice may extend the territorial validity of a warrant already issued.**

**(5) This recommendation applies with the necessary modifications to a court before which an indictment [charge document] has been presented.**

### Commentary

Recommendation 16 deals with the issuance of a warrant. Subsection (1) provides that a warrant can only be issued on certain grounds. They generally parallel the grounds for maintaining a suspect in police custody provided in Recommendation 7(1), with one additional clarification. Often a warrant is issued only to locate the accused because his or her whereabouts are unknown and not because the peace officer believes that it will be necessary to keep the person in custody to compel attendance in court. To clarify that this procedure continues in this scheme, paragraph 1(b) is added. We anticipate that where a warrant is issued solely to locate the person the issuing justice will endorse the warrant with an authorization that the peace officer release the accused. In general, this subsection structures more precisely the exercise of judicial discretion than does the imprecise "public interest" requirement of present *Code* subsection 455.3(4). Subsection (2) outlines the procedure that a justice must follow. Paragraph (2)(b) supplements previous proposals. It ensures that a justice, before issuing a warrant, inquires as to the reasons advanced by the applicant for the issuance of a warrant, and that a record of such reasons will exist, either because the oral evidence is taken down generally in accordance with the procedures applicable to preliminary inquiries or because the reasons are set down in an affidavit. This provides more flexibility than the requirement in all cases of an affidavit.<sup>213</sup> Moreover, it permits the justice to question the applicant about the necessity for issuing the warrant. Paragraph (2)(c) provides explicit authority for a justice to authorize the release of an accused by so endorsing on the warrant. Subsection (3) integrates present *Code* subsection 455.3 (7) which makes it unnecessary to confirm a documentary notice issued by the police pursuant to a judicial endorsement on a warrant in order for such notice to be effective. Subsection (4) gives a justice the power to extend the territorial validity of a warrant already issued. Subsection (5) ensures that the same procedure governing the issuance of a warrant applies to a court before which an indictment has been presented.

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213. See Report 29, at 30-33.

## RECOMMENDATION

**17. (1) A peace officer who finds it impracticable to appear in person may, by telephone or other means of telecommunication, apply:**

- (a) for a warrant where an information [charge document] has already been laid charging the accused with a crime; or**
- (b) for an extension of the territorial validity of a warrant which has a restricted territorial validity.**

**(2) Where a justice receives an application for a warrant or for the extension of the territorial validity of a warrant by telephone or other means of telecommunication, the justice shall:**

- (a) record verbatim the contents of the information [charge document], if the information [charge document] is not in the possession of the justice;**
- (b) record the reasons advanced by the applicant for the issuance of a warrant rather than the issuance of a summons or the confirmation of an appearance notice or for the extension of the territorial validity of a warrant as the case may be; and**
- (c) question the applicant about the circumstances which make it impracticable for the applicant to appear in person.**

**(3) Where a justice issues a warrant for arrest by telephone or other means of telecommunication:**

- (a) the justice shall complete and sign the warrant in Form 6; and**
- (b) the peace officer, on the direction of the justice, shall complete and sign a facsimile of the warrant in Form 6.**

**(4) Where a justice extends the territorial validity of a warrant by telephone or other means of telecommunication, the peace officer, on the direction of the justice, shall endorse the warrant to that effect.**

## Commentary

This recommendation consolidates all of our proposals in Report 29 which relate exclusively to telewarrants. It also supplements these proposals to include obtaining an extension of the territorial validity of a warrant by telewarrant, thus making the scheme more comprehensive. Therefore, it confirms our orientation toward telewarrants for arrest where obtaining a warrant by ordinary means proves impracticable.

## RECOMMENDATION

**18. The information [charge document] or its transcription, the record of the reasons advanced by the applicant for the issuance of a warrant or for the extension of its territorial validity or the affidavit of the applicant in Form 4 or its transcription, and the warrant or a copy of the warrant in Form 6 shall be filed with the court.**

## Commentary

This general requirement to file the information [charge document], affidavit and warrant is taken from Report 29 with appropriate modifications to conform to the proposals made in Recommendations 16 and 17. The filing would create a record of the proceedings which will provide a proper basis for any future consideration of the propriety of the process.

### E. Contents of Summonses and Warrants

#### RECOMMENDATION

19. (1) A summons shall:

- (a) be in writing and in Form 5;
- (b) be directed to the accused;
- (c) set out briefly the crime the accused is alleged to have committed;
- (d) require the accused to attend in court at a specific time and place and to attend thereafter as required by the court; and
- (e) contain a warning to the accused that failure to attend in court as required is a crime and may result in a warrant for the arrest of the accused being issued and set out the text of the Code provision creating that crime.

(2) In addition, a summons may require a person accused of an indictable offence [or a crime punishable by more than two years imprisonment, or by two years or less imprisonment where legislation provides for an enhanced penalty upon a second conviction,] to attend at a specific time and place for the purposes of the *Identification of Criminals Act* [or for fingerprinting or photographing for identification purposes].

(3) A peace officer shall serve a summons personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it at the person's last or usual place of abode with a person who appears to live there and appears to be at least sixteen years of age.

(4) A peace officer may prove service of a summons either orally or by an affidavit made before a justice or other person authorized to administer oaths or to take affidavits.

(5) Where any summons, notice or other process is required to be or may be served on a corporation, and no other method of service is provided, such service may be effected by delivery:

- (a) in the case of a municipal corporation, to the mayor, warden, reeve or other chief officer of the corporation, or to the secretary, treasurer or clerk of the corporation; and

**(b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or of a branch thereof.**

**(6) A summons may be served anywhere in Canada.**

### Commentary

This recommendation largely incorporates present *Code* provisions 455.5, 631.1 and 631.2 concerning the contents and service of a summons. Once served, the summons would be effective notwithstanding the territorial jurisdiction of the authority that issued the summons. It does not address the issue of whether counsel or an agent can appear in court in the accused's stead, as this will be addressed more comprehensively in a forthcoming Working Paper on Double Jeopardy, Pleas and Verdicts.

### RECOMMENDATION

**20. (1) A warrant shall:**

**(a) be in writing and in Form 6;**

**(b) name the accused;**

**(c) set out briefly the crime the accused is alleged to have committed;**

**(d) set out briefly the reasons why the issuance of a warrant is necessary;**

**(e) be executed by a peace officer in the territorial jurisdiction in which it was issued, unless the justice specifies that it may be executed anywhere in the province or anywhere in Canada; and**

**(f) order that the accused be arrested immediately and brought before a specified court in the jurisdiction in which the warrant was issued or a court having jurisdiction over arrested persons in the territorial jurisdiction in which the accused was found.**

**(2) A warrant may permit the accused to be released in accordance with an endorsement made by the justice issuing the warrant.**

### Commentary

This recommendation replaces present *Code* sections 456.2 and 456.3 which generally restrict the territorial validity of a warrant to the territorial jurisdiction of the justice issuing it. It also renders superfluous section 461 by which a warrant issued in one territorial jurisdiction can be executed in another once an endorsement to that effect has been made by a justice in that other jurisdiction. This accords with the flexible approach to Canada-wide validity and execution of warrants advocated in Report 29. Indeed, Form 6 is generally taken from that Report (at 63-64). The chief merit of this form of warrant is that both peace officers and justices must now clearly address their

minds to the issue of whether a warrant is necessary and, if so, whether detention of the accused is necessary. This reflects an appropriate orientation to both the rule of law and the principle of restraint.

### III. Awaiting First Appearance Before a Justice

#### RECOMMENDATION

**21. An arrested person who has not been released shall be held in custody in accordance with the recommendations governing general conditions of pre-trial custody.**

#### Commentary

The conditions governing pre-trial custody found in Recommendations 55 through 63 apply to this stage of police custody just as they also apply to custody following a judicial remand. These conditions of pre-trial custody are designed to assert the right of an accused to make a full answer and defence and to a proper investigation into allegations of abuse occurring while in custody. Nonetheless, they are subject to those restrictions “necessary for the purposes of custody, the maintenance of security and order in the place of custody, or the prevention of interference with the administration of justice.” This formulation will be discussed in the commentary under Recommendation 56(2).

#### RECOMMENDATION

**22. A peace officer having custody of an arrested person shall cause the person to be taken before a justice:**

- (a) where a justice is available within a period of twenty-four hours after the person’s arrest, without unreasonable delay and in any event within that period; or**
- (b) where a justice is not available within a period of twenty-four hours after the person’s arrest, as soon as practicable.**

#### Commentary

We base this recommendation largely upon present *Code* section 454.<sup>214</sup> The introductory wording of the recommendation is sufficiently general to apply to cases where a person is arrested by a citizen and delivered to a peace officer. The proposed

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214. Some provisions of section 454 are not included here because they are more properly placed elsewhere. Recommendation 7(3) covers *Code* subsection 454(3) on release by police of persons arrested when “about to commit” a crime. Finally, Recommendation 54 deals with the liability of peace officers who fail to bring an arrested person to a justice within the appropriate time period.

twenty-four hour period runs from the time of arrest rather than, as in the present law, from the time the person arrested was delivered to a peace officer.

## **RECOMMENDATION**

**23. (1) Where a warrant for arrest has been issued in one territorial jurisdiction and the person has been arrested in another territorial jurisdiction on the basis of such a warrant, that person shall be taken before a justice pursuant to Recommendation 22.**

**(2) At any time prior to taking such a person before a justice, a peace officer may release the person if the warrant for arrest has been obtained and contains the justice's endorsement authorizing such release.**

**(3) If the justice is not satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the crime, the justice shall release that person.**

**(4) A justice who on reasonable grounds believes that the person arrested is the person alleged to have committed the crime may:**

**(a) release the person in accordance with the general provisions of judicial interim release; or**

**(b) remand the person in detention to await the arrival of the warrant and the transfer of that person, but if no transfer has been so initiated within a period of three days after the remand, the custodian shall release that person.**

## **Commentary**

This recommendation incorporates, with appropriate modifications, the provisions made in Report 29 (at 33) on release of a person who is arrested on the belief that a warrant is outstanding for him or her which has been issued in another territorial jurisdiction. This scheme would work as follows. Generally the arresting peace officer would have to bring the accused before a justice within the time frame imposed by Recommendation 22. However, the peace officer may release the accused prior to taking him or her before the justice if the warrant is received in the interim and if the warrant contains a justice's endorsement authorizing release. The justice must release the person if not satisfied on reasonable grounds that the person arrested is the person alleged to have committed the crime. If satisfied that the person arrested is the same one alleged to have committed the crime, the justice has two options. He or she may release in accordance with the recommendations which follow governing judicial interim release. Or, the justice may order the accused to be held in custody. If the latter, the total period of custody cannot be for more than three days after the time that the accused is remanded in custody unless within that period the warrant originating in the other territorial jurisdiction arrives and the transfer is initiated. The effect is that a person cannot be held in custody for more than four days from the time of arrest until the transfer is initiated. The four-day period corresponds with the usual maximum period of time for which a person may be held in custody prior to the show-cause



hearing, that is to say the twenty-four hour period within which the accused must be brought before a justice outlined in Recommendation 22 and the three-day adjournment period outlined in Recommendation 24.<sup>215</sup>

#### **RECOMMENDATION**

**24. (1) A justice before whom an accused person is brought may, upon application by the prosecutor or the accused, adjourn the proceedings and remand the accused in custody by warrant, but no such adjournment shall be for more than three clear days except with the accused's consent.**

**(2) A warrant under this section shall be in writing and in Form 7.**

#### **Commentary**

This recommendation merely incorporates present *Code* section 457.1 concerning the adjournment of proceedings and remand in custody of the accused by the justice.

### **IV. Judicial Interim Release of Accused Persons**

#### **A. Jurisdiction of Provincial Court Judges**

#### **RECOMMENDATION**

**25. Provincial court judges, and justices of the peace who have been specially designated for the purpose by the Chief Judge of the provincial criminal court, should have jurisdiction to hear and determine matters of judicial interim release in relation to all crimes.**

#### **Commentary**

This recommendation abolishes the distinction which exists under the present law between section 427 crimes and all other crimes. The present regime creates unnecessary constitutional, administrative and technical problems. These are solved by placing authority to determine interim release or detention in the jurisdiction of one court. Provincial court judges now hear almost all interim-release applications. The distinction in the present law which prevents provincial court judges from hearing interim release in relation to section 427 crimes means, in practice, that these judges do not hear bail applications for murder cases. This is not a useful distinction. Thus,

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<sup>215</sup> This recommendation is based largely on the proposals for reform in this area made by Report 29, at 33-35.

given the *de facto* status of provincial court judges as the main criminal courts throughout the country, provincial court judges ought to have general jurisdiction for all bail matters.

However, provincial court judges may not be available in parts of some provinces and territories to speedily handle judicial interim-release issues. For this reason, it is apparent that to ensure speedy justice and equal treatment certain justices of the peace should handle matters of interim release. We would anticipate that such justices would be trained in legal matters. They should not depend on Crown counsel and police for legal advice since, as Ewaschuk J. pointed out in *Re Currie and Niagara Escarpment Commission*,<sup>216</sup> this raises serious questions about their independence. In this regard, it should be noted that under Ontario's proposed revision of the *Justices of the Peace Act*, a provincial court judge shall be appointed Co-ordinator of the justices of the peace and he or she may issue directions to the justices on questions of law and procedure.<sup>217</sup> To ensure that qualified justices determine interim release issues, those justices should be specially designated by the Chief Judge of the provincial criminal court.

#### B. Authority to Determine Interim Release and Detention for the Crime Charged

#### RECOMMENDATION

**26. (1) An order for the release or detention of an accused shall be made in relation to the particular crime for which the accused was taken before a justice, notwithstanding that the accused is in custody on another matter.**

**(2) If an order for the accused's custody is made, the order shall take effect and shall remain in force until vacated or varied or until the charge is disposed of.**

**(3) If an order for the accused's release is made, the order shall take effect concurrently with any other order for release or upon the termination of custody upon another matter and shall remain in force until vacated or varied or until the charge is disposed of.**

#### Commentary

This recommendation incorporates the present law relating to jurisdiction to determine interim release for the crime charged in a straightforward, understandable manner. Subsection (1) ensures that a judge may determine interim release for the crime charged notwithstanding that the accused is in custody on another matter either as an accused or witness. Subsection (2) ensures that detention orders have priority over any

216. *Re Currie and Niagara Escarpment Commission* (1984), 46 O.R. (2d) 484 (H.C.); reversed (1984), 48 O.R. (2d) 609 (C.A.).

217. Bill 93, *An Act to revise the Justices of the Peace Act*, 34th Leg. Ont., 1988, 1st Reading January 6, 1988, cl. 13, 18.

release orders. Where there is another detention order in effect, the new detention order would take effect concurrently with it and, once custody terminated with respect to the other matter, would operate to keep the person in custody until varied or the charge is disposed of. Subsection (3) ensures that a release order runs concurrently from the time it is made with any other release orders until it terminates pursuant to its terms. However, where the accused is already in custody on another matter, the release order would not take effect until the period of custody ends. For example, if an accused was on probation on another charge but was taken back into custody on being charged with a second crime, the judge would have jurisdiction to order interim release in relation to that crime but the release order would take effect only when the parole authorities decided to put the accused back on probation.

### C. Unconditional Release

#### **RECOMMENDATION**

**27. (1) A justice before whom an accused is taken shall, unless a plea of guilty by the accused is accepted, order that the accused be released upon giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause why the accused should be held in custody or why conditions on the accused's release should be imposed.**

**(2) Where an accused who is taken before a justice pleads guilty and the plea is accepted, the justice may make an order for the accused's release pending imposition of sentence.**

#### Commentary

This recommendation essentially restates in a more concise manner *Code* subsection 457(1) absent any reference to the section 427 crimes exclusion in order to follow the policy adopted in Recommendation 25. Subsection (1) of the recommendation provides the general rule that the judge must release an accused on an undertaking without conditions unless the prosecutor shows cause why detention or conditions on release is justified. Subsection (2) incorporates present *Code* subsection 457.3(2), which permits a judge to release the accused who pleads guilty before him or her pending imposition of sentence.

### D. Conditional Release

#### **RECOMMENDATION**

**28. (1) A justice who does not make an order for unconditional release shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released upon giving an undertaking with such of the following conditions as the justice directs:**

**(a) an agreement to abide by any of the non-pecuniary conditions found in subsection (2);**

**(b) an agreement, without sureties, to forfeit such amount as the justice directs on breach of the undertaking, but without deposit of money or valuable security;**

**(c) an agreement, with sureties, to forfeit such amount as the judge directs on breach of the undertaking, but without deposit of money or other valuable security;**

**(d) with consent of the prosecutor, an agreement without sureties to forfeit such amount as the justice directs on breach of the undertaking, and with the deposit of such sum of money or other valuable security as the justice directs; or**

**(e) where the accused is not ordinarily resident in the province of custody or does not ordinarily reside within two hundred kilometers of the place of custody, an agreement with or without sureties to forfeit such amount as the justice directs on breach of the undertaking and with the deposit of such sum of money or other valuable security as the justice directs.**

**(2) The justice may require the accused to fulfil any one or more of the following non-pecuniary conditions as specified in the order:**

**(a) report at a specified time and place for purposes of conducting investigative procedures in respect of the person authorized by the Code of Criminal Procedure;**

**(b) remain within a specified territorial jurisdiction;**

**(c) notify a peace officer or other person designated in the order of any change of address, occupation or employment;**

**(d) abstain from communicating with any witness or other person named in the order except in accordance with such conditions as the justice deems necessary;**

**(e) abstain from attending at a specified place within the territorial jurisdiction;**

**(f) deposit the accused's passport, if any;**

**(g) comply with such other reasonable non-pecuniary conditions as the justice considers necessary.**

**(3) In making an order for conditional release, a justice:**

**(a) shall give reasons for making the order;**

**(b) shall not make an order for pecuniary conditions unless an order for non-pecuniary conditions would not be adequate in the circumstances;**

**(c) may, where an agreement with sureties is ordered, name particular persons as sureties; and**

**(d) may give any directions as may be necessary for the conditional release of the accused.**

**(4) An undertaking shall be in writing and in Form 8.**

### Commentary

The Commission agrees with the policy of restraint behind the “ladder” provisions in *Code* subsections 457(2) and (3) whereby non-pecuniary conditions in an undertaking are considered first and are rejected in favour of more onerous pecuniary conditions only when proved to be insufficient. Hence, this recommendation makes only minor changes to the present law. First, the recommendation uses the word “undertaking” throughout and puts the “recognizance” concept in only as optional pecuniary conditions in an undertaking. This reduces the number of forms which those administering the law use and clarifies the nature of the document to those who are not lawyers or are unfamiliar with technical legal matters. Second, it requires the judge to give reasons for making a conditional order for release. Reasons need not be lengthy but they are important aspects of procedural fairness, particularly where conditions may impose a heavy burden on an accused. Third, it clarifies the ambiguous wording of subsection 457(3) of the “ladder” provisions by making the prosecutor show cause why an order with pecuniary conditions should be imposed instead of one with non-pecuniary conditions. As regards non-pecuniary conditions, it should be noted that paragraph (2)(a) permits a judge to order a person to report for the purpose of conducting investigative procedures in respect of the person authorized by our forthcoming Code of Criminal Procedure.

### E. Detention Orders

#### RECOMMENDATION

**29. Those provisions of the *Code* which place a reverse onus upon the accused to show cause why detention is not justified should be repealed and replaced by provisions placing the onus on the prosecution to justify detention where necessary.**

### Commentary

This recommendation abolishes the “reverse onus” provisions presently in *Code* subsection 457(5.1) and section 457.7 (where the reverse onus is placed upon the accused at the initial interim-release hearing) and subsections 458(4), (5) and 459(7) (where reverse onus is placed on an accused who engages in actual or anticipated criminal conduct after having been released). This Commission generally rejects the use of reverse onus clauses in criminal matters. They are invariably deviations from such general principles as presumption of innocence and proof beyond a reasonable doubt. It is therefore no surprise that “reverse onus” clauses usually raise the spectre

of unconstitutionality. Moreover, their utility is to be doubted. For example, the prosecution does not need a reverse onus to convince a justice that a person who commits a crime while on release should be detained. In such a situation, the prosecutor's evidence to that effect at the show-cause hearing will often easily persuade the judge to conclude that detention is justified.

There is, however, one caveat to this assertion. Once a court has pronounced a verdict of guilty, then the presumptions of proof beyond a reasonable doubt or of innocence do not apply as they do prior to the verdict. The present law places the onus upon the person convicted to show cause why he or she should be released pending appeal. There is no convincing policy reason why generally this should not continue. This issue will be addressed in our specific recommendations on release pending appeal further on in this Working Paper.

## **RECOMMENDATION**

**30. (1) The justice shall order that the accused be detained in custody until dealt with according to law where the prosecutor shows cause why the detention of the accused is necessary:**

- (a) to ensure that the accused will appear in court;**
- (b) to prevent interference with the administration of justice;**
- (c) to prevent the continuation or repetition of the crime for which the person has been charged; or**
- (d) to ensure the protection or safety of the public.**

**(2) The justice who orders detention may order the accused to submit to investigative procedures in respect of the person authorized by the Code of Criminal Procedure.**

**(3) The justice may order the temporary detention of the accused for the purpose of conducting investigative procedures in respect of the person authorized by the Code of Criminal Procedure. Detention orders for this purpose should be time-limited and the accused should be released immediately upon completion of the investigative procedures, with or without conditions.**

- (4) The justice who makes an order for detention shall:**
  - (a) state the reasons for making the order; and**
  - (b) issue a warrant for the committal of the accused in writing and in Form 9 which states the reasons for the detention and the date of the accused's court appearance.**

## **Commentary**

This recommendation integrates and reforms *Code* subsections 457(7), (5) and 457.4(3). The major reform is that grounds of detention are set down in a manner which is generally consistent with the grounds for issuing a warrant contained in

Recommendation 16 which is based in turn on the proposals of our Report 29 (at 28-30). By this means, a consistency in approach between Report 29 and this Working Paper is obtained. Also, this approach eliminates certain defects in the way the present grounds for detention are set out. First, there is no longer a reference to the primary ground of detention (i.e. to ensure attendance in court) and the secondary ground of detention (i.e. it is necessary in the public interest or for the protection or safety of the public). In practice, this is a fictional distinction because any of these grounds suffice to justify detention. In any event, the grounds set out here in large part accord with the grounds set out in the present law and so preserve the spirit of the present law. Second, consistent with our approach in Report 29, the "public interest" requirement has been dropped on the basis that it is too vague a standard. This admittedly does not radically change the present law given that there still remains the ground of "the protection or safety of the public." Most cases falling within the present "public interest" requirement would also satisfy this ground. But in a rare situation where it is clear that the accused's release will not jeopardize the protection or safety of the public, the fact that the circumstances of the case may prove offensive to the "public interest" should not, in itself, justify detention. In addition, this proposal is more comprehensive. Subsections (2) and (3) address clearly the issue of judicial detention imposed for the purposes of conducting investigative procedures in respect of the person authorized by statute. Where the accused is ordered detained upon one of the grounds specified in subsection (1), the judge by subsection (2) may order the accused to submit to such procedures once authorized. By contrast, subsection (3) provides that where the accused would otherwise be released, the court may nonetheless order the temporary detention of the accused solely for the purpose of conducting those investigative procedures. But this detention must be time-limited. The warrant of committal, outlined in Form 9 of this Working Paper, would cover both situations. Finally, subsection (4) requires that a warrant of committal contain a statement of reasons for the pre-trial detention. This creates procedural fairness for the accused, who will have a right to see this document. It also helps to maintain security and order in the place of pre-trial custody, because custodial officials will be able at the outset to obtain information enabling them to determine appropriate conditions for the accused's pre-trial custody. Reinforcing the requirement to state the accused's court appearance date, which now appears in the form of the remand warrant but not in the legislation, may help to prevent loss of time to jailers and to courts.

#### F. Procedure on a Show-Cause Hearing

### RECOMMENDATION

**31. (1) The present *Code* provisions relating to the conduct of show-cause hearings, the taking of evidence (section 457.3) and the making of a record of the proceedings (subsection 457(6)) should be integrated with the recommendations setting out judicial authority over interim release in the following manner:**

**In any proceedings for judicial interim release:**

- (a) the justice may**
    - (i) make such inquiries on oath or otherwise of and concerning the accused as considered desirable,**
    - (ii) take into consideration any relevant matters agreed upon by the prosecutor and the accused,**
    - (iii) receive evidence of an intercepted private communication or evidence obtained as a result of an interception of a private communication apparently made under and within the meaning of Part IV.I in writing, orally or in the form of a recording and, for the purposes of this section, section 178.16 does not apply to such evidence, and**
    - (iv) receive and base the decision upon evidence considered credible or trustworthy in the circumstances of each case;**
  - (b) the prosecutor may, in addition to any other evidence, lead evidence**
    - (i) to prove that the accused has previously been convicted of a crime,**
    - (ii) to prove that the accused has been charged with and is awaiting trial for another crime,**
    - (iii) to prove that the accused has previously committed a crime against the interim-release provisions of the Code, or**
    - (iv) to show the circumstances of the alleged crime, particularly as they relate to the probability of conviction of the accused;**
  - (c) it is sufficient if a record is made of the reasons for release or detention in accordance with the provisions of the Code relating to the taking of evidence at preliminary inquiries.**
- (2) Paragraph 457.3(1)(b) should be repealed and replaced by the following:**  
**The accused on a show-cause hearing may testify but shall not be cross-examined as to the facts or circumstances of the crime unless the accused has first testified as to those facts and circumstances.**

## Commentary

Subsection (1) of this recommendation is designed to incorporate most of the present provisions of the *Code* which govern show-cause hearings. Subparagraph 31(1)(a)(iii), dealing with the admissibility of wiretap evidence, mirrors present *Code* paragraph 457.3(1)(d.1) but in a clearer manner as proposed by our Working Paper on *Electronic Surveillance*.<sup>218</sup> However, there are two notable exceptions. First, subsection (1) contains no reference to present *Code* section 457.2 which permits a justice to order a publication ban. The Commission has already proposed reforms in this area in its Working Paper on *Public and Media Access to the Criminal Process*. In that Working Paper the Commission recommended that bail hearings should usually be open to the

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218. LRCC, *Electronic Surveillance* (Working Paper 47) (Ottawa: LRCC, 1986) at 74 and 87.



public, subject only to a general power to exclude the public on specific grounds, while also providing for publication bans on prejudicial matters disclosed therein.<sup>219</sup> Second, subsection (2) replaces present *Code* paragraph 457.3(1)(b). It brings the law in line with fundamental principles of natural justice by permitting defence counsel to examine the accused as to the facts and circumstances of the crime subject to the procedural fairness of letting the prosecutor cross-examine as to those same facts and circumstances once the accused testifies in this regard.

#### G. Expediting Proceedings

#### RECOMMENDATION

**32. A court before which a person who is the subject of an order for interim release or detention appears pursuant to these recommendations may give directions for expediting any criminal proceeding to which the order relates.**

#### Commentary

This recommendation merely re-enacts present *Code* section 459.1. It is a free-standing provision in the sense that it provides a discretion to a judge to make an order to expedite proceedings in relation to any criminal proceeding to which an order for interim release or detention relates. For example, a person who is charged with a serious crime and who has thereby been suspended from his or her job may ask the court for an order to expedite proceedings at the show-cause hearing or on an application to vary or review. However, the recommendation does not apply to a review of detention where trial is delayed. Instead, Recommendation 45(7) applies to make such a direction mandatory.

#### H. Order for Conveyance of an Accused in Custody

#### RECOMMENDATION

**33. (1) Where an accused person who is being held in custody is required to attend at a criminal proceeding as an accused, a judge of the court before which the accused's attendance is required may, upon application, order in writing that the accused be brought before the judge presiding at the proceeding if:**

- (a) the applicant sets out the facts of the case in an affidavit and produces any relevant summons, subpoena or warrant; and**
- (b) the judge is satisfied that the ends of justice require the order.**

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<sup>219</sup> LRCC, *Public and Media Access to the Criminal Process* [Working Paper 56] (Ottawa: LRCC, 1987) at 75-79.

(2) The order shall be addressed to the custodian of the accused who, on receipt thereof, shall deliver the accused to a person named in the order or bring the accused before the court.

(3) The presiding judge shall make an appropriate order for the accused's custody for the purpose of the proceeding and for the accused's release in the event of discharge or acquittal.

(4) On application by the prosecutor with the written consent of an accused, a judge of the court before which the accused's attendance is required may order the transfer of the accused to the custody of a named peace officer for a period specified therein where the judge is satisfied that such transfer is required for the purpose of assisting a peace officer acting in the execution of duty.

(5) This order shall be addressed to the custodian of the accused who, on receipt thereof, shall deliver the accused to the peace officer who is named in the order.

(6) The peace officer shall return the accused to the place of confinement at the time the order was made once the purposes of the order have been carried out.

#### Commentary

This recommendation merely incorporates those provisions of present *Code* section 460 which deal with compelling the attendance of an accused already in custody. However, it is better organized than the present *Code* because it does not mix compelling the attendance of a person in custody as an accused in with compelling the attendance of a person in custody as a witness. Recommendation 37 addresses the latter issue.

#### I. Coroners' Warrants

#### RECOMMENDATION

**34. Section 462 of the *Code* creating coroners' warrants of committal should be repealed.**

#### Commentary

As noted earlier in this paper, this *Code* section now has limited application, given the change in some provinces to a "medical examiner" system and the prohibition in other provinces of a finding of legal responsibility. This runs contrary to the concept that provisions of a Code of Criminal Procedure should have uniform application across Canada. More importantly, such a Code should restrict itself to criminal matters and

should not create special provisions to come to the aid of what is in essence a civil inquiry.<sup>220</sup> This means that the general arrest powers should be relied upon to arrest persons following a coroner's inquest.

## V. Judicial Authority in Compelling Appearance of Witnesses

### A. Subpoenas

#### RECOMMENDATION

**35. (1) Where a person is likely to give relevant evidence in a criminal proceeding, a judge of the court having jurisdiction over the proceeding may issue, or cause to be issued, a subpoena requiring the person to attend to give evidence.**

**(2) A subpoena shall require the person to whom it is directed:**

**(a) to attend at a time and place stated in the subpoena to give evidence;**

**(b) to remain in attendance throughout the proceeding unless excused by the presiding judge; and**

**(c) if specified, to bring to the court anything in the person's possession or control relating to the proceeding.**

**(3) A subpoena shall be valid anywhere in the province in which it is issued, but shall be valid in any other territorial jurisdiction in Canada only where the applicant pays attendance money as determined by the court.**

**(4) Service of a subpoena shall be effected and proved in the same manner as a summons.**

**(5) A subpoena shall be in writing and in Form 10.**

#### Commentary

This recommendation simplifies and unifies under one provision *Code* sections 626 through 630 insofar as they relate to subpoenas. However, subsection (1) alters the present test for issuance from one of a person "likely to give material evidence" to one of a person "likely to give *relevant* evidence." This focuses more clearly on the purpose of the provision: that those who have relevant evidence and are recalcitrant to give it can be compelled to attend. The recommendation also places authority for issuance of subpoenas in the "judge of the court having jurisdiction over the proceeding." By doing so, it collapses the existing distinction between justices and provincial court judges and courts of criminal jurisdiction, superior courts of criminal

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220. See *Batary v. Attorney-General of Saskatchewan*, *supra*, note 201.

jurisdiction and courts of appeal presently made by *Code* section 627. Paragraphs (2)(a) and (c) repeat the substance of *Code* section 628 while paragraph 2(b) improves upon the present law by ensuring that direction to remain in attendance appears on the face of the subpoena. Subsection (3) acts as a check upon parties who seek a subpoena for an out-of-province witness. The issuance of a subpoenas in such cases would be conditional on the party paying attendance money to the witness in an amount as determined by the court.

## B. Warrant for Arrest of Witness

### RECOMMENDATION

**36. (1) Where it is established by a party that a person who is likely to give relevant evidence:**

**(a) will not attend in response to a subpoena if issued; or**

**(b) is evading service of a subpoena,**

**a judge of the court having jurisdiction over the proceeding may issue, or cause to be issued, a warrant directing peace officers to arrest and bring the person to give evidence.**

**(2) A judge may issue a warrant for the arrest of a witness for execution in a territorial jurisdiction or may specify that the warrant may be executed anywhere in the province or in Canada.**

**(3) A warrant for the arrest of a witness shall be in writing and in Form 11.**

### Commentary

This recommendation consolidates much of the present law in *Code* sections 626 and 631 subject to some necessary reforms. First, for consistency with Recommendation 35 on subpoenas, the warrant is issued in respect of a person “likely to give relevant evidence” and the jurisdiction for issuing this warrant is placed upon “a judge of the court having jurisdiction over the proceeding.” Second, instead of the present wording “[w]here it is made to appear ...”, this recommendation uses the wording “[w]here it is established ....” The word “established” is somewhat more precise because case-law generally accepts that this term requires proof on the balance of probabilities.<sup>221</sup> Third, for consistency, the territorial validity of a warrant for the arrest of a witness is placed on the same basis as an arrest warrant for an accused — that is to say the “Canada-wide warrant” explained in our Report 29 (at 33-34).

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221. See *R. v. Appleby*, *supra*, note 184.

### C. Order for Conveyance of a Witness in Custody

#### RECOMMENDATION

**37. The powers of a judge presiding at a criminal proceeding to compel the attendance of an accused person in custody apply with the necessary modifications to witnesses who are in custody.**

#### Commentary

This recommendation merely incorporates into this Part on compelling appearance of witnesses, those provisions of present *Code* section 460 dealing with compelling the appearance of persons in custody as witnesses.

### VI. Judicial Interim Release of Witnesses

#### RECOMMENDATION

**38. Where a witness is brought before a court pursuant to a warrant for arrest, or where there are reasonable grounds to believe that a person in attendance at a criminal proceeding who is likely to give relevant evidence cannot be relied upon to continue in attendance in response to a subpoena, the judge presiding at the criminal proceeding may:**

- (a) order the witness detained in custody until the witness does what is required or until the proceeding has ended; or**
- (b) order that the witness be released upon an undertaking to appear and give evidence when required, with or without conditions.**

#### Commentary

This recommendation combines *Code* sections 477 and 634. It recognizes the legitimacy of incarcerating a person who is unwilling to do his or her duty as a witness. However, this proposal, by its use of an undertaking with or without conditions instead of the traditional recognizance, provides the presiding judge with more flexible means to encourage a witness's co-operation than does the present law. It ensures that the witness is treated at least as equally as an accused.

## VII. Enforcement of Compliance with the Compelling Appearance and Interim-Release Provisions

### A. Bench Warrants

#### RECOMMENDATION

**39. (1) A bench warrant for the arrest of a person may be issued by a judge or justice having jurisdiction over any aspect of a criminal proceeding if the person has been compelled to appear in that proceeding and fails to appear or to remain in attendance as required.**

**(2) Proof of the fact that the person received notice of the proceedings by way of a summons, appearance notice, subpoena, order, or by virtue of any undertaking shall be made before the warrant shall issue.**

**(3) Unless the judge issuing the warrant has endorsed it to authorize interim release by a peace officer and the person has been released, a person who is arrested under a bench warrant shall be taken before a justice having jurisdiction in interim-release matters or the judge presiding over the criminal proceeding at which the presence of the person is required and an order for interim release or detention in custody shall be made.**

**(4) A bench warrant shall have the same force and effect and may be executed according to the same territorial limitations as an arrest warrant.**

**(5) A bench warrant shall be in writing and in Form 12.**

#### Commentary

This recommendation defines what a bench warrant is. It also creates one concise bench warrant provision. It therefore reforms the present law which is riddled with several variously expressed bench warrant provisions — for example paragraphs 456.1(2)(a) and (b), sections 457.5, 526 and subsections 457.6(5), 633(1) and (2). Subsections (1) and (2) provide that where it is proved that an accused or witness has been required to attend at a criminal proceeding and remain there by an appearance notice, subpoena, order or any undertaking, a bench warrant can be issued if the person fails to do so. Subsection (3) integrates the procedure for arrest by bench warrant with Recommendation 8, so that the arresting peace officer may release where the warrant is endorsed with a direction by the justice or judge to do so. Subsection (4) makes the territorial effect of a bench warrant identical to that of an ordinary warrant for arrest.

B. Costs

**RECOMMENDATION**

**40. Where a person is brought before a court after arrest pursuant to a bench warrant, the judge or justice may order that the person pay the costs incident to the issuance of the warrant and its execution.**

Commentary

This Commission is presently conducting a separate study into the entire issue of costs in criminal cases. Notwithstanding that study, it seems appropriate to recommend in this Working Paper that a person brought before a court under a bench warrant should pay the costs incident to the issuance and execution of process. This applies in a uniform manner, a policy already reflected in the present *Code* — subsection 636(2) permits the imposition of such costs upon witnesses. It is only fair to require a person to pay costs for the issuance of second process caused by a deliberate or wilful failure to appear, whether or not the person is subsequently convicted or acquitted. Given the discretionary terms of the recommendation, it can be applied flexibly in the event that the failure to appear or to fulfil other conditions of the document compelling appearance was not the fault of the accused or witness or would cause undue hardship in the circumstances.

C. Forfeiture on Breach of Pecuniary Conditions in Appearance Notices and Undertakings

**RECOMMENDATION**

- 41. (1) The procedures found in Part XXII of the *Code* governing:**
- (a) the effect of pecuniary conditions;**
  - (b) the responsibility of sureties;**
  - (c) the surrender of persons by sureties; and**
  - (d) procedures in default,**

**should apply to any pecuniary conditions set out in an appearance notice or undertaking.**

**(2) The procedures for forfeiture upon breach of pecuniary conditions in appearance notices and undertakings should be amended to provide a right of appeal against forfeiture orders to the Court of Appeal.**

**(3) All of the forfeiture provisions should be placed in the same Part of the Code of Criminal Procedure as contains the compelling appearance and interim-release provisions.**

## Commentary

This recommendation re-enacts the present law, subject to two reforms. The first reform is the reference to “pecuniary conditions in an appearance notice or undertaking.” This reflects our proposals to reduce the number of forms required to carry out the objectives of interim release and to use more understandable language in them. The second reform creates rights of appeal in relation to forfeiture orders. By subsection (2), an order of forfeiture is subject to a right of appeal to the court of appeal. Choosing the court of appeal as the appeal court in such matters is consistent with other existing law on forfeiture — for example, by subsection 11(5) of the *Narcotic Control Act*,<sup>222</sup> the court of appeal is the final court for appeal of forfeiture of material seized under that Act. It is also consistent with the proposal for appeal to the court of appeal for forfeiture orders under our Report on *Disposition of Seized Property*.<sup>223</sup> Depending upon the amount subject to forfeiture, the effects of an order for forfeiture may have serious consequences for the individuals in question. For this reason, basic principles of fairness require that there be an opportunity to review such an order before it becomes final and thus the subject of execution in the manner of a civil debt.

### D. Crimes for Breach of Compelling Appearance and Interim-Release Provisions

#### RECOMMENDATION

**42. It should be a crime to breach the terms or conditions of an appearance notice, summons, undertaking or subpoena.**

## Commentary

The crimes in *Code* subsections 133(2) to (5) have been the primary sanctions for ensuring compliance with the compelling appearance and interim-release provisions of the *Bail Reform Act*. Also, a witness who fails to attend at court as required by law is caught by section 636 of the *Code* under the rubric of contempt of court. It is generally assumed that the existence of these provisions is an important deterrent to those who might be tempted not to comply. We agree with this reasoning and consequently advocate the retention of crimes of this sort. However, the definition of

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222. *Supra*, note 45.

223. LRCC, *Disposition of Seized Property* [Report 27] (Ottawa: LRCC, 1986) at 35-36.



the crime should be that which is set out in paragraph 121(a) of the Commission's proposed Code.<sup>224</sup> This should have the effect of rendering present *Code* sections 133 and 636 unnecessary. Consequently, they should then be repealed.

## VIII. Continuation, Variance and Review of Interim Release and Detention Orders

### A. Duration of Orders

#### RECOMMENDATION

**43. (1) A detention order or the terms and conditions governing interim release continue in force until the completion of the criminal proceeding in relation to which they were made.**

**(2) Where a new information [charge document] charging the same crime or an included crime is laid, a justice need not determine whether a case is made out for issuing process and the previous detention order or the existing terms and conditions of release apply in respect of the new information [charge document].**

**(3) On cause being shown by the applicant, an order to vacate or vary a detention order or the terms and conditions of release may be made:**

- (a) by the court before which an accused is being tried or the witness attends, at any time;**
- (b) by the justice presiding at the preliminary inquiry if, upon completion of the preliminary inquiry, the accused is ordered to stand trial;**
- (c) by any justice where the accused or witness, after having been released, has been arrested without warrant by a peace officer in accordance with the power to arrest without warrant;**
- (d) by the court before which the accused is found guilty, pending imposition of sentence; or**
- (e) with the consent of the prosecutor and the accused or witness, at any time,
  - (i) by the judge or justice who issued the order or any other judge or justice,**
  - (ii) by the court before which the accused is to be tried or the witness is to attend.****

**(4) An accused may apply to a justice to vacate or vary any conditions of release contained in an appearance notice.**

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224. Code, para. 121(a) at 203, Rec. 25(7)(a) at 120.

**(5) Where an application is made to vacate or vary a detention order or the terms and conditions of release, the procedures to be followed at show-cause hearings apply with necessary modifications.**

## Commentary

Interim release depends upon the character of the person in question and the changing circumstances in which he or she lives. Therefore, an interim-release decision is never final. It must be open to variance where circumstances warrant it. This recommendation largely redrafts and simplifies *Code* section 457.8 in relation to accused persons. However, for comprehensiveness with other recommendations, certain changes have been made. Paragraph (3)(c) permits an application to be made before a justice to vary conditions of release where the accused has been arrested without warrant following release. In most cases where an accused has been arrested following release, an application for variance would likely be brought. But this may not occur where there is a trivial breach of a condition of release. Subsection (4) permits the accused to apply for variance of the conditions of an appearance notice before a justice. This is necessary given our Recommendation 11 which enlarges the authority of peace officers to impose conditions for interim release. The procedures to be followed at a show-cause hearing referred to in subsection (5) are those previously outlined in Recommendation 31, which to some extent reform the existing law.

Moreover, this recommendation would apply as well to witnesses who are in custody or released on conditions and who seek to have the order varied. Hence, subsection (3) contains references, where appropriate, as to where a witness may seek a variance.

## B. Review of Interim Release and Detention Orders

### RECOMMENDATION

**44. (1) Where a judge or justice makes an order for interim release or detention, a witness bound by such an order, the accused, or the prosecutor may, at any time before trial, apply for a review of the order to a court having appellate jurisdiction in relation to the judge or justice who made it.**

**(2) The application for review shall not be heard unless the applicant has given the accused or prosecutor or, where necessary, the witness, at least two clear days notice in writing of the application or unless the parties consent to a shorter period or time is abridged by order of the court.**

**(3) The reviewing court may, on its own motion or on request of the applicant, compel the appearance at the hearing of the accused or witness bound by an order by way of summons and may adjourn the proceedings for the purpose of serving the summons.**

(4) The court may, before or at any time during the hearing of the application, upon the request of the accused or prosecutor or, where necessary, the witness, adjourn the proceedings, but if the person who is the subject of the order is in custody, no adjournment shall be for more than three clear days except with the person's consent.

(5) A review shall be by way of hearing *de novo*.

(6) Upon the hearing of the application, the court may consider;

(a) the transcript, if any, of the proceedings heard by the judge who made the original order and by any judge who subsequently varied or reviewed the original order;

(b) the exhibits, if any, filed in any hearings in paragraph (a); and

(c) such additional evidence or exhibits as may be tendered by any of the parties,

and shall grant interim release or order detention in accordance with Recommendations 27, 28 and 30.

(7) Once an application has been heard and decided, another application under this recommendation shall not be made with respect to the same applicant, except with leave of a judge, prior to the expiration of thirty days from the date of the previous decision.

(8) The procedures to be followed at a show-cause hearing apply, with the necessary modifications, to applications for review of an order for interim release or detention.

## Commentary

This recommendation redrafts present *Code* sections 457.5 and 457.6 on review of interim-release decisions in a more concise and simpler manner. Instead of two separate sections, the procedures for the application of review by the accused and prosecutor is merged into one section. This avoids unnecessary duplication. There are other changes. The provision also applies to review of interim release and custody of witnesses. And, subsection 3 clarifies the law by requiring the court to summons a person when the person's attendance is desired at the review hearing. By this means, a failure to attend would result in a bench warrant being issued. Of special importance is subsection (5). It resolves the continuing confusion as to whether a review is a *de novo* or an appeal proceeding or a mixture of both in favour of a *de novo* proceeding. We choose the latter for two reasons. First, it is more consistent with the underlying philosophy running throughout these recommendations that an accused be released pending trial unless detention is justified. If the reviewing judge, in the exercise of his or her own discretion, concludes that the accused should be released, he or she should have the power to do so. Second, at this review hearing, the judge should be able to hear a full range of evidence. Thus, subsection (6) ensures that a reviewing judge has complete access to all previous evidence and exhibits presented at prior interim-release hearings on the same matter and to such additional evidence as may be tendered by any of the

parties. The matter of bench warrants for failure to attend is covered by Recommendation 39. As noted, the reference in subsection (8) to “procedures to be followed at a show-cause hearing” are those previously described in Recommendation 31.

We emphasize that, under this proposed scheme, there is a right to an automatic review of a decision relating to interim release or detention for *every* crime. As noted earlier, under the present law, where the interim-release application is made before a superior court judge for a section 427 crime, there is no such right. Instead, by section 608.1, the review is discretionary. In the event that Parliament decides to retain the exclusive jurisdiction of superior court judges for section 427 crimes, the *Code* should be amended to ensure that there is an automatic right of review for such crimes.

### C. Remedies Where Trial Delayed

#### **RECOMMENDATION**

**45. (1) Where a person, who is not required to be detained in custody in respect of any other matter, is being detained pursuant to these recommendations, and a trial has not commenced:**

**(a) in the case of an accused held for trial on an indictable offence [or a crime punishable by more than two years imprisonment under our proposed classification scheme], within ninety days from the day on which the original order for custody was made;**

**(b) in the case of an accused held for trial in a summary conviction proceeding [or a crime punishable by two years or less imprisonment under our proposed classification scheme], within thirty days from the day on which the original order for custody was made; or**

**(c) in the case of a witness held in relation to any criminal proceeding, within thirty days from the day on which the original custody order was made,**

**the custodian of the person detained shall, forthwith, upon the expiration of those ninety days or thirty days as the case may be, apply to a court having jurisdiction in interim-release matters to review the person’s detention.**

**(2) On receiving the application, the court shall:**

**(a) fix a date for a hearing to be held in the jurisdiction**

**(i) where the person is in custody, or**

**(ii) where the trial is to take place; and**

**(b) direct that notice of the hearing be given to the parties in such a manner as it may specify.**

**(3) At the hearing, the court, in addition to the factors in Recommendation 30, may take into consideration:**

**(a) in relation to an accused, whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge; or**

**(b) in relation to a witness, the importance of the relevant evidence the witness is likely to give, whether the evidence can be provided to the court by an alternative means without the further custody of the witness, or whether the witness's attendance can be ensured in any other way.**

**(4) At a hearing in relation to an accused, the court shall, if not satisfied that the continued custody of the accused is justified, release the accused pending trial on an undertaking with or without conditions.**

**(5) At a hearing in relation to a witness, the court shall:**

**(a) if not satisfied that the continued custody of the witness is justified, release the witness on an undertaking with or without conditions; or**

**(b) if thirty days has expired in a summary conviction matter [or a crime punishable by two years or less imprisonment under our proposed classification scheme], order the release of the witness.**

**(6) In the case of an indictable offence [or a crime punishable by more than two years imprisonment under our proposed classification scheme] the court shall, if satisfied that continued custody of a witness is justified, order the continued detention of the witness subject to the restriction that the total period of detention of the witness shall not exceed ninety days.**

**(7) A court before which an application is made shall make an order to expedite the trial.**

**(8) Where pursuant to an application for review a person remains in custody, an expedited date for trial has been set and the trial does not go forward on that date, the custodian of the person must apply to a court for another review of detention and for just and appropriate relief as the court may order.**

## Commentary

This recommendation provides means to expedite proceedings and an automatic review of pre-trial custody in the event of delay. It essentially redrafts *Code* section 459 which applies to accused persons but also adds elements of section 635 which applies to witnesses. It thus comprises important elements of policy directed toward achieving a trial within a reasonable time as now required by *Charter* paragraph 11(b).

Subsection (1) provides for review of detention where trial is delayed for both an accused and witness. Subsection (2) is a restatement of the existing law. Paragraph (3)(a) repeats the present law in relation to accused persons but (3)(b) adds new law in relation to witnesses. This addition improves the law, particularly if a mechanism such as commission evidence is developed to respond to this situation. Subsection (4) re-enacts the substance of the present law in relation to an accused in the context of the

means of judicial release advocated in Recommendations 27 and 28. Subsections (5) and (6) deal with release and detention of witnesses at this review hearing in a manner consistent with our general provisions on interim release, with one major change. That change is that a witness detained in relation to a summary conviction crime [that is to say a crime punishable by two years or less imprisonment under our proposed classification scheme] cannot be detained for a period in excess of thirty days. This reflects the principle that the less serious the crime, the less intrusive the potential restrictions on liberty should be. Subsection (7) provides, as *Code* subsection 459(9) now does, that the judge shall make an order to expedite the proceedings at this hearing. Subsection (8) provides that when an expedited date for trial has been set, and the trial does not go forward on that date, the custodian of the person must apply to a judge for another review of detention. In such a case, the court may grant just and appropriate relief as it considers desirable.

## IX. Release Pending Appeal

### RECOMMENDATIONS

**46. A person may apply for release from custody to a judge of an appeal court:**

- (1) pending the determination of the appeal, if the appellant has filed and served a notice of appeal or, where leave is required, an application for leave to appeal; or**
- (2) when the minister of Justice makes a reference under section 617.**

**47. An appellant who applies to a judge of an appeal court to be released pending the determination of the appeal shall give written notice of the application to the prosecutor or to such other person as the appeal court directs.**

**48. A judge of an appeal court shall order that the person be released pending the determination of the appeal or pending the determination of a reference made by the minister of Justice if the person establishes:**

- (a) in the case of an appeal against conviction, that the appeal or application for appeal is not frivolous; or**
- (b) in the case of an appeal against sentence, that the appeal has sufficient merit and that, in the circumstances, the detention would cause unnecessary hardship; and**
- (c) that the person shall surrender himself into custody in accordance with the terms of the order; and**
- (d) that detention is not necessary to prevent interference with the administration of justice or to ensure the protection or safety of the public.**

**49. (1) A judge of an appeal court may order that the appellant be released upon giving an undertaking with or without conditions.**

**(2) An undertaking shall be in writing and in Form 8.**

**50. (1) On cause being shown by the applicant or on consent of the prosecutor and the accused, the judge of the appeal court which gave such order or another judge of the same court may vacate or vary it.**

**(2) An order for release which vacates or varies a previous order shall come into effect only when the appellant enters into a new undertaking.**

**51. Where the person released pending appeal has been arrested following release, a judge of the appeal court shall release the person on an undertaking with such conditions as the judge considers desirable where the accused shows cause why detention is not justified on the grounds outlined for pre-trial detention.**

**52. A judge of the appeal court, or a judge of the Supreme Court of Canada upon application by an appellant in the case of an appeal to that Court, may give such directions as are thought necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be.**

**53. (1) Where a judge of an appeal court makes an order for interim release or detention, the accused or the prosecutor may apply for a review of the order to the appeal court.**

**(2) The application shall not be heard unless the applicant has given the affected parties at least two clear days notice in writing of the application or unless the parties consent to a shorter period or time is abridged by order of the court.**

**(3) The appeal court may, on its own motion or at the request of the applicant, compel the appearance of the person bound by the order at the hearing by way of summons and may adjourn the proceedings for the purpose of serving the summons.**

**(4) The appeal court may, before or at any time during the hearing of the application, upon the request of one of the affected parties, adjourn the proceedings, but if the person who is the subject of the order is in custody, no adjournment shall be for more than three clear days except with the person's consent.**

**(5) A review shall be by way of a review on the record.**

**(6) The appeal court may confirm the decision or substitute such other decision as, in its opinion, should have been made.**

**(7) A decision as substituted under this section shall have effect and may be enforced in all respects as though it was the decision originally made.**

**(8) Once an application has been heard and decided, another application under this recommendation shall not be made with respect to the same applicant, except with leave of a judge of the appeal court, prior to the expiration of thirty days from the date of the previous decision.**

## Commentary

These recommendations incorporate in a simple and concise manner much of the present law outlined in *Code* sections 608 and 608.1. However, they also propose changes designed to ensure consistency in the treatment of accused persons and to mesh these provisions better with the thrust of the other recommendations of the Working Paper. These changes are as follows.

First, instead of separate release provisions for indictable as opposed to summary conviction crimes, there are now comprehensive provisions applying to all crimes. These provisions specify grounds of release. Thus, they improve upon the present law which contains no such grounds in relation to summary conviction offences.

Second, Recommendation 46(1) alters *Code* paragraph 608(1)(b) as to the time when an application for release pending appeal can be made when the appeal is against sentence only. Under the present law, such release can only be considered once the appellant has been granted leave to appeal. Where the leave application is merged with a consideration of the merits of the appeal (as is the current practice in some jurisdictions) the possibility of bail is effectively precluded. Also, this procedure is inconsistent with the approach taken in all other cases. Where the appeal is against conviction, or where there is a pending appeal to the Supreme Court of Canada, and leave is required, the court may consider an application for interim release once notice of an application for leave to appeal is filed. Thus, a person who seeks release pending appeal of sentence only to a court of appeal is faced with a more difficult procedure. To avoid this, the person may resort to the ruse of categorizing the appeal as one against conviction and sentence, which would enable the person to seek release once notice of the application for leave to appeal is filed. Thereafter the appellant could abandon that part of the appeal relating to conviction thus leaving the appeal as one against sentence only. To promote a consistent scheme and to prevent such possible manipulation, we propose that, for an appeal against sentence only, an application for release may be brought once notice of the application for leave has been given. This would be permitted by Recommendation 46(1).

Third, Recommendation 46 is better organized than present section 608 in one important respect. Subsection 608(7) provides that where the minister of Justice directs a new trial or hearing or refers the matter to the court of appeal, the person who seeks release is to be treated as though he or she were a person appealing against conviction. Recommendation 46(2) places reference to this ministerial power at the beginning of the release-pending-appeal provisions and confines the procedure solely to a reference made by the minister of Justice, pursuant to section 617. It does not cover bail determinations that are consequent on the direction of the minister. Such a direction



results in a new trial or hearing. Under our proposals release in such matters are to be dealt with by Recommendation 15.

Fourth, Recommendation 48 provides comprehensive grounds for release that prevent the arbitrary exercise of power. Instead of the present discretionary power to release, Recommendation 48 provides for mandatory release of the person convicted once the grounds of release have been satisfied. It also sets out the grounds for release pending appeal for an appeal against conviction or sentence or where the minister of Justice has made a reference in a manner which avoids unnecessary repetition. The grounds of release largely remain the same. For example, subsection 48(b), with appropriate changes, retains the special ground for release for appeal against sentence only set out in *Code* paragraph 608(4)(a). Thus, a person appealing against sentence must show that the appeal has sufficient merit and that, in the circumstances, detention would cause unnecessary hardship. This would apply in cases where the sentence imposed was clearly harsh — for example where any other court would have ordered the liberation of the accused. However, the grounds for release have been altered in a manner consistent with the thrust of previous recommendations. In this regard, the ground of “public interest” has been dropped and replaced by two more specific grounds of detention which appear appropriate at this stage — namely to prevent interference with the administration of justice or to ensure the protection or safety of the public.

Fifth, by Recommendation 50, there is now a specific provision permitting the appellate court to vary its order for release or detention. This is meant to parallel the general scheme for interim release which, by Recommendation 43, also has a separate variance procedure.

Sixth, Recommendation 53 now provides for a review mechanism which largely parallels the review mechanism set out in Recommendation 44. Thus, Recommendation 53 would provide an automatic right of review to the appeal court from a decision of a judge of the appeal court. This is consistent with our general view that a review should be of right and not discretionary. There are also notice, adjournment and re-application provisions similar to those in Recommendation 44. One difference, however, should be noted. By subsection 53(5) the review of a decision of the judge of an appeal court would continue to be a review in the nature of an appeal, not a *de novo* proceeding. At this stage, there should be sufficient documentation before the court to enable it to make a proper determination of the issues.

This revised release-pending-appeal scheme makes no specific provision here dealing with applications for release where a new trial or hearing has been ordered by the court of appeal, Supreme Court of Canada or minister of Justice. Under present *Code* subsection 608(7), a person seeking such release is dealt with in the same manner as a person seeking release pending appeal against conviction. The onus is on the accused to show cause why detention is not justified. The Commission believes that such a person should be dealt with in the same manner as a person awaiting trial. In other words, the regular scheme of interim release should apply and, under Recommendation 15 of our scheme, does apply.

## X. Legal Effects of Non-compliance with Procedural Requirements

### RECOMMENDATION

**54. An arrest or subsequent custody is unlawful where it is in breach of the procedures providing for arrest or custody.**

#### Commentary

This recommendation states the fundamental principle which gives rise to the civil, criminal and administrative remedies that ensure compliance with this régime.

Peace officers who wrongly arrest a person, fail to release under Recommendations 7 through 11, fail to maintain appropriate standards of pre-trial custody in accordance with Recommendation 21, or fail to bring a person before a justice to be dealt with according to law within the requisite time period of Recommendation 22, would thus be holding the person unlawfully. In our Report 29 (at 44-45) we discussed at some length the potential civil, criminal and administrative remedies which might be brought to bear in relation to wrongful arrest and failure to release. The Commission, in a forthcoming Working Paper, will examine in depth the remedies to apply for breach of the rules of criminal procedure. It will not address remedies in the civil context. These same principles ought also to apply to conditions of pre-trial custody and to bringing a prisoner before a judge. A corollary to this approach is the absence from our recommendations of provisions analagous to *Code* subsections 450(3), 452(3), 453(3) and 454(4) all of which limit the criminal liability of peace officers who fail to carry out the release provisions of the *Code*.

The remedies in relation to errors by judicial officials are structured differently. The tradition of the independence of the judiciary makes higher court judges immune from suit or criminal prosecution in relation to errors committed in the execution of their judicial duties.<sup>225</sup> Appeal and removal from office are the remedy. Hence the necessity of a mechanism of review for such judicial decisions addressed in Recommendation 44.<sup>226</sup>

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225. See *Sirros v. Moore* (1974), [1975] Q.B. 118.

226. There are serious questions to be raised about the degree of immunity which judges enjoy. Justices and magistrates may not benefit automatically from the same entrenched principles of judicial independence as higher court judges. See, e.g., D. Brillinger, "Suit May Proceed Against Judge, N.B. Court Decides" Vol. 6, No. 20, Lawyer's Weekly, Sept. 26, 1986. Civil proceedings may be taken in some jurisdictions against justices who exceed their jurisdiction. Courts may be receptive to such civil actions when such justices act on bad faith, malice, or ulterior motive. See *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union* (1964), [1964] 3 C.C.C. 381 (B.C.S.C.). For this reason, *Code* section 717 provides that a superior court quashing an order of a justice or magistrate may issue an order that no civil proceedings be taken against the justice or magistrate or those acting under him or her where there was an excess of jurisdiction. The basic issue is whether all judges should have the same degree of protection. We will take up this matter in a separate study.

The remedies in relation to violations of conditions of pre-trial detention outlined in Recommendations 55 to 63 are somewhat more problematic. Such conditions may be violated, nonetheless the accused is justifiably detained in custody. We envisage here that the appropriate remedy should generally be to ensure that the accused's conditions of custody be brought into line with these recommendations.

## XI. General Conditions of Pre-trial Custody and the Right to Make Full Answer and Defence

### A. Definition of Pre-trial Custody

#### RECOMMENDATION

**55. A person in pre-trial custody is any person who is held in custody following an arrest or pursuant to an order for detention made in accordance with these recommendations.**

#### Commentary

Standards governing conditions of pre-trial custody exist and are developing in international law. The *International Covenant on Civil and Political Rights*,<sup>227</sup> which Canada has signed, is the starting point for many of these standards. In addition, international standards have been developing out of treaties,<sup>228</sup> United Nations and other conventions,<sup>229</sup> and international meetings.<sup>230</sup>

As well, in Canada, provincial regulations exist which also govern pre-trial custody.<sup>231</sup> Although these standards are not uniform across Canada, it is evident from

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227. (1976), 999 U.N.T.S. 172.

228. See, e.g., United Nations Conference on Consular Relations, The "Vienna Convention on Consular Relations," Art. 36(1)(c), 596 U.N.T.S. 262 at 292, 1963 to which Canada is a signatory.

229. The *International Covenant on Civil and Political Rights*, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* being the most important. While their status as sources of international "law" is somewhat more controversial, certainly the *Universal Declaration of Human Rights* and the *United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* are of undeniable importance in this regard.

230. Two extremely important documents originating from different kinds of international forums are the Council of Europe Committee of Ministers Resolution (73)5 entitled "Standard Minimum Rules for the Treatment of Prisoners," in Justice (British Section of the International Commission of Jurists), *Justice in Prison* (London: Justice, 1983) at 80-93; and the United Nations *Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, in United Nations Doc. E/CN.4/1296, at 17 (1978).

231. See, e.g., both Ontario and Québec's *Regulation respecting Houses of Detention*, *supra*, note 130.

our discussions with provincial correctional officials that there is substantial, though possibly not total, compliance with these international standards. These standards address such issues as the right to procedural information, the right to communication with counsel, visitation rights, the right to reading material and the question whether the accused detained pending trial should be segregated from the person already convicted. The latter issue is particularly complex, because it is arguably more logical that any right to be segregated should be based not on the legal status of the accused, but on his or her individual traits — for example is the person non-violent or mentally disabled? It is therefore not surprising that provinces have resolved this issue, if at all, in a piecemeal manner.<sup>232</sup>

However, for this Working Paper our purpose is more restricted. We are not engaged here in a full-scale review of correctional law. Rather our purpose is to develop rules governing pre-trial custody insofar as they clearly relate to criminal procedure. In other words, we seek in this Part to ensure a congruence between those international standards governing conditions of pre-trial custody and those rules presently existing under provincial legislation in a manner which would ultimately enhance the accused's right to make full answer and defence, and implicitly the right to a fair trial, or would assist in the substantiation of allegations of abuse occurring while in custody. Such rules are primarily of a procedural, not correctional, nature.

Recommendation 55 ensures that the rules which follow apply to any person in pre-trial custody. This includes custody before and after the judicial hearing to determine interim release. No one is excluded from their protective ambit. This is logical because the right to full answer and defence or to a proper investigation into allegations of abuse are of fundamental importance to every person in pre-trial custody.

Not addressed in this scheme is the question of the appropriate remedy where violations of these rules occur. Generally, at least where the breach is not a violation of constitutional standards, contravention of these rules should not ordinarily result in the liberation of the person in custody. Instead, the conditions of custody should be altered so as to conform to these rules and redress may be secured outside any code structure. A variety of mechanisms are available to ensure this result. Civil suits and disciplinary proceedings are possible. Provincial ombudsmen or provincial human rights commissions could examine the complaints of persons in custody. In addition, we will be proposing in future studies reforms in the area of both remedies generally and extraordinary remedies which could also redress these breaches.

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232. In Québec, s. 17 of *An Act Respecting Probation and Houses of Detention*, *supra*, note 130, requires the segregation of persons not convicted from those who are convicted. In addition, the regulations under that *Act* require additional classes of persons to be segregated. By contrast, the Ontario *Ministry of Correctional Services Act*, *supra*, note 130, does not require segregation in accordance with the legal status of the alleged offender. Instead, the regulations under that *Act* allow a discretionary power to segregate largely where necessary to protect the inmate or the security of the institution.

## B. Interpretation and Limitation

### RECOMMENDATION

**56. (1) The rights in these recommendations are intended to ensure that the person in pre-trial custody is able to make full answer and defence or to substantiate allegations of abuse occurring while in such custody.**

**(2) The exercise of these rights shall be limited only where necessary for the purposes of custody, the maintenance of security and order in the place of custody, or the prevention of interference with the administration of justice.**

### Commentary

Recommendation 56(1) is the general rule of interpretation. By this mechanism, the rules which follow are to be applied solely to ensure that a person in pre-trial custody can adequately prepare for trial and that allegations of abuse while in detention can be adequately investigated and redressed. Thus, this recommendation operates to restrict the application of these rules to matters of criminal procedure.

Recommendation 56(2) envisages restrictions on liberty as inherent in the notion of pre-trial custody. However, the purposes of these restrictions are important and form the measure of their legitimacy. The first kind of restrictions and conditions are those that are necessary "for the purposes of custody." These essentially reflect the purposes which initially justify detention. For example, a person justifiably detained by police for the limited purpose of determining identity or conducting investigative procedures in respect of the person authorized by the Code of Criminal Procedure *prima facie* ought to be subjected to less severe conditions restricting his or her liberty than the person detained in order to ensure the protection and safety of the public. Hence the necessity of clearly structuring the grounds of detention in order that the extent of proper conditions of pre-trial custody may be determined. Similarly, it is essential that warrants of committal which implement detention orders show on their face the reasons for the pre-trial custody so that gaolers may hold the prisoner in an appropriate manner.

The second kind of restrictions are those required for the "maintenance of security and order in the place of custody." "Maintenance of security" includes personal security. This phrase is similar to the terminology employed in the United Nations *Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.<sup>233</sup> "Maintenance of order" includes the orderly administration of the detention facility. In this context, for example, the detention facility could justifiably refuse a lawyer's demand to communicate with his or her client during the hours that the facility serves meals.

The third kind of restrictions are those necessary to prevent interference with the administration of justice. This is surely self-evident. No system of criminal justice can

<sup>233</sup> *Supra*, note 230, esp. Art. 17, 24, 25 and 32.

operate effectively if it permits persons to sabotage it. This restriction, for example, enables police at the lock-up or correctional officials at the detention facility to prevent a communication where it is feared that the result will be the destruction of evidence or the coercion of a witness.

#### C. Duty to Assist

#### **RECOMMENDATION**

**57. A person in pre-trial custody shall be entitled to all reasonable assistance in asserting rights available under these recommendations.**

#### Commentary

This recommendation provides that a person in pre-trial custody is entitled to all reasonable assistance in asserting rights under these recommendations. Thus, there is an obligation imposed upon custodial authorities to reasonably assist the person in detention in asserting these rights.

#### D. Right to Be Informed

#### **RECOMMENDATION**

**58. A person in pre-trial custody shall be informed without unreasonable delay of the rights available under these recommendations.**

#### Commentary

This recommendation requires that a person in pre-trial custody — namely an accused or witness — should be informed of the rights set out in these recommendations — for example the right to a copy of the warrant under Recommendation 59 or the right to counsel under Recommendation 60. By this means, the person in pre-trial custody is made aware of the rights which these recommendations provide.

#### E. Copy of Warrant

#### **RECOMMENDATION**

**59. A person in pre-trial custody shall be given, upon request, a copy of the warrant of remand or committal or other document which is the authority for detention.**

## Commentary

This recommendation accords with basic principles of fundamental justice by ensuring that a person in custody will receive, if he or she so wishes, a copy of the document authorizing detention which can be given to counsel. There is no obligation to provide this copy where the accused does not want it, because to do so may well jeopardize his or her safety. For example, the person in custody may be an alleged child molester who genuinely fears that the copy or information gleaned from it may get into the hands of other prisoners. With this information, the person in custody is in a better position to answer the charge or to decide whether to apply for judicial review of the detention order.

## F. Communication with Counsel

### RECOMMENDATION

- 60. (1) A person in pre-trial custody shall:**
- (a) be afforded reasonable opportunities to consult with counsel;**
  - (b) be allowed, for the purpose of obtaining legal advice, to send or receive confidential written messages to or from counsel and to have the messages forwarded without delay; and**
  - (c) be permitted to meet with counsel in sight, but not within hearing, of peace officers or other persons in authority.**

## Commentary

An important means by which a person in custody can obtain a full answer and defence is to ensure his or her right to communicate with counsel. This recommendation synthesizes the wisdom of the present case-law interpreting the meaning of the "right to counsel" under the *Charter* and the *Bill of Rights*. In particular, it accords with the decision of the Supreme Court of Canada in *Solosky v. The Queen*.<sup>234</sup> The purpose behind the recommendation is to provide a short statement of the substance of the right to counsel which can easily be read or given to detained persons in accordance with Recommendation 58.

Consistent with the *Solosky* case, this right is not absolute. By Recommendation 56(1), this right must be interpreted in a manner which ensures that the person in pre-trial custody is able to make full answer and defence or to substantiate allegations of abuse occurring while in custody. Communications which fall within the protective ambit of this right must be for the purpose of giving or receiving legal advice. As under the present law, solicitor-client privilege would not apply where the

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<sup>234</sup>. *Supra*, note 132.

communication invites to the commission of a crime or would be evidence of a crime because the communication is not made for the purpose of giving or receiving legal advice.

#### G. Communication with Family and Others

#### RECOMMENDATION

**61. A person in pre-trial custody shall be given a reasonable opportunity to see and communicate with family or friends or, in appropriate cases, with consular or diplomatic officials.**

#### Commentary

This recommendation recognizes a basic fact of life behind bars — counsel is often not the exclusive source of legal service to a client who is in custody. Often, family and friends can help the detained person by retaining counsel, forwarding messages to counsel or even by doing the legwork necessary to gather pertinent information about the accused's case. Their help may be especially important where the person detained is unable to secure the assistance of counsel. Thus, this recommendation recognizes another mechanism by which to ensure a full answer and defence or a full investigation into allegations of abuse. This recommendation complements the provincial regulations governing visitors' rights.<sup>235</sup>

#### H. Medical Examination

#### RECOMMENDATION

**62. A person in pre-trial custody has the right to be examined by an independent physician upon the person's request or upon that of family or counsel.**

#### Commentary

An accused's mental or physical condition may form an important part of his or her defence. For example, it may provide evidence of the accused's incapacity to commit the crime or of defences such as self-defence. Thus, the right to a physical examination by an independent physician is an important means to safeguard the accused's right to a full answer and defence. Where allegations of cruel or abusive treatment by the authorities are raised, this mechanism provides for independent verification of the medical facts. However, by Recommendation 56(2), this right is

<sup>235</sup> See, e.g., *Regulation respecting Houses of Detention*, R.R.Q. 1981, c. P-26, r. 1, s. 27. *Protection of All Persons under Any Form of Detention or Imprisonment*, in United Nations Doc. E/CN.4/1296, at 17 (1978).



limited so as to prevent its manipulation or abuse. The orderly administration of the detention facility must remain a priority. The detainee is not entitled to a higher standard of care than that available to other citizens within the province. Where the assertion of this right would result in physical relocation that places an undue burden upon the resources of the place of detention, the maintenance of security and order is arguably threatened. On this basis, the custodian could refuse to permit the person in custody to see an independent physician. We anticipate that the costs of this medical examination would be borne by the general system of health care available in the province. Where the person does not qualify for such care, then, just as in the case of a person who does not qualify for legal aid, the person must pay the costs.

#### I. Legal or Other Relevant Material

#### **RECOMMENDATION**

**63. A person in pre-trial custody shall have reasonable access to legal or other relevant material.**

#### Commentary

This recommendation provides that a person in custody shall have “reasonable access” to legal or other relevant material. Again, by Recommendation 56(1), this material is that which enables the accused to make a full answer and defence or assists him or her in the investigation of allegations of abuse occurring while in custody. For example, if a person is unrepresented by counsel, he or she should be able to have access to material that makes him or her more aware of the nature of the charge and how best to lawfully defend against it. Reading material not relevant to these issues is not covered by this right. “Reasonable access” does not mean that the institution should have a library or, where it does, should have on hand in its library all such material. Rather, the institution should use reasonable efforts to obtain the material elsewhere. In the event that the search for this material would create such a drain on resources that the security or order of the place of custody would be threatened, then Recommendation 56(2) would operate to justify the curtailment of the search.

## CHAPTER FOUR

### Summary of Recommendations

#### Issuance of Appearance Notices

1. The present distinctions between an appearance notice, a promise to appear and a recognizance should be abolished. Instead, these documents should be consolidated into one form of documentary notice called the appearance notice.

2. A peace officer may issue an appearance notice to a person who the officer believes on reasonable grounds has committed a crime.

3. (1) An appearance notice shall:

- (a) be in writing and in Form 1;
- (b) set out the name of the accused;
- (c) set out briefly the crime the accused is alleged to have committed;
- (d) require the accused to attend in court at a specific time and place and to attend thereafter as required by the court;
- (e) require the accused to notify a designated peace officer or other person of any change in the accused's address, employment or occupation; and
- (f) contain a warning to the accused that failure to abide by the requirements set out in the appearance notice is a crime and may result in a warrant for the arrest of the accused being issued and set out the text of the Code provision creating that crime.

(2) In addition, an appearance notice may:

- (a) require a person accused of an indictable offence [or a crime punishable by more than two years imprisonment, or by two years or less imprisonment where legislation provides for an enhanced penalty upon a second conviction,] to attend at a specific time and place for the purposes of the *Identification of Criminals Act* [or for fingerprinting or photographing for identification purposes]; or
- (b) require the accused to comply with any conditions of release set out in the appearance notice as are authorized by statute.

**4. (1) The peace officer shall:**

- (a) give the accused a duplicate of the appearance notice; and**
- (b) certify that the accused was given a duplicate.**

**(2) Where a peace officer seeks to impose conditions of an accused's release in the appearance notice, the officer shall have the accused sign the appearance notice.**

**(3) The conditions shall be effective only if the accused signs the appearance notice.**

**(4) A peace officer shall warn a person that a failure to sign may result in detention.**

#### Preference for Appearance Notices and Summonses

**5. A peace officer shall, wherever possible, issue an appearance notice or seek the issuance of a summons rather than detain an accused person in custody.**

#### Arrest Without Warrant

**6. A peace officer may arrest without warrant:**

**(1) a person who the officer believes on reasonable grounds has committed or is committing a crime;**

**(2) a person for whom the officer has reasonable grounds to believe there is an arrest warrant in force that may be executed in the territorial jurisdiction in which the person is found; or**

**(3) a person who the officer believes on reasonable grounds is about to commit:**

- (a) a crime that is likely to cause harm to a person or damage to property;**  
**or**
- (b) a crime against the compelling appearance and interim-release provisions of the Code.**

#### The Duty to Release After Arrest

**7. (1) A peace officer who arrests a person without warrant, or into whose custody an arrested person is delivered, shall release the person as soon as practicable, unless the officer has reasonable grounds to believe that proceedings should be instituted against the person and that continued custody is necessary:**

- (a) to ensure that the person will appear in court;**
- (b) to establish the identity of the person;**

- (c) to conduct investigative procedures in respect of the person authorized by the Code of Criminal Procedure in order to prevent loss or destruction of evidence;
- (d) to prevent interference with the administration of justice;
- (e) to prevent the continuation or repetition of the crime for which the person has been arrested; or
- (f) to ensure the protection or safety of the public.

(2) Where the accused is in custody only on grounds (1)(b) or (1)(c), the authorities shall promptly conduct the inquiries necessary to determine identity or the investigative procedures in respect of the person and release the accused immediately upon their completion.

(3) Where a peace officer arrests a person who was about to commit a crime likely to cause harm to a person or damage to property or against the compelling appearance or interim-release provisions of the Code, the person shall be released unconditionally as soon as practicable after the officer is satisfied that continued custody is no longer necessary to prevent the commission of the crime.

8. Where a person has been arrested with a warrant, a peace officer may release the person if the justice who issued the warrant authorized the accused's release by making an endorsement to that effect on the warrant.

9. The present distinction between the arresting peace officer and the officer in charge should be abolished. The power to release should be given uniformly to all officers who have custody of an arrested or detained person and should include the power to release upon conditions.

10. A peace officer who arrests a person without warrant or into whose custody an arrested person is delivered may compel the person's attendance in court:

- (a) by way of an appearance notice; or
- (b) by seeking the issuance of a summons.

#### Conditions of Release

11. A peace officer who issues an appearance notice and who believes on reasonable grounds that it is necessary in order to achieve any of the purposes listed in subsection 7(1) may require the accused:

- (a) to deposit the accused's passport, if any;
- (b) to remain within a specified territorial jurisdiction;
- (c) to abstain from communicating with any person expressly named;
- (d) to abstain from attending at a specified place;

- (e) to agree to forfeit, but without deposit of money or valuable security, an amount not to exceed two thousand dollars in the event of the accused's failure to fulfil any of the requirements of the appearance notice; or
- (f) if the accused is not ordinarily resident in the province or does not ordinarily reside within two hundred kilometres of the place of trial, to agree to forfeit, with or without deposit of money or valuable security, an amount not to exceed two thousand dollars in the event of the accused's failure to fulfil any of the requirements of the appearance notice.

#### Laying an Information [Charge Document]

12. (1) Anyone who believes on reasonable grounds that a person has committed a crime may lay an information [charge document] in writing and under oath before a justice and the justice shall receive the information [charge document] if it alleges that the person named in it committed a crime.

(2) Where an appearance notice has been issued, an information [charge document] shall be laid before a justice as soon as practicable and in any event before the time of appearance in court stated in the appearance notice.

(3) An information [charge document] shall be in writing and in Form 2.

#### Procedure for Issuance of Process

13. (1) After an information [charge document] has been laid, a justice shall, before determining whether to confirm an appearance notice or issue a summons or warrant, consider *ex parte*:

- (a) the allegations of the informant; and
- (b) the evidence of other witnesses where the justice considers it desirable or necessary to do so.

(2) A justice who hears oral evidence shall:

- (a) take the evidence upon oath; and
- (b) cause the evidence to be taken down in accordance with the procedures applicable to preliminary inquiries, with such modifications as the circumstances require.

14. (1) After an information [charge document] has been laid, a justice, who has reasonable grounds to believe that the person named in the information [charge document] has committed a crime, may:

- (a) confirm the appearance notice as to any crime specified therein, or as to any other crime charged in the information [charge document], and shall endorse the information [charge document] accordingly;

(b) confirm the appearance notice as to the time, date and place of appearance specified therein, or as to any other time, date or place, and shall endorse the information [charge document] accordingly;

(c) cancel the appearance notice and issue a summons or warrant, and shall endorse the summons or warrant accordingly; or

(d) where no appearance notice has been issued to the accused, issue a summons or warrant to compel the accused to attend court to answer the charge set out in the information [charge document].

(2) Where satisfied that there are insufficient grounds for believing that the accused has committed the crime, the justice shall cancel the appearance notice with the intention of issuing no other process.

(3) A justice shall, as soon as practicable, give notice to an accused in writing and in Form 3 of:

(a) the confirmation of an appearance notice in relation to a charge other than that set out in the appearance notice, or a time, date or place of appearance other than that set out in the appearance notice; or

(b) the cancellation of the appearance notice with the intention of issuing no other process.

#### Recommencement and Subsequent Proceedings

15. (1) Where recommencement of proceedings occurs following the entry of a prosecutorial stay, or where an indictment [charge document] has been filed with the court, the court, if it considers it necessary, may compel the accused to attend before it by way of a summons or a warrant of arrest.

(2) Where, as a result of an appeal, review or a direction of the minister of Justice, proceedings against the accused person are continued or a new trial or a new hearing is ordered, a justice may issue either a summons or a warrant for arrest in order to compel the accused to attend at such proceedings.

(3) The release or detention of the person under this recommendation shall be determined in accordance with the general scheme of interim release or detention.

#### Issuing Warrants for Arrest

16. (1) A justice shall not issue a warrant for the arrest of an accused person unless the justice has reasonable grounds to believe that the warrant is necessary:

(a) to ensure the accused's attendance in court;

(b) to locate the accused whose whereabouts are unknown;

(c) to conduct investigative procedures in respect of the person authorized by the Code of Criminal Procedure in order to prevent loss or destruction of evidence;

- (d) to prevent interference with the administration of justice;
  - (e) to prevent the continuation or repetition of the crime for which the person has been charged; or
  - (f) to ensure the protection or safety of the public.
- (2) Before determining whether to issue a warrant for arrest, a justice shall:
- (a) examine the information [charge document] or cause it to be read;
  - (b) inquire as to the reasons advanced by the applicant for resorting to the use of a warrant rather than a summons or an appearance notice. Reasons may be provided orally or by an affidavit in Form 4 and in any event the justice may question the applicant orally concerning the necessity for the issuance of the warrant; and
  - (c) consider whether to authorize the arresting officer to release the accused by making an endorsement to that effect on the warrant.
- (3) Where a justice authorizes the release of an accused by making an endorsement to that effect on a warrant, the appearance notice issued pursuant to the endorsement need not be confirmed by a justice.
- (4) Upon application by a peace officer, a justice may extend the territorial validity of a warrant already issued.
- (5) This Recommendation applies with the necessary modifications to a court before which an indictment [charge document] has been presented.
17. (1) A peace officer who finds it impracticable to appear in person may, by telephone or other means of telecommunication, apply:
- (a) for a warrant where an information [charge document] has already been laid charging the accused with a crime; or
  - (b) for an extension of the territorial validity of a warrant which has a restricted territorial validity.
- (2) Where a justice receives an application for a warrant or for the extension of the territorial validity of a warrant by telephone or other means of telecommunication, the justice shall:
- (a) record verbatim the contents of the information [charge document], if the information [charge document] is not in the possession of the justice;
  - (b) record the reasons advanced by the applicant for the issuance of a warrant rather than the issuance of a summons or the confirmation of an appearance notice or for the extension of the territorial validity of a warrant as the case may be; and
  - (c) question the applicant about the circumstances which make it impracticable for the applicant to appear in person.
- (3) Where a justice issues a warrant for arrest by telephone or other means of telecommunication:
- (a) the justice shall complete and sign the warrant in Form 6; and

(b) the peace officer, on the direction of the justice, shall complete and sign a facsimile of the warrant in Form 6.

(4) Where a justice extends the territorial validity of a warrant by telephone or other means of telecommunication, the peace officer, on the direction of the justice, shall endorse the warrant to that effect.

18. The information [charge document] or its transcription, the record of the reasons advanced by the applicant for the issuance of a warrant or for the extension of its territorial validity or the affidavit of the applicant in Form 4 or its transcription, and the warrant or a copy of the warrant in Form 6 shall be filed with the court.

#### Contents of Summonses and Warrants

19. (1) A summons shall:

(a) be in writing and in Form 5;

(b) be directed to the accused;

(c) set out briefly the crime the accused is alleged to have committed;

(d) require the accused to attend in court at a specific time and place and to attend thereafter as required by the court; and

(e) contain a warning to the accused that failure to attend in court as required is a crime and may result in a warrant for the arrest of the accused being issued and set out the text of the Code provision creating that crime.

(2) In addition, a summons may require a person accused of an indictable offence [or a crime punishable by more than two years imprisonment, or by two years or less imprisonment where legislation provides for an enhanced penalty upon a second conviction,] to attend at a specific time and place for the purposes of the *Identification of Criminals Act* [or for fingerprinting or photographing for identification purposes].

(3) A peace officer shall serve a summons personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it at the person's last or usual place of abode with a person who appears to live there and appears to be at least sixteen years of age.

(4) A peace officer may prove service of a summons either orally or by an affidavit made before a justice or other person authorized to administer oaths or to take affidavits.

(5) Where any summons, notice or other process is required to be or may be served on a corporation, and no other method of service is provided, such service may be effected by delivery:

(a) in the case of a municipal corporation, to the mayor, warden, reeve or other chief officer of the corporation, or to the secretary, treasurer or clerk of the corporation; and



**(b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or of a branch thereof.**

**(6) A summons may be served anywhere in Canada.**

**20. (1) A warrant shall:**

**(a) be in writing and in Form 6;**

**(b) name the accused;**

**(c) set out briefly the crime the accused is alleged to have committed;**

**(d) set out briefly the reasons why the issuance of a warrant is necessary;**

**(e) be executed by a peace officer in the territorial jurisdiction in which it was issued, unless the justice specifies that it may be executed anywhere in the province or anywhere in Canada; and**

**(f) order that the accused be arrested immediately and brought before a specified court in the jurisdiction in which the warrant was issued or a court having jurisdiction over arrested persons in the territorial jurisdiction in which the accused was found.**

**(2) A warrant may permit the accused to be released in accordance with an endorsement made by the justice issuing the warrant.**

#### Awaiting First Appearance Before a Justice

**21. An arrested person who has not been released shall be held in custody in accordance with the recommendations governing general conditions of pre-trial custody.**

**22. A peace officer having custody of an arrested person shall cause the person to be taken before a justice:**

**(a) where a justice is available within a period of twenty-four hours after the person's arrest, without unreasonable delay and in any event within that period; or**

**(b) where a justice is not available within a period of twenty-four hours after the person's arrest, as soon as practicable.**

**23. (1) Where a warrant for arrest has been issued in one territorial jurisdiction and the person has been arrested in another territorial jurisdiction on the basis of such a warrant, that person shall be taken before a justice pursuant to Recommendation 22.**

**(2) At any time prior to taking such a person before a justice, a peace officer may release the person if the warrant for arrest has been obtained and contains the justice's endorsement authorizing such release.**

**(3) If the justice is not satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the crime, the justice shall release that person.**

**(4) A justice who on reasonable grounds believes that the person arrested is the person alleged to have committed the crime may:**

**(a) release the person in accordance with the general provisions of judicial interim release; or**

**(b) remand the person in detention to await the arrival of the warrant and the transfer of that person, but if no transfer has been so initiated within a period of three days after the remand, the custodian shall release that person.**

**24. (1) A justice before whom an accused person is brought may, upon application by the prosecutor or the accused, adjourn the proceedings and remand the accused in custody by warrant, but no such adjournment shall be for more than three clear days except with the accused's consent.**

**(2) A warrant under this section shall be in writing and in Form 7.**

#### Jurisdiction of Provincial Court Judges

**25. Provincial court judges, and justices of the peace who have been specially designated for the purpose by the Chief Judge of the provincial criminal court, should have jurisdiction to hear and determine matters of judicial interim release in relation to all crimes.**

#### Authority to Determine Interim Release and Detention for the Crime Charged

**26. (1) An order for the release or detention of an accused shall be made in relation to the particular crime for which the accused was taken before a justice, notwithstanding that the accused is in custody on another matter.**

**(2) If an order for the accused's custody is made, the order shall take effect and shall remain in force until vacated or varied or until the charge is disposed of.**

**(3) If an order for the accused's release is made, the order shall take effect concurrently with any other order for release or upon the termination of custody upon another matter and shall remain in force until vacated or varied or until the charge is disposed of.**

#### Unconditional Release

**27. (1) A justice before whom an accused is taken shall, unless a plea of guilty by the accused is accepted, order that the accused be released upon giving an undertaking without conditions, unless the prosecutor, having been given a**

reasonable opportunity to do so, shows cause why the accused should be held in custody or why conditions on the accused's release should be imposed.

(2) Where an accused who is taken before a justice pleads guilty and the plea is accepted, the justice may make an order for the accused's release pending imposition of sentence.

#### Conditional Release

28. (1) A justice who does not make an order for unconditional release shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released upon giving an undertaking with such of the following conditions as the justice directs:

- (a) an agreement to abide by any of the non-pecuniary conditions found in subsection (2);
- (b) an agreement, without sureties, to forfeit such amount as the justice directs on breach of the undertaking, but without deposit of money or valuable security;
- (c) an agreement, with sureties, to forfeit such amount as the judge directs on breach of the undertaking, but without deposit of money or other valuable security;
- (d) with consent of the prosecutor, an agreement without sureties to forfeit such amount as the justice directs on breach of the undertaking, and with the deposit of such sum of money or other valuable security as the justice directs; or
- (e) where the accused is not ordinarily resident in the province of custody or does not ordinarily reside within two hundred kilometers of the place of custody, an agreement with or without sureties to forfeit such amount as the justice directs on breach of the undertaking and with the deposit of such sum of money or other valuable security as the justice directs.

(2) The justice may require the accused to fulfil any one or more of the following non-pecuniary conditions as specified in the order:

- (a) report at a specified time and place for purposes of conducting investigative procedures in respect of the person authorized by the Code of Criminal Procedure;
- (b) remain within a specified territorial jurisdiction;
- (c) notify a peace officer or other person designated in the order of any change of address, occupation or employment;
- (d) abstain from communicating with any witness or other person named in the order except in accordance with such conditions as the justice deems necessary;
- (e) abstain from attending at a specified place within the territorial jurisdiction;

- (f) deposit the accused's passport, if any;
  - (g) comply with such other reasonable non-pecuniary conditions as the justice considers necessary.
- (3) In making an order for conditional release, a justice:
- (a) shall give reasons for making the order;
  - (b) shall not make an order for pecuniary conditions unless an order for non-pecuniary conditions would not be adequate in the circumstances;
  - (c) may, where an agreement with sureties is ordered, name particular persons as sureties; and
  - (d) may give any directions as may be necessary for the conditional release of the accused.
- (4) An undertaking shall be in writing and in Form 8.

#### Detention Orders

29. Those provisions of the *Code* which place a reverse onus upon the accused to show cause why detention is not justified should be repealed and replaced by provisions placing the onus on the prosecution to justify detention where necessary.

30. (1) The justice shall order that the accused be detained in custody until dealt with according to law where the prosecutor shows cause why the detention of the accused is necessary:

- (a) to ensure that the accused will appear in court;
- (b) to prevent interference with the administration of justice;
- (c) to prevent the continuation or repetition of the crime for which the person has been charged; or
- (d) to ensure the protection or safety of the public.

(2) The justice who orders detention may order the accused to submit to investigative procedures in respect of the person authorized by the Code of Criminal Procedure.

(3) The justice may order the temporary detention of the accused for the purpose of conducting investigative procedures in respect of the person authorized by the Code of Criminal Procedure. Detention orders for this purpose should be time-limited and the accused should be released immediately upon completion of the investigative procedures, with or without conditions.

- (4) The justice who makes an order for detention shall:
- (a) state the reasons for making the order; and
  - (b) issue a warrant for the committal of the accused in writing and in Form 9 which states the reasons for the detention and the date of the accused's court appearance.

## Procedure on a Show-Cause Hearing

31. (1) The present *Code* provisions relating to the conduct of show-cause hearings, the taking of evidence (section 457.3) and the making of a record of the proceedings (subsection 457(6)) should be integrated with the recommendations setting out judicial authority over interim release in the following manner:

In any proceedings for judicial interim release,

(a) the justice may

- (i) make such inquiries on oath or otherwise of and concerning the accused as considered desirable,
- (ii) take into consideration any relevant matters agreed upon by the prosecutor and the accused,
- (iii) receive evidence of an intercepted private communication or evidence obtained as a result of an interception of a private communication apparently made under and within the meaning of Part IV.I in writing, orally or in the form of a recording and, for the purposes of this section, section 178.16 does not apply to such evidence, and
- (iv) receive and base the decision upon evidence considered credible or trustworthy in the circumstances of each case;

(b) the prosecutor may, in addition to any other evidence, lead evidence

- (i) to prove that the accused has previously been convicted of a crime,
- (ii) to prove that the accused has been charged with and is awaiting trial for another crime,
- (iii) to prove that the accused has previously committed a crime against the interim-release provisions of the *Code*, or
- (iv) to show the circumstances of the alleged crime, particularly as they relate to the probability of conviction of the accused;

(c) it is sufficient if a record is made of the reasons for release or detention in accordance with the provisions of the *Code* relating to the taking of evidence at preliminary inquiries.

(2) Paragraph 457.3(1)(b) should be repealed and replaced by the following:

The accused on a show-cause hearing may testify but shall not be cross-examined as to the facts or circumstances of the crime unless the accused has first testified as to those facts and circumstances.

## Expediting Proceedings

32. A court before which a person who is the subject of an order for interim release or detention appears pursuant to these recommendations may give directions for expediting any criminal proceeding to which the order relates.

### Order for Conveyance of an Accused in Custody

**33. (1) Where an accused person who is being held in custody is required to attend at a criminal proceeding as an accused, a judge of the court before which the accused's attendance is required may, upon application, order in writing that the accused be brought before the judge presiding at the proceeding if:**

- (a) the applicant sets out the facts of the case in an affidavit and produces any relevant summons, subpoena or warrant; and**
- (b) the judge is satisfied that the ends of justice require the order.**

**(2) The order shall be addressed to the custodian of the accused who, on receipt thereof, shall deliver the accused to a person named in the order or bring the accused before the court.**

**(3) The presiding judge shall make an appropriate order for the accused's custody for the purpose of the proceeding and for the accused's release in the event of discharge or acquittal.**

**(4) On application by the prosecutor with the written consent of an accused, a judge of the court before which the accused's attendance is required may order the transfer of the accused to the custody of a named peace officer for a period specified therein where the judge is satisfied that such transfer is required for the purpose of assisting a peace officer acting in the execution of duty.**

**(5) This order shall be addressed to the custodian of the accused who, on receipt thereof, shall deliver the accused to the peace officer who is named in the order.**

**(6) The peace officer shall return the person to the place of confinement at the time the order was made once the purposes of the order have been carried out.**

### Coroners' Warrants

**34. Section 462 of the *Code* creating coroners' warrants of committal should be repealed.**

### Subpoenas

**35. (1) Where a person is likely to give relevant evidence in a criminal proceeding, a judge of the court having jurisdiction over the proceeding may issue, or cause to be issued, a subpoena requiring the person to attend to give evidence.**

- (2) A subpoena shall require the person to whom it is directed:**
  - (a) to attend at a time and place stated in the subpoena to give evidence;**
  - (b) to remain in attendance throughout the proceeding unless excused by the presiding judge; and**

(c) if specified, to bring to the court anything in the person's possession or control relating to the proceeding.

(3) A subpoena shall be valid anywhere in the province in which it is issued, but shall be valid in any other territorial jurisdiction in Canada only where the applicant pays attendance money as determined by the court.

(4) Service of a subpoena shall be effected and proved in the same manner as a summons.

(5) A subpoena shall be in writing and in Form 10.

#### Warrant for Arrest of Witness

36. (1) Where it is established by a party that a person who is likely to give relevant evidence:

(a) will not attend in response to a subpoena if issued; or

(b) is evading service of a subpoena,

a judge of the court having jurisdiction over the proceeding may issue, or cause to be issued, a warrant directing peace officers to arrest and bring the person to give evidence.

(2) A judge may issue a warrant for the arrest of a witness for execution in a territorial jurisdiction or may specify that the warrant may be executed anywhere in the province or in Canada.

(3) A warrant for the arrest of a witness shall be in writing and in Form 11.

#### Order for Conveyance of a Witness in Custody

37. The powers of a judge presiding at a criminal proceeding to compel the attendance of an accused person in custody apply with the necessary modifications to witnesses who are in custody.

#### Judicial Interim Release of Witnesses

38. Where a witness is brought before a court pursuant to a warrant for arrest, or where there are reasonable grounds to believe that a person in attendance at a criminal proceeding who is likely to give relevant evidence cannot be relied upon to continue in attendance in response to a subpoena, the judge presiding at the criminal proceeding may:

(a) order the witness detained in custody until the witness does what is required or until the proceeding has ended; or

(b) order that the witness be released upon an undertaking to appear and give evidence when required, with or without conditions.

## Bench Warrants

39. (1) A bench warrant for the arrest of a person may be issued by a judge or justice having jurisdiction over any aspect of a criminal proceeding if the person has been compelled to appear in that proceeding and fails to appear or to remain in attendance as required.

(2) Proof of the fact that the person received notice of the proceedings by way of a summons, appearance notice, subpoena, order, or by virtue of any undertaking shall be made before the warrant shall issue.

(3) Unless the judge issuing the warrant has endorsed it to authorize interim release by a peace officer and the person has been released, a person who is arrested under a bench warrant shall be taken before a justice having jurisdiction in interim-release matters or the judge presiding over the criminal proceeding at which the presence of the person is required and an order for interim release or detention in custody shall be made.

(4) A bench warrant shall have the same force and effect and may be executed according to the same territorial limitations as an arrest warrant.

(5) A bench warrant shall be in writing and in Form 12.

## Costs

40. Where a person is brought before a court after arrest pursuant to a bench warrant, the judge or justice may order that the person pay the costs incident to the issuance of the warrant and its execution.

## Forfeiture on Breach of Pecuniary Conditions in Appearance Notices and Undertakings

41. (1) The procedures found in Part XXII of the *Code* governing:
- (a) the effect of pecuniary conditions;
  - (b) the responsibility of sureties;
  - (c) the surrender of persons by sureties; and
  - (d) procedures in default,

should apply to any pecuniary conditions set out in an appearance notice or undertaking.

(2) The procedures for forfeiture upon breach of pecuniary conditions in appearance notices and undertakings should be amended to provide a right of appeal against forfeiture orders to the Court of Appeal.

(3) All of the forfeiture provisions should be placed in the same Part of the Code of Criminal Procedure as contains the compelling appearance and interim-release provisions.



## Crimes for Breach of Compelling Appearance and Interim-Release Provisions

**42. It should be a crime to breach the terms or conditions of an appearance notice, summons, undertaking or subpoena.**

## Duration of Orders

**43. (1) A detention order or the terms and conditions governing interim release continue in force until the completion of the criminal proceeding in relation to which they were made.**

**(2) Where a new information [charge document] charging the same crime or an included crime is laid, a justice need not determine whether a case is made out for issuing process and the previous detention order or the existing terms and conditions of release apply in respect of the new information [charge document].**

**(3) On cause being shown by the applicant, an order to vacate or vary a detention order or the terms and conditions of release may be made:**

- (a) by the court before which an accused is being tried or the witness attends, at any time;**
- (b) by the justice presiding at the preliminary inquiry if, upon completion of the preliminary inquiry, the accused is ordered to stand trial;**
- (c) by any justice where the accused or witness, after having been released, has been arrested without warrant by a peace officer in accordance with the power to arrest without warrant;**
- (d) by the court before which the accused is found guilty, pending imposition of sentence; or**
- (e) with the consent of the prosecutor and the accused or witness, at any time,**
  - (i) by the judge or justice who issued the order or any other judge or justice,**
  - (ii) by the court before which the accused is to be tried or the witness is to attend.**

**(4) An accused may apply to a justice to vacate or vary any conditions of release contained in an appearance notice.**

**(5) Where an application is made to vacate or vary a detention order or the terms and conditions of release, the procedures to be followed at show-cause hearings apply with necessary modifications.**

## Review of Interim Release and Detention Orders

**44. (1) Where a judge or justice makes an order for interim release or detention, a witness bound by such an order, the accused, or the prosecutor may, at any time before trial, apply for a review of the order to a court having appellate jurisdiction in relation to the judge or justice who made it.**

(2) The application for review shall not be heard unless the applicant has given the accused or prosecutor or, where necessary, the witness, at least two clear days notice in writing of the application or unless the parties consent to a shorter period or time is abridged by order of the court.

(3) The reviewing court may, on its own motion or on request of the applicant, compel the appearance at the hearing of the accused or witness bound by an order by way of summons and may adjourn the proceedings for the purpose of serving the summons.

(4) The court may, before or at any time during the hearing of the application, upon the request of the accused or prosecutor or, where necessary, the witness, adjourn the proceedings, but if the person who is the subject of the order is in custody, no adjournment shall be for more than three clear days except with the person's consent.

(5) A review shall be by way of hearing *de novo*.

(6) Upon the hearing of the application, the court may consider;

(a) the transcript, if any, of the proceedings heard by the judge who made the original order and by any judge who subsequently varied or reviewed the original order;

(b) the exhibits, if any, filed in any hearings in paragraph (a); and

(c) such additional evidence or exhibits as may be tendered by any of the parties,

and shall grant interim release or order detention in accordance with Recommendations 27, 28 and 30.

(7) Once an application has been heard and decided, another application under this recommendation shall not be made with respect to the same applicant, except with leave of a judge, prior to the expiration of thirty days from the date of the previous decision.

(8) The procedures to be followed at a show-cause hearing apply, with the necessary modifications, to applications for review of an order for interim release or detention.

#### Remedies Where Trial Delayed

45. (1) Where a person, who is not required to be detained in custody in respect of any other matter, is being detained pursuant to these recommendations, and a trial has not commenced:

(a) in the case of an accused held for trial on an indictable offence [or a crime punishable by more than two years imprisonment under our proposed classification scheme], within ninety days from the day on which the original order for custody was made;

(b) in the case of an accused held for trial in a summary conviction proceeding [or a crime punishable by two years or less imprisonment under

our proposed classification scheme], within thirty days from the day on which the original order for custody was made; or

(c) in the case of a witness held in relation to any criminal proceeding, within thirty days from the day on which the original custody order was made,

the custodian of the person detained shall, forthwith, upon the expiration of those ninety days or thirty days as the case may be, apply to a court having jurisdiction in interim-release matters to review the person's detention.

(2) On receiving the application, the court shall:

(a) fix a date for a hearing to be held in the jurisdiction

(i) where the person is in custody, or

(ii) where the trial is to take place; and

(b) direct that notice of the hearing be given to the parties in such a manner as it may specify.

(3) At the hearing, the court, in addition to the factors in Recommendation 30, may take into consideration:

(a) in relation to an accused, whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge; or

(b) in relation to a witness, the importance of the relevant evidence the witness is likely to give, whether the evidence can be provided to the court by an alternative means without the further custody of the witness, or whether the witness's attendance can be ensured in any other way.

(4) At a hearing in relation to an accused, the court shall, if not satisfied that the continued custody of the accused is justified, release the accused pending trial on an undertaking with or without conditions.

(5) At a hearing in relation to a witness, the court shall:

(a) if not satisfied that the continued custody of the witness is justified, release the witness on an undertaking with or without conditions; or

(b) if thirty days has expired in a summary conviction matter [or a crime punishable by two years or less imprisonment under our proposed classification scheme], order the release of the witness.

(6) In the case of an indictable offence [or a crime punishable by more than two years imprisonment under our proposed classification scheme], the court shall, if satisfied that continued custody of a witness is justified, order the continued detention of the witness subject to the restriction that the total period of detention of the witness shall not exceed ninety days.

(7) A court before which an application is made shall make an order to expedite the trial.

**(8) Where pursuant to an application for review a person remains in custody, an expedited date for trial has been set and the trial does not go forward on that date, the custodian of the person must apply to a court for another review of detention and for just and appropriate relief as the court may order.**

#### **Release Pending Appeal**

**46. A person may apply for release from custody to a judge of an appeal court:**

**(1) pending the determination of the appeal, if the appellant has filed and served a notice of appeal or, where leave is required, an application for leave to appeal; or**

**(2) when the minister of Justice makes a reference under section 617.**

**47. An appellant who applies to a judge of an appeal court to be released pending the determination of the appeal shall give written notice of the application to the prosecutor or to such other person as the appeal court directs.**

**48. A judge of an appeal court shall order that the person be released pending the determination of the appeal or pending the determination of a reference made by the minister of Justice if the person establishes:**

**(a) in the case of an appeal against conviction, that the appeal or application for appeal is not frivolous; or**

**(b) in the case of an appeal against sentence, that the appeal has sufficient merit and that, in the circumstances, the detention would cause unnecessary hardship; and**

**(c) that the person shall surrender himself into custody in accordance with the terms of the order; and**

**(d) that detention is not necessary to prevent interference with the administration of justice or to ensure the protection or safety of the public.**

**49. (1) A judge of an appeal court may order that the appellant be released upon giving an undertaking with or without conditions.**

**(2) An undertaking shall be in writing and in Form 8.**

**50. (1) On cause being shown by the applicant or on consent of the prosecutor and the accused, the judge of the appeal court which gave such order or another judge of the same court may vacate or vary it.**

**(2) An order for release which vacates or varies a previous order shall come into effect only when the appellant enters into a new undertaking.**

**51. Where the person released pending appeal has been arrested following release, a judge of the appeal court shall release the person on an undertaking**

with such conditions as the judge considers desirable where the accused shows cause why detention is not justified on the grounds outlined for pre-trial detention.

52. A judge of the appeal court, or a judge of the Supreme Court of Canada upon application by an appellant in the case of an appeal to that Court, may give such directions as are thought necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be.

53. (1) Where a judge of an appeal court makes an order for interim release or detention, the accused or the prosecutor may apply for a review of the order to the appeal court.

(2) The application shall not be heard unless the applicant has given the affected parties at least two clear days notice in writing of the application or unless the parties consent to a shorter period or time is abridged by order of the court.

(3) The appeal court may, on its own motion or at the request of the applicant, compel the appearance of the person bound by the order at the hearing by way of summons and may adjourn the proceedings for the purpose of serving the summons.

(4) The appeal court may, before or at any time during the hearing of the application, upon the request of one of the affected parties, adjourn the proceedings but if the person who is the subject of the order is in custody, no adjournment shall be for more than three clear days except with the person's consent.

(5) A review shall be by way of a review on the record.

(6) The appeal court may confirm the decision or substitute such other decision as, in its opinion, should have been made.

(7) A decision as substituted under this section shall have effect and may be enforced in all respects as though it was the decision originally made.

(8) Once an application has been heard and decided, another application under this recommendation shall not be made with respect to the same applicant, except with leave of a judge of the appeal court, prior to the expiration of thirty days from the date of the previous decision.

#### Legal Effects of Non-compliance with Procedural Requirements

54. An arrest or subsequent custody is unlawful where it is in breach of the procedures providing for arrest or custody.

#### Definition of Pre-trial Custody

**55. A person in pre-trial custody is any person who is held in custody following an arrest or pursuant to an order for detention made in accordance with these recommendations.**

#### Interpretation and Limitation

**56. (1) The rights in these recommendations are intended to ensure that the person in pre-trial custody is able to make full answer and defence or to substantiate allegations of abuse occurring while in such custody.**

**(2) The exercise of these rights shall be limited only where necessary for the purposes of custody, the maintenance of security and order in the place of custody, or the prevention of interference with the administration of justice.**

#### Duty to Assist

**57. A person in pre-trial custody shall be entitled to all reasonable assistance in asserting rights available under these recommendations.**

#### Right to Be Informed

**58. A person in pre-trial custody shall be informed without unreasonable delay of the rights available under these recommendations.**

#### Copy of Warrant

**59. A person in pre-trial custody shall be given, upon request, a copy of the warrant of remand or committal or other document which is the authority for detention.**

#### Communication with Counsel

**60. (1) A person in pre-trial custody shall:**

**(a) be afforded reasonable opportunities to consult with counsel;**

**(b) be allowed, for the purpose of obtaining legal advice, to send or receive confidential written messages to or from counsel and to have the messages forwarded without delay; and**

**(c) be permitted to meet with counsel in sight, but not within hearing, of peace officers or other persons in authority.**

### Communication with Family and Others

**61. A person in pre-trial custody shall be given a reasonable opportunity to see and communicate with family or friends or, in appropriate cases, with consular or diplomatic officials.**

### Medical Examination

**62. A person in pre-trial custody has the right to be examined by an independent physician, upon the person's request or upon that of family or counsel.**

### Legal or other Relevant Material

**63. A person in pre-trial custody shall have reasonable access to legal or other relevant material.**

## APPENDIX A

### Model Forms for the Implementation of Certain Recommendations

#### FORM 1\*

##### Appearance Notice

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To A.B. of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_.

You are said to have committed (*set out briefly the crime(s)*) \_\_\_\_\_.

You are required to attend Court on \_\_\_\_\_ day, the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon, in Courtroom No. \_\_\_\_\_, at \_\_\_\_\_ Court in the municipality of \_\_\_\_\_. You must attend again as required by the Court to be dealt with according to law.

You are required to notify (*name person*) \_\_\_\_\_, (*address*) \_\_\_\_\_ of any change in your address, employment or occupation.

You are warned that failure to attend Court as ordered by the Appearance Notice may result in your having to pay the costs of further Court procedures to make you attend by means of a Bench Warrant. Failure to appear or to obey any of the conditions which you may acknowledge in writing at the end of this Appearance Notice is a crime under paragraph 121(a) of the Criminal Code which reads:

- 121.** Every one commits a crime who fails to
- (a) comply with the terms of
    - (i) an appearance notice, summons or subpoena issued pursuant to the Code of Criminal Procedure, or
    - (ii) an undertaking entered into pursuant to the Code of Criminal Procedure;

You are also warned that committing this crime may result in a warrant being issued for your arrest.



You are required to appear on \_\_\_\_\_day, the \_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_o'clock in the morning/afternoon, at (police station) \_\_\_\_\_, (address) \_\_\_\_\_, for the purposes of the *Identification of Criminals Act* [or for fingerprinting or photographing for identification purposes.] (Comply *ONLY* if filled in.)

### SPECIAL CONDITIONS OF RELEASE

By signing this portion of the Appearance Notice you now know that, to be released from custody, you have agreed to comply with the following conditions (filled in by the Peace Officer who issues this Appearance Notice to you): [Those conditions, if any, which apply to you, are valid only if you sign the Appearance Notice.]

- (a) deposit your passport with (name person) \_\_\_\_\_, (address) \_\_\_\_\_;
- (b) remain within the territorial jurisdiction of (name jurisdiction) \_\_\_\_\_;
- (c) not communicate with (name person) \_\_\_\_\_except under the following conditions: (as the Peace Officer specifies); \_\_\_\_\_
- (d) not go to (name place) \_\_\_\_\_;
- (e) forfeit \$ \_\_\_\_\_(not to exceed \$2,000.00) if you fail to attend Court or fulfill any other requirements of this Appearance Notice;
- (f) (this paragraph applies *ONLY* to an Accused who is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place of trial) deposit herewith money or valuable security in the amount or value of \$ \_\_\_\_\_ (not to exceed \$2,000.00). You agree to forfeit this amount if you fail to attend Court or fulfill any other requirements of this Appearance Notice.

Dated this \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_o'clock in the morning/afternoon at (place) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of Recipient)

I certify that I gave a duplicate of this Appearance Notice to the Recipient on the \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_o'clock in the morning/afternoon at (place) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of Issuing Peace Officer)

\* (Recommendations 1, 2, 3, 4, 5, 10, 11 and 12)

FORM 2\*

Information [Charge Document]

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

In the (set out name of the Court, where applicable) \_\_\_\_\_.

Her Majesty the Queen  
against  
(name of Accused) \_\_\_\_\_

Statement of Alleged Crime(s): (Specify the crime(s) charged and state the section number and applicable federal statute. Use separate paragraphs for each additional or alternative count.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Details of Alleged Crime(s): (State such details as the date, time, place, method and circumstances of the alleged crime(s).) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Fill in EITHER section 1 or section 2, below.)

1. The Informant, C.D. of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_, has reasonable grounds to believe and does believe that the Accused committed the alleged crime(s) in the manner set out above.

Sworn before me (name of Justice) \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon.

\_\_\_\_\_  
(Signature of Informant)

\_\_\_\_\_  
(Signature of a Justice of  
the Peace (jurisdiction)  
\_\_\_\_\_)

2. The Accused stands charged of the alleged crime(s).

Dated this \_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at \_\_\_\_ o'clock in the morning/afternoon.

---

*(Signature of signing  
officer, agent of  
Attorney General, etc.,  
as the case may be)*

*Note:* The date of birth of the Accused may be mentioned on the Information [Charge Document].

\* (Recommendation 12)

FORM 3\*

Notice of Confirmation or Cancellation  
of an Appearance Notice

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To A.B. of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_.

(Fill in EITHER the paragraph concerning CONFIRMATION or CANCELLATION)

CONFIRMATION

You are notified of the CONFIRMATION of the Appearance Notice which requires you to attend on \_\_\_\_\_day, the \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_o'clock in the morning/afternoon, in Courtroom No. \_\_\_\_at \_\_\_\_\_Court in the municipality of \_\_\_\_\_, and to fulfill any conditions agreed to by you in that notice.

You are also notified that the above described Appearance Notice has been amended so that you are now: (*Comply where filled in*)

(a) charged with the following crime(s) (*state crime(s)*): \_\_\_\_\_

\_\_\_\_\_

(b) to attend on \_\_\_\_\_day, the \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_o'clock in the morning/afternoon, in Courtroom No. \_\_\_\_at \_\_\_\_\_Court in the municipality of \_\_\_\_\_.

*or*

CANCELLATION

You are notified of the CANCELLATION of the Appearance Notice which required you to attend on \_\_\_\_\_day, the \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_o'clock in the morning/afternoon, in Courtroom No. \_\_\_\_at \_\_\_\_\_Court in the municipality of \_\_\_\_\_, and to fulfill any conditions agreed to by you in that notice. You are therefore no longer required to attend and need no longer fulfill such conditions.

Dated this \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_o'clock in the morning/afternoon at (*place*) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of a Justice of  
the Peace (*jurisdiction*))

\_\_\_\_\_)

\* (Recommendation 14)

FORM 4\*

Affidavit for Use in Application for Warrant

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

This is the Affidavit of (name of applicant) \_\_\_\_\_, of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_, now called the Applicant.

The Applicant states that he/she has reasonable grounds to believe that a Warrant of Arrest for the Accused (name of Accused) \_\_\_\_\_, named in an Information [Charge Document], should be issued or should have extended territorial validity because (Here state the reason(s) relied on in Recommendation 16(1) with a brief description of the supporting facts): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Fill in the following for applications for issuance or extension of warrant made by telephone or other means of telecommunication ONLY.

The Applicant states that he/she is making an application (for issuance/extension of a warrant) by telephone or other means of telecommunications because (Here state why it is considered impracticable to appear in person): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Sworn before me (name of Justice) \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_ o'clock in the morning/afternoon.

\_\_\_\_\_  
(Signature of Applicant)  
  
\_\_\_\_\_  
(Signature of a Justice of the Peace (jurisdiction))  
\_\_\_\_\_

\* (Recommendations 16 and 18)

FORM 5\*

Summons

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To A.B. of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_.

You were today charged before me of (set out briefly the crime(s) with which the Accused is charged) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

You are now ordered to:

(a) attend Court on \_\_\_\_\_ day, the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon, at \_\_\_\_\_ or before any Justice for the (name territorial jurisdiction) \_\_\_\_\_ who is there. You must attend again as required by the Court, to be dealt with according to law; and

(b) appear on \_\_\_\_\_ day, the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon, at \_\_\_\_\_, for the purposes of the *Identification of Criminals Act* [or for fingerprinting or photographing for identification purposes]. (Comply ONLY if filled in.)

You are warned that failure to attend Court as ordered by the Summons may result in your having to pay the costs of further Court procedures to make you attend by means of a Bench Warrant. Failure to attend is a crime under paragraph 121(a) of the Criminal Code which reads:

**121.** Every one commits a crime who fails to

(a) comply with the terms of

(i) an appearance notice, summons or subpoena issued pursuant to the Code of Criminal Procedure, or

(ii) an undertaking entered into pursuant to the Code of Criminal Procedure;

You are also warned that committing this crime may result in a Warrant being issued for your arrest.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon at (place) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of a Justice of  
the Peace (jurisdiction))

\* (Recommendation 19)

FORM 6\*

Warrant for Arrest  
or  
Facsimile Warrant for Arrest

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To the Peace Officers of (*here insert territorial jurisdiction in which the Warrant may be executed*) \_\_\_\_\_.

This Warrant is issued for the arrest of (*name*) \_\_\_\_\_, (*occupation*) \_\_\_\_\_, now called the Accused.

The Accused has been charged with (*here set out briefly the crime(s) with which the Accused is charged*) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

There are reasonable grounds to believe that the issue of this Warrant is necessary to (*state which of the following is applicable*):

(a) ensure that the Accused will appear in Court for trial for the said crime(s) because (*here state the grounds*) \_\_\_\_\_  
\_\_\_\_\_;

(b) locate the Accused because her/his whereabouts are unknown;

(c) conduct the following investigative procedure(s) in respect of the person to prevent loss or destruction of evidence (*here set out briefly the investigative procedure(s)*) \_\_\_\_\_  
\_\_\_\_\_;

(d) prevent interference with the administration of justice by (*here state the feared interference*) \_\_\_\_\_  
\_\_\_\_\_;

(e) prevent the continuation or repetition of the crime(s) of (*here name the crime(s)*) \_\_\_\_\_  
\_\_\_\_\_;

(f) ensure the protection or safety of the public from (*here state the feared danger*).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

You are therefore ordered to arrest the Accused immediately to be dealt with according to law and to bring her/him before (*name the Court, Judge or Justice in the originating territorial jurisdiction*) \_\_\_\_\_ or another competent Court, Judge or Justice in another territorial jurisdiction in which the Accused is arrested.

(*Fill in the following ONLY where applicable*)

I authorize the release of the Accused pursuant to a Peace Officer's power to release by an appearance notice provided by the Code of Criminal Procedure.

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_ o'clock in the morning/afternoon at (*place*) \_\_\_\_\_.

\_\_\_\_\_  
(*Signature of a Justice of the Peace (jurisdiction)*)  
\_\_\_\_\_)

To the Accused:

A copy of the record which formed the basis for this Warrant may be obtained at (*state address*) \_\_\_\_\_ from the Justice who issued it.

\* (Recommendations 16, 17 and 20)



FORM 7\*

Warrant Remanding an Accused

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To the Peace Officers in (territorial jurisdiction) \_\_\_\_\_:

I order you to arrest immediately, if necessary, and convey safely to the (prison) \_\_\_\_\_ at (address) \_\_\_\_\_ (name person) \_\_\_\_\_ who is charged with (name crime(s)) \_\_\_\_\_ and who is remanded to the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

I also order you, the Keeper of the prison, to receive this person into your custody there and keep her/him safely until the day when her/his remand expires. You shall then bring her/him before me or any other Justice at \_\_\_\_\_ Court at \_\_\_\_\_ o'clock in the morning/afternoon of the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, to answer the charge and be dealt with according to law, unless you are otherwise ordered before that time.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon at (place) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of a Justice of  
the Peace (jurisdiction))  
\_\_\_\_\_)

\* (Recommendation 24)

FORM 8\*

Undertaking

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

I, A.B., of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_ understand  
that I have been charged with (set out briefly the crime(s) with which the Accused is  
charged) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

So that I may be released from custody, I undertake:

- (a) to attend Court on the \_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ and then afterwards as required by the Court, to be dealt with according to law; or
- (b) (when time and place of appearance are not known when giving the undertaking) to attend at a time and place to be set by the Court (I will be told this in writing) and afterwards as required by the Court.

(Fill in the following ONLY where applicable) I also undertake to: (insert any conditions imposed by the Court)

- (a) report at (state time and place) \_\_\_\_\_ to (name person) \_\_\_\_\_ to have the investigative procedure of (name the investigative procedure) \_\_\_\_\_ as authorized by (here refer to the authorizing section of the Code of Criminal Procedure) \_\_\_\_\_;
- (b) remain within the territorial jurisdiction of \_\_\_\_\_;
- (c) notify (name person) \_\_\_\_\_, (address) \_\_\_\_\_ of any change in my address, employment or occupation;
- (d) not to communicate with (name person) \_\_\_\_\_ except under the following conditions: (as the Court specifies in the order) \_\_\_\_\_;
- (e) not to go to (name place within the territorial jurisdiction) \_\_\_\_\_;
- (f) deposit my passport with (name person) \_\_\_\_\_, (address) \_\_\_\_\_;

(g) (name here other conditions which do not concern money) \_\_\_\_\_

\_\_\_\_\_;

(h) without deposit or sureties, to forfeit the amount of \$ \_\_\_\_\_ if I break this undertaking;

(i) with sureties, to forfeit the amount of \$ \_\_\_\_\_ if I break this undertaking;

(j) where the prosecutor consents, without sureties, to deposit money or other valuable security in the amount of \$ \_\_\_\_\_, and to forfeit the amount of \$ \_\_\_\_\_ if I break this undertaking; or

(k) (this paragraph applies ONLY where the person is non-resident of the province of custody or does not ordinarily reside within 200 kilometres of the place of custody) with or without sureties, to deposit money or other valuable security in the amount of \$ \_\_\_\_\_ and to forfeit the amount of \$ \_\_\_\_\_ if I break this undertaking.

I understand that if I do not attend Court as I have undertaken, I may have to pay the costs of further Court procedures to make me attend by means of a Bench Warrant. Such a failure is a crime under paragraph 121(a) of the Criminal Code which reads:

**121.** Every one commits a crime who fails to

(a) comply with the terms of

(i) an appearance notice, summons or subpoena issued pursuant to the Code of Criminal Procedure, or

(ii) an undertaking entered into pursuant to the Code of Criminal Procedure;

I have also been warned that committing this crime may result in a warrant being issued for my arrest.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon at (place) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of the Accused)

\* (Recommendation 28)

FORM 9\*

Warrant of Committal of Accused for Pre-trial Custody

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To the Peace Officers in the said (territorial jurisdiction) \_\_\_\_\_ and to the  
Keeper of the (prison) \_\_\_\_\_ at (address) \_\_\_\_\_;

This Warrant is issued for the committal of A.B. of (address) \_\_\_\_\_,  
(occupation) \_\_\_\_\_, now called the Accused.

The Accused has been charged with (set out briefly the crime(s) with which the Accused  
is charged) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

An order for the pre-trial custody of the Accused has been made because it is necessary  
to (here fill in the applicable reason given by the Judge):

(a) ensure that the Accused will appear in Court to answer the crime(s) charged  
because (here state the grounds) \_\_\_\_\_  
\_\_\_\_\_;

(b) prevent interference with the administration of justice by (here state the  
feared interference) \_\_\_\_\_  
\_\_\_\_\_;

(c) prevent the continuation or repetition of the crime(s) of (here name the  
crime(s)) \_\_\_\_\_  
\_\_\_\_\_;

(d) ensure the protection or safety of the public from (here state the feared  
danger) \_\_\_\_\_  
\_\_\_\_\_;

(e) have an investigative procedure(s) in respect of the person authorized by  
(here refer to authorizing section of the Code of Criminal Procedure) \_\_\_\_\_  
conducted upon the Accused. However, if the Accused is detained only on this  
ground, the period of detention cannot be for more than \_\_\_\_\_ hour(s) from (time)  
\_\_\_\_\_(day) \_\_\_\_\_(month) \_\_\_\_\_(year) \_\_\_\_\_, and in any event the

Accused must be released immediately upon completion of the investigative procedure(s).

This Warrant orders you to take the Accused, convey her/him safely to the (*prison*) \_\_\_\_\_ at (*address*) \_\_\_\_\_, and deliver her/him to the Keeper, with the following instructions:

I order you, the Keeper, to take the Accused into your custody in the prison, and keep her/him safely there until he/she is required for trial on \_\_\_\_\_day, the \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_o'clock in the morning/afternoon or at such other time as may be set according to law.

Dated this \_\_\_\_\_day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_o'clock in the morning/afternoon at (*place*) \_\_\_\_\_.

\_\_\_\_\_  
(*Signature of a Judge or  
Clerk of the Court of  
jurisdiction*) \_\_\_\_\_)

\* (Recommendation 30)

FORM 10\*

Subpoena

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To E.F. of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_:

A.B. has been charged with (state the crime(s) appearing in the Information [Charge Document]) \_\_\_\_\_. It seems that, at the request of the (Crown/Accused), you may be able to give relevant evidence.

You are therefore ordered to attend at (name Court) \_\_\_\_\_, on \_\_\_\_\_ day, the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon to give evidence about this charge, and to remain there throughout the proceedings unless excused by the presiding Judge.

You are also ordered to bring with you anything in your possession or under your control relating to this charge, and more particularly the following: (specify anything required) \_\_\_\_\_

You are also warned that if you fail to attend Court as ordered, you may have to pay the costs of further Court procedures to make you attend by means of a Bench Warrant. Failure to attend is a crime under paragraph 121(a) of the Criminal Code which reads:

121. Every one commits a crime who fails to
- (a) comply with the terms of
    - (i) an appearance notice, summons or subpoena issued pursuant to the Code of Criminal Procedure, or
    - (ii) an undertaking entered into pursuant to the Code of Criminal Procedure:

You are also warned that committing this crime may result in a warrant being issued for your arrest.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the morning/afternoon at (place) \_\_\_\_\_.

\_\_\_\_\_  
(Signature of a Judge or  
Clerk of the Court of  
(jurisdiction) \_\_\_\_\_)

\* (Recommendation 35)

FORM 11\*

Warrant for Arrest of Witness

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

To the Peace Officers of (*here insert territorial division in which the Warrant may be executed*) \_\_\_\_\_;

A.B. of (*address*) \_\_\_\_\_, (*occupation*) \_\_\_\_\_, has been charged with (*state the crime(s) appearing in the Information [Charge Document]*) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

It has been established that E.F. of (*address*) \_\_\_\_\_, (*occupation*) \_\_\_\_\_, now called the Witness, is, at the request of the (*Crown/Accused*), likely to give relevant evidence and that (*either the Witness will not attend unless compelled to do so, or the Witness is evading service of a subpoena*) \_\_\_\_\_.

You are ordered to arrest immediately and bring the Witness before (*name Court*) \_\_\_\_\_ where detention or release of the witness will be dealt with according to the Code of Criminal Procedure.

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_ o'clock in the morning/afternoon at (*place*) \_\_\_\_\_.

\_\_\_\_\_  
(*Signature of a Judge or  
Clerk of the Court of  
(jurisdiction) \_\_\_\_\_*)

\* (Recommendation 36)

FORM 12\*

Bench Warrant

Canada,  
Province of \_\_\_\_\_,  
(territorial jurisdiction) \_\_\_\_\_.

G.H. of (address) \_\_\_\_\_, (occupation) \_\_\_\_\_, has  
failed to appear in Court or to remain there in response to (*here state either Summons,  
Subpoena, Appearance Notice or Undertaking*) \_\_\_\_\_ dated (*date of issue of the  
original process*) \_\_\_\_\_ at (*the place of issue of the original process*) \_\_\_\_\_.

You are ordered to arrest G.H. immediately and bring her/him before (*name Court*)  
\_\_\_\_\_ to be dealt with according to law.

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_ o'clock in the morning/afternoon at  
(*place*) \_\_\_\_\_.

\_\_\_\_\_  
(*Signature of a Judge or  
Clerk of the Court of  
jurisdiction*) \_\_\_\_\_)

\* (Recommendation 39)



## APPENDIX B

### Table of Concordance

[This table of concordance shows the changes in the numbering of the present *Criminal Code* sections relevant to compelling appearance and interim release which will appear in the forthcoming statutory revision of the *Code*. This table reflects the state of the law as of Dec. 31, 1984. Consequently, it does not include references to new sections passed into law as result of the *Criminal Law Amendment Act, 1985*. These and subsequent amendments to the *Code* will be published in the supplements.]

OLD	NEW	OLD	NEW
<b>Part III</b>		457(5.1)	515(6)
133	145	457(5.2)	515(7)
<b>Part XIV</b>		457(5.3)	515(8)
448	493	457(6)	515(9)
449	494	457(7)	515(10)
450	495	457(8)	515(11)
451	496	457.1	516
452	497	457.2	517
453	498	457.3	518
453.1	499	457.4	519
453.2	500	457.5	520
453.3	501	457.6	521
453.4	502	457.7(1)	522(1)
454(1)	503(1)	457.7(2)(a)-(d)	522(2)(a)-(d)
454(1.1)	503(2)	457.7(2)(d.1)	522(2)(e)
454(2)	503(3)	457.7(2)(e)	522(2)(f)
454(3)	503(4)	457.7(2)(f)	522(2)(g)
454(4)	503(5)	457.7(2.1)	522(3)
455	504	457.7(2.2)	522(4)
455.1	505	457.7(3)	522(5)
455.2	506	457.8	523
455.3	507	458(1)-(4)	524(1)-(4)
455.4	508	458(4.1)	524(5)
455.5	509	458(4.2)	524(6)
455.6	510	458(4.3)	524(7)
456	511	458(5)	524(8)
456.1	512	458(5.1)	524(9)
456.2	513	458(6)	524(10)
456.3	514	458(7)	524(11)
457(1)	515(1)	458(9)	524(13)
457(2)(a)-(c)	515(2)(a)-(c)	459	525
457(2)(c.1)	515(2)(d)	459.1	526
457(2)(d)	515(2)(e)	460	527
457(3)-(5)	515(3)-(5)	461	528

OLD	NEW	OLD	NEW
462	529	706	772
<b>Part XVII</b>		707	773
507.1	578	<b>Part XXIV</b>	
508	579	731	795
<b>Part XVIII</b>		747(a)	812(f)
608	679	747(b)	812(g)
608.1	680	747(c)	812(c)
617	690	747(d)	812(b)
<b>Part XIX</b>		747(e)	812(a)
625	697	747(f)	812(d)
626	698	747(g)	repealed
627	699	747(h)	812(e)
628	700	747(i)	812(h)
629	701	748	813
630	702	749	814
631	703	750	815
632	704	751	repealed
633	705	752	816
634	706	752.1	817
635	707	752.2	818
636	708	752.3	819
<b>Part XXII</b>		753	820
696	762	754	821
697	763	755	822
698	764	755.1	823
699	765	761	829
700	766	762	830
701	767	763	831
702	768	764	832
703	769	765	833
704	770	766	834
705	771		

## APPENDIX C

### Glossary

**Appearance notice:** an early-release mechanism issued by a peace officer either instead of or after arresting a person. It charges a person with minor crimes and commands him or her to attend in court at a certain time and place to face the charge. It may also command the person to attend at a time and place for the purposes of the *Identification of Criminals Act*, namely for fingerprinting or photographing. It is issued at present only where minor crimes have been allegedly committed.

**Bench warrants:** those warrants issued by a judge or justice presiding over a proceeding in which the accused or witness has been compelled to appear and yet has failed to do so. This warrant is called a bench warrant to distinguish it from other warrants issued by a justice on reasonable grounds and ordinarily supported by accompanying documentation.

**Information:** one of two charge documents (the other being the indictment). It is an allegation taken before a justice, in writing and under oath, that a person or persons have committed a crime; also, the document upon which proceedings are commenced which subsequently may be superceded by an indictment.

**Issuance of process:** a writ, subpoena, warrant or similar document is said to be issued when it is presented to the proper officer of the court by the party seeking to have it issued, and has been authenticated by such officer and returned to the party; **process** refers to the compelling nature of the document.

**Officer in charge:** the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest or a peace officer designated by him or her who is in charge of the place of detention.

**Promise to appear:** another kind of early-release mechanism entered into only before the officer in charge, who is generally the officer of the police force responsible for the lock-up or other place to which an accused is taken after arrest. The accused literally promises to appear in court at a certain time and place and, possibly, to attend at a time and place for the purpose of the *Identification of Criminals Act*, namely fingerprinting or photographing, to identify the accused.

**Recognizance:** this is another form of release mechanism. In general, a recognizance is an acknowledgement of indebtedness to the Sovereign in a stated amount, which indebtedness becomes void upon the fulfillment of the particular conditions stipulated, for example appearance in court for trial at a certain date. Traditionally, the recognizance was entered into in open court and it recorded the orally agreed upon debt. It usually bound the accused or witness or any other persons accepted as sureties. However, the *Bail Reform Act* created another recognizance entered into by the accused before the officer in charge.

**Summons:** this is a document issued by a justice of the peace to compel the attendance of the accused upon deciding to issue process. It is served by the police generally upon the accused personally, but it does not authorize arrest.

**Surety:** this is a third party who undertakes in a recognizance to pay to the Sovereign a specified amount of money should the witness or accused fail to abide by the conditions of release. The person on bail is released into the custody of the surety who is responsible for ensuring that the person on bail satisfies the conditions of release. Otherwise, the surety risks forfeiting that amount.

**Undertaking:** under present law, this is a release mechanism which is the judicial equivalent of the promise to appear made before the officer in charge. By it, an accused undertakes to appear in court at a certain time and place and may, in addition, if the justice so orders, undertake to comply with certain conditions, for example to deposit a passport. However, it does not impose pecuniary conditions. A recognizance is used for that purpose.

**Warrant of arrest:** this is a document issued by a justice to peace officers upon deciding to issue process which gives the police authority to arrest the person named in it and deliver him or her before a justice of the peace. Thus, it is a more severe mechanism than a summons to compel the attendance of the person.